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# **AMERICAN STATE REPORTS.**

**VOLUME 123.**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ARKANSAS.**

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**ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAIL-  
WAY COMPANY v. CITIZENS' BANK OF LITTLE  
ROCK.**

[87 Ark. 26, 112 S. W. 154.]

**CARRIERS—Bills of Lading.**—If a carrier issues a bill of lading for goods and surrenders them without taking up such bill, it is liable for the value of the goods to a bona fide holder of the bill of lading. (p. 19.)

**CARRIERS—Bills of Lading—Authority to Take Up.**—If a carrier ships goods and delivers them to a compress company at their destination as a warehouseman, the compress company becomes the agent of the carrier to take up the carrier's bills of lading and issue warehouse receipts therefor. (p. 20.)

**CARRIERS—Bills of Lading—Effect—Impeachment.**—A bill of lading has a twofold aspect, as it is both a receipt and a contract, and as a receipt it is only prima facie evidence of the facts recited, and between the parties it is impeachable for mistake, error or false statements in it. (p. 22.)

**CARRIERS—Bills of Lading—Authority of Agents.**—A carrier acts through agents, and is bound by all they do within the scope of their authority, and it is within the scope of their authority to receive goods and issue bills of lading therefor, but not to issue bills of lading when the goods are not received. (p. 22.)

**CARRIERS—Receipt for Goods not Received.**—No carrier nor warehouseman has authority to issue any receipt for goods not actually received into its possession. (p. 22.)

**CARRIERS—Liability for Goods When as Depositary Only.**—A delivery of goods to a carrier must be for immediate transportation, and if the goods are delivered to him to be stored by him for a certain time or until the happening of a certain event, or until further orders, the carrier becomes a mere depositary or bailee, and his liability is measured only by the principles governing that relation, and not as a carrier. (p. 23.)

**CARRIERS—Bills of Lading—Authority of Agent.**—It is beyond the scope of a railroad freight agent's authority to issue a bill of lading or receipt for goods not actually received, and such receipt



is not binding upon the carrier, at least before the right of a bona fide holder of a negotiable bill of lading intervenes. (p. 23.)

**CARRIERS—Bills of Lading—Due-bills—Liability.**—If a bill of lading for goods delivered by a carrier to a warehouseman has been surrendered for a due-bill, issued by the carrier's agent without authority and the carrier has been induced to ship out the goods on other orders obtained through fraud, the carrier's liability cannot be made to rest on the bill of lading, but must rest on the due-bill alone. (p. 24.)

T. M. Mehaffy and J. E. Williams, for the appellant.

Rose Hemingway and Cantrell & Loughborough, for the appellee.

<sup>27</sup> HILL, C. J. This is another chapter in the financial career of the Alphin-Lake Cotton Company. It is an action brought by the Citizens' Bank of Little Rock to recover of the St. Louis, Iron Mountain and Southern Railway Company the value of cotton delivered by it to the cotton company without a surrender of the bills of lading representing said bales. There are thirteen counts in the complaint, the first twelve counts for sixty-two bales and the thirteenth count for twelve bales. The latter will be considered separately, as it presents a different question.

The transactions involving the loss to the bank of the sixty-two bales of cotton set forth in the twelve counts were as follows: Various shipments of cotton were made to the Alphin-Lake Cotton Company in the same method as those described in Arkansas etc. Ry. Co. v. German Nat. Bank, 77 Ark. 482, 113 Am. St. Rep. 160, 92 S. W. 522; that is to say, the shipper delivered the cotton to the railroad company and took a bill of lading consigned to shipper's order. Usually it was in care of the compress company in Little Rock, with directions to notify the Alphin-Lake Cotton Company. In all cases the cotton was delivered to the compress company. The bills of lading for said cotton had been attached to drafts drawn upon the Alphin-Lake Cotton Company by the shipper, and these drafts were paid by the bank, and the amount thereof charged to the Alphin-Lake Cotton Company, and the bills of lading held by the bank as security for the advance thus made to the Alphin-Lake Cotton Company.

<sup>28</sup> The method pursued by the railroad companies, the compress companies and banks in Little Rock in handling cotton, through which was made possible the success of the schemes of the Alphin-Lake Cotton Company, was fully stated in Citizens' Bank v. Arkansas Comp. & W. Co., 80 Ark. 601, 117 Am. St. Rep. 102, 96 S. W. 997. The evidence in this case

as to the cotton customs is the same as in that case. The bank intrusted the Alphin-Lake Cotton Company with the bills of lading whenever the cotton company desired to replace them with compress receipts (or other bills of lading for outgoing cotton); and in lieu of the bills of lading thus intrusted to the cotton company would be returned compress receipts, or, in some instances where compress receipts were not returned for all of the cotton called for in the bill of lading, there would be an indorsement made upon the bill of lading by the compress company that certain bales of cotton had been received on transfer receipt, the number of which was given, and the bill of lading would be returned and stand good for the bales not called for by the warehouse receipt. For instance, a bill of lading for forty bales contained an indorsement showing that for thirty-four of the bales, transfer receipts had been issued, which would leave the bill of lading to stand for the six bales for which compress receipts were not issued. In some way, not explained in the evidence, the cotton company got the railroad company to ship out cotton that was represented by these remnants of the bills of lading, and in three instances where there had been no credit upon the bills of lading.

The bank sued for the thirteen bales represented by the three uncredited bills of lading and for forty-nine bales represented by bills of lading, upon which credits had been indorsed reducing them to that number of bales, which bills originally called for many more bales than the forty-nine, which were the remnants. There can be no doubt of the right of the bank to recover for the thirteen bales of cotton for which it held bills of lading, and which it had not temporarily surrendered for exchange for warehouse receipts, as the decision in *Arkansas Southern Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 113 Am. St. Rep. 160, 92 S. W. 522, settles every possible phase of the controversy over them. See, also, *Arkansas Southern Ry. Co. v. German Nat. Bank*, 207 U. S. 270, 28 Sup. Ct. Rep. 78, 52 L. ed. 201, where an interesting review of that case may be found.

<sup>29</sup> There can be no distinction worked out between the actions based on the remnants of the bills of lading and those based on the bills of lading as originally received by the bank. The compress company became the agent of the railroad company for the purpose of taking up its bills of lading and issuing therefor warehouse receipts. Where all of the cotton had not been received by the compress company when the bill of lading was presented to it, or for some other reason, the com-

press company only issued its receipts for a part of the cotton called for in the bill of lading, and it then indorsed upon the bill of lading a credit for the amount which had been taken up by these receipts, and left the bill of lading outstanding for the bales not called for by the receipt, and this bill of lading was returned to the bank in that condition and held by it as security for the bales of cotton for which it did not get warehouse receipts, and warehouse receipts took the place of the balance originally called for by the bill of lading, and were noted on the bill of lading. When the cotton company received a bill of lading from the bank for the purpose of getting compress receipts in lieu thereof, it was acting as agent for the bank; and, had this loss occurred through its conduct while so acting for the bank, then the bank could not recover herein. But such is not the case. For, in every instance where the cotton company was intrusted with the bill of lading, the same was returned, or compress receipts for the bales called for in it in lieu thereof, or, where credits were made, compress receipts were returned for the amount thus credited; and these matters were checked up by the bank every day, and no shortage was found in this respect. Therefore, it is clear that the limited agency of the cotton company for the bank did not cause the loss herein sued upon.

It was also shown that, of the sixty-two bales that were shipped out by the railroad company without the surrender of bills of lading, the proceeds of forty-six of them went to the Citizens' Bank, the plaintiff in this case. In each of these instances, however, the proceeds went to the bank through collecting a draft attached to an outgoing bill of lading, which bill of lading had been obtained by the surrender of a warehouse receipt which had been taken out of the bank for the purpose of being exchanged for the said outgoing bill of lading, and the draft was placed to the credit of <sup>30</sup> the cotton company when drawn by the cotton company with said outgoing bill of lading attached; and in this way the bank paid twice for one bale of cotton and received the proceeds thereof from it when the draft attached to the outgoing bill of lading was paid, but left it unpaid for its first advancement when it paid the draft attached to the incoming bill of lading.

There was nothing in the evidence that showed that the bank knew that the cotton was being thus manipulated. So far as the sixty-two bales of cotton, represented by the unsurrendered bills of lading and the remnants of bills of lading, are concerned, there are no facts to take the case without the principles governing in *Arkansas Southern Ry. Co. v. Ger-*



man Nat. Bank, 77 Ark. 482, 113 Am. St. Rep. 160, 92 S. W. 522, and to this extent the judgment is affirmed.

The facts in regard to the twelve bales of cotton are as follows: The compress company was in the habit of issuing one receipt for several bales of cotton, instead of issuing separate receipts for each bale of cotton, and would issue a receipt for as many bales as would be called for by the bill of lading. In shipping out cotton, it was necessary, under the custom then prevailing, to get a turnout order. In order that the cotton company might make a shipment, the bank delivered to it, for the purpose of obtaining an outgoing bill of lading, a certain compress receipt calling for a large number of bales of cotton. The cotton company did not ship out all of the cotton called for by said compress receipt, but delivered the compress receipt to the railroad company, and got an outgoing bill of lading for twelve bales less than the amount called for by said receipt, and returned the outgoing bill of lading to the bank, and for the twelve bales called for by the receipt, not in the bill of lading, delivered to the bank a certain receipt or "due-bill," as it was called (which term for the want of a better will be adopted), issued under authority of Mr. A. R. Bragg, division freight agent of the railroad company. This receipt or due-bill was as follows: "No. 1, return 12 bales, account Alphin-Lake, Bill of Lading 379, A. R. B., 11-15-02." This was written by Mr. G. W. Swaim, who was bill of lading clerk under Mr. Bragg, and who was empowered by Mr. Bragg to issue such an instrument.

There was a custom existing in the division freight office of issuing bills of lading for compress receipts; and where the <sup>31</sup> compress receipts called for more cotton than the shipper desired to ship out, the receipt was surrendered, and the freight office would execute a due-bill for the excess in the number called for in the compress receipt. These due-bills were accepted by the railroad company the same as compress receipts. This custom prevailed in Little Rock, but was not shown to extend beyond it, or that it was known to any officials of the railroad other than the local ones.

The facts show here, as they did in the case of *Citizens' Bank v. Arkansas Comp. & W. Co.*, 80 Ark. 601, 117 Am. St. Rep. 102, 96 S. W. 997, that the compress receipts were not relied upon to identify particular bales. They represented merely so many bales of cotton, and the identification of the cotton was furnished by the turnout order. The procedure was thus explained by Mr. Justice Riddick: "When he [Lake] desired to ship any cotton held by the compress company, he



obtained from the bank, receipts for the number of bales he desired to ship, and the compress company would then ship the cotton out on his 'turnout' order upon his surrendering receipts for an equal number of bales, without regard to whether these receipts had been issued or assigned to him or not. For, prior to this litigation, the receipts which the compress company gave for the cotton contained only a meager description of the cotton, and cotton standing on the books of the warehouse to the credit of one person would be shipped out on the order of such person upon his surrendering receipts issued to him or to any other person for a like number of bales. In other words, the compress company, the banks and cotton dealers dealt with these compress receipts as if they called for no particular cotton, but only for a certain number of bales of cotton."

The testimony shows that the railroad officials redeemed their due-bills by issuing a bill of lading for them, just as they would issue a bill of lading for a compress receipt; the identity of the cotton for which the bill of lading was issued not depending in either instance upon the compress receipt (or due-bill) itself, as it took both the receipt (or due-bill) and the turnout order to identify the cotton shipped.

The bank accepted and retained this due-bill in lieu of compress receipts, and now sues the railroad company upon it. Can it recover upon it? It is not a bill of lading. A bill of lading <sup>32</sup> has a twofold aspect. It is both a receipt and a contract: 1 Hutchinson on Carriers, sec. 157; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998. As a receipt, it is prima facie, and not conclusive, evidence of the facts recited, and between the parties it is impeachable for mistake, error or false statements in it: 1 Hutchinson on Carriers, sec. 158.

A carrier acts through agents, and is bound by all they do within the scope of their authority; and it is within the scope of their authority to receive goods and issue bills of lading therefor, but it is not within the scope of their authority to issue bills of lading when the goods are not received: 1 Hutchinson on Carriers, secs. 159-162.

The statute forbids any warehouseman or carrier to issue any receipt for goods unless the goods shall have been actually received into its possession: Kirby's Digest, secs. 524, 532. A delivery of goods to a carrier must be for immediate transportation. If goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until further orders, the carrier becomes a mere depositary or bailee, and his liability only measured by the principles

governing that relation, and not as a carrier: 1 Hutchinson on Carriers, sec. 112, and cases in note 23. Section 530 of Kirby's Digest makes warehouse receipts given by warehousemen for cotton or other commodities, when stored or deposited, and bills of lading or transportation receipts given by carriers, transferable by indorsement, and all persons to whom the same shall be transferred shall be deemed to be the owner of such goods, and the goods shall not be delivered except upon surrender of such warehouse receipt. This section and others in chapter 15 of Kirby's Digest make the warehouse receipt or bill of lading representative, so far as delivery goes, of the commodity itself, and guards and protects the value of such evidence of the commodity by requiring the actual delivery of the commodity before the issuance of the receipt and forbidding the delivery of the commodity without the surrender of the evidence of it. The legislature of 1907 provided for giving bonds pending the transmission of a bill of lading, which is but another emphasis of the protection which the law affords these evidences of property.

An application of the principles above announced to the <sup>33</sup> facts at bar brings this conclusion: It was beyond the scope of the freight agent's authority, and contrary to law, to issue a bill of lading or receipt for goods not actually received, and such receipt is not binding, at least before the right of a bona fide holder of a negotiable bill of lading intervenes, upon the carrier. There was no cotton actually delivered to the railroad when Mr. Bragg issued the due-bill sued on. If the compress receipt which was surrendered when the due-bill was issued be taken as an actual delivery of the cotton, yet it was not delivered for immediate shipment, but merely to be held until some further orders were received for it to be shipped out; and in the meantime the railroad company was merely a depository, and liable only as such for the safekeeping; and in this instance there was nothing to keep safely other than a mere symbol of the property itself. This symbol was an incomplete one, as the custom required another instrument to identify the cotton in order that the proper bill of lading could be issued therefor. The bank permitted its compress receipt, which represented so many bales of cotton—indeterminate, it is true, but still a given number of bales of cotton in a warehouse—to be surrendered, and accepted in lieu thereof this due-bill. The due-bill represented nothing tangible; it is a promise to issue a bill of lading, and such a promise is beyond the scope of authority of the agent making it. It is a mere symbol for another symbol; it can-

not be binding upon the railroad as a receipt, for no goods were received; it is not a bill of lading, and the statute relating to them cannot apply. It is a promise to give a bill of lading for twelve bales of cotton because the carrier holds a compress receipt for twelve bales, but the carrier's agent cannot bind the carrier by a bill of lading until the goods are actually delivered for immediate shipment. In no view of it is it a binding obligation of the railroad company.

It is said by the appellee that it makes no difference whether Bragg had authority to issue the due-bill or not, since the railroad actually got the cotton sued for. They invoke the doctrine of estoppel against a corporation pleading an ultra vires act when it has received the consideration for the act—when it is an executed contract. The railroad received this cotton for transportation only, and did not take it as its own, and did not receive any <sup>34</sup> benefit other than its freight tolls. It was through some error or rascality that the railroad company was induced to ship it out without surrender of the bill of lading or compress receipt representing it, and that is the foundation of the claim against it. But, as the bill of lading had been surrendered for compress receipts, and compress receipts for this due-bill, liability cannot be sustained on such ground, but must rest upon the due-bill alone. The railroad company, like the bank, is an innocent victim of the machination of the Alphin-Lake Cotton Company. This is conceded to be a case in which one of two innocent parties must suffer for the misdeeds of a "daring financial buccaneer," and the doctrine invoked is wholly foreign to the issues.

The judgment in favor of the bank for the value of the cotton sued for in the first twelve counts is affirmed, and the judgment in favor of the bank for the value of the twelve bales sued for in the thirteenth count is reversed, and judgment entered here for the proper sum.

Mr. Justice Hart, having presided in the chancery court, was disqualified, and did not participate herein.

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*The Rights of Assignees of Bills of Lading* are discussed in the note to *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 332. In Louisiana a carrier is not estopped, notwithstanding the issuing of a bill of lading by its agent, from showing that no goods were received or shipped by it, though the bill of lading has been transferred to an innocent third person for value in due course of business: *Henderson v. Louisville etc. Co.*, 116 La. 1047, 114 Am. St. Rep. 582. And in Alabama assignments of bills of lading are not governed by the commercial law, and an assignee simply acquires the title to the goods described therein: *Hass v. Citizens' Bank*, 144 Ala. 562, 113 Am. St. Rep. 61. If goods by the terms of a bill of lading are deliverable to

the order of the shipper, the carrier should not deliver to another except upon production of the bill of lading properly indorsed by the shipper, for such a stipulation is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods: *Arkansas Southern etc. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, 113 Am. St. Rep. 160.

## UNION SAWMILL COMPANY v. FELSENTHAL LAND AND TOWNSITE COMPANY.

[87 Ark. 117, 112 S. W. 205.]

**RAILWAYS—Estoppel—Ejectment.**—A land owner who stands by and sees a railroad, to be devoted to a public use, constructed on his land without enjoining or otherwise preventing the construction, acquiesces in such use of his land, and is estopped from maintaining ejectment for the entry, and is restricted to a recovery for the damages sustained. (p. 28.)

**EJECTMENT—Taking of Land—Trespass.**—If land is taken by a private corporation not possessing the right of eminent domain, but is not devoted to a public use, such taking is a mere trespass, and the land owner may recover possession in ejectment. (p. 29.)

Bunn & Patterson, for the appellant.

Smead & Powell and Campbell & Stevenson, for the appellee.

**118 HILL, C. J.** This is a controversy over a strip of land used as a right of way for a tramroad from Grand Marie Lake to a railroad in the town of Felsenthal. It is in use by the Union Sawmill Company, and claimed by it under promise of a deed thereto by the Felsenthal Land and Townsite Company, and occupancy of it under such promise. The townsite company says the promise was conditional, and the condition was not performed.

The Union Sawmill Company and the Little Rock and Monroe Railway Company were owned by practically the same parties and managed by the same officers. The townsite company, the appellee, owned property in the town of Felsenthal, near which, at Huttig, the sawmill company was located. The said railroad company constructed a line of railroad from Huttig to Monroe, Louisiana, "it being designed mainly as a feeder to the sawmill." In the summer of 1903, the railroad company began to extend its road northward to the El Dorado and Bastrop railroad, upon which road Felsenthal is situated, apparently to cross the said railroad at a point a few miles west of Felsenthal. This brought on negotiations



between the townsite company and the railroad and sawmill companies, which resulted in a written agreement between the townsite company and the railroad company, containing, among other things, an agreement to give a right of way through the lands of the townsite company, which right of way was given and the road constructed thereupon; but that did not cover the right of way now in controversy.

<sup>119</sup> In 1904 the work on the right of way for a tramroad, the property in controversy, was begun, either by the railroad company or the sawmill company; as these companies were managed by the same persons it did not appear upon which account the work was done, but the secretary of the sawmill company says the railroad company built part of it, and the sawmill company extended it afterward.

While this work was progressing, the manager of the townsite company directed that the work be stopped, which was done for a day, and as a result of this stoppage a meeting was brought about between representatives of the townsite company and of the sawmill and railroad companies, which meeting was held at Camden at the office of attorneys who represented both companies except where their interests were adversary. The testimony conflicts as to whether a positive agreement was reached at that time for a conveyance of the land to the railroad company or the sawmill company for the tramway in controversy by the townsite company, or whether an agreement was reached that the conveyance would be made after the location of the tramway was agreed upon by Mr. Ramsey, representing the townsite company, and the engineer of the railroad company. The testimony is in irreconcilable conflict on this point, doubtless due to a misapprehension of what actually occurred. One of the attorneys who was called by appellant, and who was probably in a position to be more unbiased than some of the other witnesses, stated: "The proposition in its simple form was simply this: The Felsenthal Land and Townsite Company agreed to give the right of way; there was no definite time fixed when the deed should be executed; it was agreed that the track should be located down near the lake by Mr. Ramsey and the engineer of the Little Rock and Monroe Railway Company. While there was a great deal of discussion, that was the conclusion of it."

Mr. Ramsey says: "It was fully understood that they were to have a right of way of twenty-five feet, parallel with the right of way of the E. & B. Railway, and, joining it down to the east end of the corporate limits, from that point and as far as they wanted to go down the lake; the right of way

was to be settled by myself, representing the townsite company, and the engineer of the Little Rock and Monroe Railway Company." <sup>120</sup> And furthermore he says that he was never called upon by the engineer or anyone else to select the route. He says further that the representatives of the townsite company distinctly declined to make any deed until the right of way had been agreed upon by the engineer and himself.

On the other side, Mr. Scott, who was secretary and treasurer of the sawmill company, testifies that an agreement was reached to give the right of way for the proposed tramway, and the making of the deed was deferred only because Mr. Felsenthal had to make some further adjustments with the El Dorado and Bastrop railroad about changing their right of way before he could make this deed. He says that after the meeting was adjourned he showed Mr. Ramsey a plat of the line which had been proposed, and Mr. Ramsey agreed that it would be all right for them to go ahead and build the line to the lake and along its west bank as proposed, and cautioned them to so construct the same that it would not interfere with wagons getting to and from the landing.

The summary of the testimony of these witnesses represents the varying views that were given of the result of the conference. If Mr. Ramsey agreed to the line as prepared on paper, and the company acted upon his agreement and constructed it, then it would certainly have been entitled to a deed to the right of way, and an equitable title would have been conferred without the deed. If Mr. Ramsey's and the engineer's agreement to the location of the tramroad was a condition precedent to the railroad or sawmill company obtaining title to the right of way for the tramroad, then no title passed until that condition was performed.

The finding in favor of the townsite company gives credence to the latter version of the agreement, and it cannot be said to be against the preponderance of the evidence. It is immaterial whether the deed was to be made to the railroad company or to the sawmill company; there is much testimony on this point, but it is unimportant, for if the condition precedent was not performed neither acquired title to the property. After the Camden conference, the tramroad was constructed; it extended from the Little Rock and Monroe Railroad to the Grand Marie Lake, and along the bank of the lake for a short <sup>121</sup> distance, affording a connection with the lake, an arm of the Ouachita river, to haul logs therefrom to the mill.

In 1905 the parties owning the railroad company sold their entire interest in it to the St. Louis, Iron Mountain and Southern Railway Company, which took over the property; but in that sale it was stipulated that the tramroad in controversy should remain the property of the sawmill company. The steel for it had been furnished by the railroad company, and in adjusting the accounts this and whatever rights the railroad company had in the tramway passed to the sawmill company. The railroad company has passed entirely out of the matter, and was dismissed from the suit, in which it had been joined.

Taking the finding of the chancellor as settling the conflict in the evidence that neither the railroad company nor the sawmill company became entitled to a deed to the right of way, then the sawmill company's use of this tramroad was unauthorized. And that leaves only the question of whether the townsite company can recover the land, or whether it is remitted to an action for damages; the appellant insisting that the townsite company cannot recover the land, and relying upon *Warren etc. R. R. Co. v. Garrison*, 74 Ark. 136, 85 S. W. 81, to sustain this contention.

The road considered in the *Garrison* case was first a wooden tramway, but afterward the right of way was conveyed to a railway company, and it laid an iron and steel track in place of the wooden tramway, and the tramroad was converted into a railroad, a public carrier. The court held that the conveyance for the right of way for a wooden tramway did not convey an easement for a railroad, but held that, as it was a railroad which was constructed, and the owner had stood by and acquiesced, she was estopped from maintaining ejectment for the entry, and was restricted to a recovery for damages sustained. That a land owner who stands by and sees a railroad constructed on his land without enjoining or otherwise preventing the construction acquiesces in such use of his land, and is remitted to an action for damages, is well settled. It was fully discussed in *Reichert v. St. Louis etc. Ry.*, 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 182, and applied in *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, 11 S. W. 96, and again in *McKennon v. St. Louis etc. Ry. Co.*, <sup>122</sup> 69 Ark. 104, 61 S. W. 383, and next in the *Garrison* case, 74 Ark. 136, 85 S. W. 81. Again, it received application and explanation in *Arkansas etc. Ry. Co. v. Kennedy*, 84 Ark. 364, 105 S. W. 885.

The principle is thus succinctly stated by the supreme court of the United States: "It has been frequently held that if a land owner, knowing that a railroad company has entered



upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages": *Roberts v. Northern Pac. R. R. Co.*, 158 U. S. 1, 15 Sup. Ct. Rep. 756, 39 L. ed. 873.

An examination of the authorities above cited will show that it is owing to the public nature of the enterprise and the right of the railroad company to take the land under the power of eminent domain, and the statutory remedies afforded a land owner, that this principle was worked out. In the absence of these elements—that is, where the land is taken by a private corporation not possessing right of eminent domain—it is not different from the taking of land by any other private person or corporation, and is mere trespass.

In this case part of the tramway was built by the railroad company. Its extension and completion, however, was done by the sawmill company. It has never been used by the railroad company other than the railroad company may have permitted the use of its locomotives and rolling stock to haul logs to the sawmill; but in so doing it was not acting as a public carrier. The railroad company was owned and controlled by the sawmill company, and it is undisputed that the sole use of this tramway has been as a passage to haul logs from the lake to the sawmill. It has been devoted to no public use.

The judgment is affirmed.

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*Estoppel of an Owner of Land* to maintain ejectment against a railway company which he has permitted to lay its track across his premises without first acquiring a right of way is discussed in *Southern California Ry. Co. v. Slauson*, 138 Cal. 342, 94 Am. St. Rep. 58, and cases cited in the cross-reference note thereto. As to whether the owner of land who acquiesces in improvements made thereon by another, perhaps under a belief of ownership, is thereby estopped to assert his title, the cases of *Wampol v. Kountz*, 14 S. D. 334, 86 Am. St. Rep. 765, *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, *Redmond v. Excelsior Sav. etc. Assn.*, 194 Pa. 643, 75 Am. St. Rep. 714, *Leonard v. Flynn*, 89 Cal. 535, 23 Am. St. Rep. 500, and *Marines v. Goblet*, 31 S. C. 153, 17 Am. St. Rep. 22, are in point. A homestead claimant, by failing to object to the digging of an irrigation ditch on the lands claimed, is not, on the receipt of his patent, estopped from maintaining a proceeding to enjoin the continuance of the ditch until compensation is made: *Atkinson v. Washington Irr. Co.*, 44 Wash. 75, 120 Am. St. Rep. 978.

BONNETTE v. ST. LOUIS, IRON MOUNTAIN AND  
SOUTHERN RAILWAY COMPANY.

[87 Ark. 197, 112 S. W. 220.]

**RAILROADS—Authority to Employ Surgeon.**—If a stranger is injured by the operation of a train, at a point distant from the railroad company's chief offices, and there is immediate necessity for the employment of a surgeon, the train conductor, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency. (p. 34.)

R. W. Wilson, for the appellant.

F. M. Mehaffy and J. E. Williams, for the appellee.

**197** WOOD, J. The appellant sued the appellee, alleging in his complaint: "That on or about the fifteenth day of January, 1907, the said defendant, the St. Louis, Iron Mountain and Southern Railway Company, by its employes operating and running a locomotive engine or train of cars over its railroad track through Montrose, a station of said line of its railroad, then and there ran or backed said locomotive, engine or train of cars against and over one Fred Ross, a stranger, and then and there, and thereby, seriously or fatally injured him by then and there crushing, under its wheels, both thigh bones, etc.; that the injury occurred in the night-time, and that it was of a character so serious and that the emergency was so great as to require immediate surgical or medical attention; that the necessity and emergency of the occasion authorized the conductor to contract for medical services; **198** that the said station of Montrose is many miles distant from the principal offices of the defendant and from the residences of its principal officers, and that the conductor in charge of said train, and as the agent of the defendant, employed the plaintiff, who, as aforesaid, was a resident surgeon at said station, to render professional services to the said Ross, and that he, in accordance with said request and employment, rendered the said Ross surgical aid and attention. That plaintiff, assisted by Dr. W. H. Shipman, acting at the request and under the employment of said conductor, took charge of said patient, Ross; that it became and was necessary to amputate both thighs; that the plaintiff, assisted by Dr. W. H. Shipman, performed said operations or amputations; that services so rendered, and money expended for unskilled labor, medicine, etc., were of the value of one hundred and twenty-four and 50-100 dollars (\$124.50); that said con-



ductor was the highest representative of the defendant and superior officer present when the accident or injury occurred, and when said employment was made. That the defendant refused and still refuses to pay said claim, notwithstanding repeated demands have been made therefor. Wherefore plaintiff prays judgment," etc.

The appellee demurred as follows: "Comes the defendant, the St. Louis, Iron Mountain and Southern Railway Company, by its attorney, E. A. Bolton, and demurs to the complaint herein, and for cause states: That said complaint fails to state facts sufficient to constitute a cause of action against the defendant herein; that said complaint fails to state that the conductor of freight train 156 had any authority to contract for the services alleged to have been contracted for with plaintiff herein, and fails to state any facts that would bind defendant for the contract of said conductor in employing the plaintiff herein; that said complaint is otherwise informal and insufficient in law to constitute a cause of action against the defendant."

The court sustained the demurrer and dismissed the complaint, and this appeal followed.

<sup>199</sup> This court in *Arkansas Southern R. R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907, held (quoting syllabus): "Where a railway employé is injured, while in the discharge of his duties, at a point distant from the company's chief offices, and there is urgent necessity for the employment of a surgeon to render professional services, the conductor, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency."

This is the language of the court in *St. Louis etc. R. R. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092, a case in which a doctor sued the railway company for surgical attendance upon and board of a passenger injured by the company's train. In the latter case the court held the company not liable, for the reason that "the emergency, which alone could have given the conductor implied authority," had terminated before the doctor was employed. The court further said: "The authority existing in such cases is exceptional; it grows out of the present emergency, and the <sup>200</sup> absence—and consequent inability to act—of the railway's managing agent; its existence cannot extend beyond the causes from which it sprang."

In *Northern Central Ry. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, a stranger was injured in a collision, and the court

said: "We are next brought to the question whether the defendant be liable for the negligence of its agents in their treatment and disposition of the deceased subsequent to the collision. This, we think, free from doubt or difficulty. From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of defendant's engine, in a helpless and insensible condition, and it thereupon became the duty of its agents in charge of the train to remove him and do it with proper regard to his safety and the laws of humanity. If, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby death was caused, there is no principle of reason or justice upon which defendant can be exonerated from responsibility. To contend that the agents were not acting in the scope of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no further than to have cast off by the wayside the helpless and apparently dead man without taking care to ascertain whether he was dead, or alive, or, if alive, whether his life could be saved by reasonable assistance timely rendered." In *Dyche v. Vicksburg etc. R. R. Co.*, 79 Miss. 361, 30 South. 711, Dyche was a trespasser, and was run over by the company's train. The company was not negligent in running its train over him, but after the injury the company's agents took charge of him, and undertook to administer to his needs in his wounded condition. The court said: "Assuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury should have been allowed to pass upon whether or not it performed this duty. It is to be charged with no higher degree of duty than that of ordinary humanity, but the jury must settle that on the facts."

In *Marquette etc. R. R. Co. v. Taft*, 28 Mich. 289, at page 297, Judge Cooley said: "There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run  
201 over at a crossing to be picked up and have the attention proper and suitable to its case; and if no one is authorized to do so much for the faithful servant of the company who is in like manner injured, but all persons in its service are impliedly forbidden to incur on its behalf any expense beyond what may be necessary to remove him out of the way of their trains or machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then, if such is the law, the courts must not hesitate to apply it,

even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law." In *Yazoo etc. R. R. Co. v. Byrd*, 89 Miss. 308, 42 South. 286, it is said: "Railroads owe to their passengers the consideration and care of ordinary humanity, it matters not how negligent a passenger may have been in producing the injury for which he sues; . . . and if, when injured, the railroad company neglects this care which common humanity would dictate, and the passenger suffers damage, he may recover against the railroad company for its dereliction."

I have quoted liberally from the above cases to show that the authorities, whether in the case of a stranger and trespasser or of an employé and passenger, hold the company liable for failing to exercise ordinary care to administer to the absolute needs of the one whose unfortunate injury it has produced, notwithstanding it may have been without fault in producing such injury, and notwithstanding the injury may have been the direct result of the party's own negligence. In so holding the company liable in such an emergency, it will be observed that the rationale of the doctrine, whether in the case of a stranger and trespasser or of an employé or passenger, is found in the duty imposed by the dictates of common humanity. The authorities stress the moral obligation, and find from that the legal duty to alleviate as far as possible the sufferings, and to administer to the necessities which the company has contributed, however innocently, to produce. We confess that if the duty, and the consequent liability for failure to discharge that duty, grow out of the obligations <sup>202</sup> which the impulses of our common humanity would suggest and impose, under such circumstances, then we do not see that the status or relationship of the party injured to the party producing the injury could affect the question of the appellee's right to recover. For, from the humane viewpoint, clearly it could make no difference whether the helpless and unfortunate victim of the accident were trespasser, employé or passenger. We do not here either controvert or approve the doctrine of the above cases, but merely cite them to show the extent to which the authorities have gone. The doctrine of our own court, in the cases cited *supra*, although announced in cases where an employé and passenger

were injured, applies here. It is a question of the authority of the conductor to act for his company. The emergency creates that authority. Someone, as Judge Cooley holds, must have authority to represent the company under such circumstances. The conductor is the highest agent on the ground, and is in command of the train that did the injury. Before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterward ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon, but not for the surgeon's contract with others.

The judgment is therefore reversed and the cause is remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

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*Physician.*—*The Authority of an Agent of a Corporation* to bind it in calling a physician to attend an injured employé is considered in the recent cases of *Cushman v. Cloverland Coal etc. Co.*, 170 Ind. 402, 127 Am. St. Rep. 391; *Spelman v. Gold Coin Min. etc. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402; *Chase v. Swift*, 60 Neb. 696, 83 Am. St. Rep. 552. As to whether one who calls a physician for another is under an implied obligation to pay for the medical services rendered, see *Morrell v. Lawrence*, 203 Mo. 362, 120 Am. St. Rep. 660. Where surgeons operate upon an unconscious man whom they are called to attend by third persons, and who dies without regaining consciousness, the law implies a contract on his part, it has been held, to pay the reasonable value of their services: *Cotnam v. Wisdom*, 83 Ark. 601, 119 Am. St. Rep. 157.

*An Employer Who Summons a Physician* and requests him to care for an employé, who has suddenly become ill while in the discharge of his duties and unable to act for himself, has been held to be under no implied obligation to pay for the medical services rendered: *Norton v. Rourke*, 130 Ga. 600, 124 Am. St. Rep. 187, and see cases cited in the cross-reference note thereto. Yet if a master assumes to employ a surgeon to treat his servants, he must exercise reasonable care in his selection, but the presumption is that this duty has been performed: *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839.



## ROBERTSON v. ROBINSON.

[87 Ark. 367, 112 S. W. 882.]

**HUSBAND AND WIFE—Tenancy by Entirety.**—A conveyance to a husband and wife conveys an estate by the entirety, and by the right of survivorship the entire estate vests in him at her death. (p. 36.)

Taylor & Jones, for the appellant.

Austin & Danaher, for the appellee.

**367** McCULLOCH, J. This is a suit in chancery instituted originally by Mary A. Robertson against David A. Robinson, the husband of her deceased daughter, Hannah T. Robinson, to cancel a conveyance of certain lots in the city of Pine Bluff, Arkansas. The conveyance was executed after the death of Hannah T. Robinson, and the plaintiff claimed title by inheritance from her said daughter. She alleged in the complaint that by reason of extreme age she was infirm in body and mind, and was mentally incapable of executing the conveyance, and also that there was no consideration for the conveyance. She died during the pendency of the suit, and it was revived in the name of her two children. The lots in controversy were formerly owned by one Jennie Winstead, who died many years ago, leaving surviving her husband, S. L. Winstead, and child, who died without issue.

After the death of his wife, Jennie, S. L. Winstead executed **368** two deeds purporting to convey the property in controversy to Hannah T. Robinson, but there was testimony tending to establish the fact that Jennie Winstead executed and delivered a deed to David A. and Hannah T. Robinson conveying the property to them jointly as tenants by the entireties. This deed was never recorded, and it is claimed that it was accidentally destroyed by fire.

The chancellor found that this deed was duly executed and delivered by said Jennie Winstead, and we cannot say that this finding is unsupported by the testimony. Appellee himself testifies that Jennie Winstead executed and delivered the deed just before her death, and his testimony is not contradicted, though its force is weakened by his subsequent conduct in accepting a conveyance of the same property to his wife from S. L. Winstead after the death of his wife, Jennie. As S. L. Winstead had no title to convey, appellee is not estopped to dispute his wife's title under those deeds: *Walker v. Helms*, 84 Ark. 614, 106 S. W. 1170.



The finding of the chancellor is not against the preponderance of the testimony, and we will therefore not disturb it. Under this conveyance, the title passed to appellee and his wife, Hannah T., as tenants by the entireties, and by the right of survivorship the entire estate vested in him at the death of his wife: *Branch v. Polk*, 61 Ark. 388, 54 Am. St. Rep. 266, 33 S. W. 424, 30 L. R. A. 324.

It is therefore unnecessary for us to pass upon the question of Mary A. Robertson's capacity to execute a conveyance to appellee. The title being already vested in him, nothing passed by the conveyance. Nor is it important to consider what estate in the property—whether for life or in fee simple—Mary A. Robertson would have inherited from her daughter, Hannah T. Robinson, if the latter's estate had been in fee instead of in entirety under the deed from Jennie Winstead to her and her husband.

Decree affirmed.

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*A Tenancy by the Entirety is*, at the common law, created when the grantees in a deed are husband and wife, unless a contrary intent is manifest; but this rule has been abrogated in many of the American states: *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339, and cases cited in the cross-reference note thereto; *Wilson v. Frost*, 186 Mo. 311, 105 Am. St. Rep. 619; *Frost v. Frost*, 200 Mo. 474, 118 Am. St. Rep. 689.

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## KITCHENS v. JONES.

[87 Ark. 502, 113 S. W. 29.]

**MORTGAGES—Equity of Redemption, Nature of.**—An equity of redemption in mortgaged property is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly descendible by inheritance, devisable by will and alienable by deed, precisely as if it were an estate of inheritance at law. (p. 38.)

**MORTGAGES—Foreclosure—Nature of Estate in Surplus After Sale.**—If a decedent leaves real estate subject to a mortgage which is afterward regularly foreclosed, the surplus of the proceeds of the sale retains the character of real estate, for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion. (p. 39.)

Campbell & Stevenson and J. M. Vineyard, for the appellant.

M. L. Stephenson, for the appellee.

<sup>503</sup> HILL, C. J. John Jones died in April, 1906, leaving a widow and children, some of whom were minors. At the

time of his death he was the owner of certain real estate in the city of Helena, which was encumbered by a deed of trust. Default had occurred in the performance of the conditions of the deed of trust before his death, and after his death the deed was foreclosed in the chancery court, the property sold by a commissioner of the court to satisfy the mortgage debt. The proceeds of the sale paid off the mortgage, and left a surplus of five hundred and fifty-four dollars and fifty-seven cents, which was turned over by the commissioner in chancery to Kitchens, public administrator, who was administering the estate of Jones. - The land was not the homestead of the deceased. The dower rights of the widow had been released in the trust deed. This surplus was the only asset of the estate, which was insolvent.

Charity Jones filed a petition in the probate court of Phillips county, representing that she was the widow, and that there were minor children of the said John Jones, deceased; that the estate of her husband exceeded three hundred dollars in value; and she prayed that the sum of three hundred dollars be paid to her out of said fund for the use of herself and minor children. Trial was had in the probate court, and on appeal in the circuit court upon an agreed statement of facts. The circuit judge granted the petition, and the administrator has appealed.

This appeal involves a construction of section 3 of Kirby's Digest, which reads as follows: "When any person shall die, leaving a widow and minor children, or widow, or minor children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value <sup>504</sup> the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow and minor children, or widow, or minor children, as the case may be, when the court is satisfied that reasonable funeral expenses of such persons not to exceed twenty-five dollars have been paid or secured; and in all cases where the personal estate exceeds in value the sum of three hundred dollars, the widow and minor children, or widow, or minor children, as the case may be, may retain the amount of three hundred dollars out of such personal property at its appraised valuation."

In *Wilson v. Massie*, 70 Ark. 25, 65 S. W. 942, it was held that this statute repealed the pre-existing statutes upon this subject and effected a change in the law from an estimate of the whole mass of the decedent's property to an estimate of the personal property alone, in making this allowance to the

widow and minor children. This case therefore turns upon the character of the estate of Jones in the mortgaged property.

In *State v. Lawson*, 6 Ark. 269, the court said: "The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly held to be descendible by inheritance, devisable by will and alienable by deed, precisely as if it were an estate of inheritance at law."

The nature of the equity of redemption is thus stated in the *Encyclopedia*: "An equity of redemption is an estate in the mortgaged property, and is subject to all the incidents of ownership. It may be conveyed or devised; it descends to the owner's heirs or personal representatives, according to the nature of the mortgaged property, and is subject to curtesy and homestead": 11 *American and English Encyclopedia of Law*, 209, 210. The text is well supported by authorities, including several Arkansas cases, cited in the note. It is clear, therefore, that the equity of redemption left by Jones at his death was real property, and descended as real property descends. The question remains, whether its conversion into cash through the foreclosure of the mortgage changed its character within the meaning of this statute.

The argument is made that the power of conversion is well established, and that the chancery court had the right to convert the realty into personalty; and, having that right, that it changed the character of the property. A consideration of the <sup>505</sup> cases cited may be useful. *Coolidge v. Burke*, 69 Ark. 237, 62 S. W. 583, and *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56, were cases where the surviving partner converted partnership assets from one class of property to another, and it was held that the property passed in its converted state. The same principle was recently recognized in *French v. Vanatta*, 83 Ark. 306, 104 S. W. 141.

There is a radical difference between those cases and this. The estate of a partner does not take a share of the partnership assets until the partnership is wound up; and a surviving partner, or a court, in order to wind it up, may convert it; and, naturally, the asset coming from the partnership should descend in the form in which it falls into the estate. But in the case at bar the right of the widow and minor heirs accrued, under the plain terms of the statute, at the time of the death of the husband and father, and not at a later time when, in the course of the administration of his estate, his property has been changed from realty to personalty.

In *Loftis v. Glass*, 15 Ark. 680, and *Turner v. Davis*, 41 Ark. 270, the interest under consideration was the proceeds of a sale of real estate, and not the real estate itself; and it was held that the interest was personalty. That is not true here, for the inheritance was, not of the proceeds, but of the land itself, subject to the mortgage, which could have been discharged at any time by the payment of the mortgage debt.

In *Re Simmons*, 55 Ark. 485, 18 S. W. 933, after stating the rule that where a conversion is rightfully made, whether by court or trustee, all the consequences of conversion must follow, the court, through Chief Justice Cockrill, said: "It may be that this statement of the rule is subject to the explanation or qualification that the conversion takes effect only to the extent of the purpose for which conversion was required—where, for example, a surplus remains from the proceeds of land sold to satisfy a decree of foreclosure. In such a case the conversion to raise a surplus over the decree and costs was not required, and was probably not intended by the court; and the rights of the parties in interest, it is held, remain the same as if no conversion had taken place, although the sale was rightful."

This statement of the principle is absolutely conclusive<sup>506</sup> here, and is in accord with the authorities, as will be seen by those cited in the opinion.

Mr. Woerner thus states the same principle: "By the sale the real estate is converted into money. But the conversion is complete and effectual only to the extent and for the purposes for which the sale was authorized, whether by the will or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion": 2 *Woerner on Administration*, sec. 481.

The status of the decedent's estate is fixed under this statute when he dies, and the allowance contemplated by it must be made out of the personal property as it then existed, and not from the proceeds of realty which may thereafter assume personal form. In this case his equity of redemption descended, at his death, to his widow and children, according



to the statute of descent and distribution, as realty. Its subsequent conversion to pay the debt against it does not let them in to share in it as personal property, for the only purpose of the conversion was to pay the mortgage debt, and not to change the status of the property.

The judgment is reversed and the cause remanded, with directions to enter a judgment in conformity to this opinion.

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*Where Land was Sold Under Mortgage Foreclosure*, after the death of the mortgagor, it was held in *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293, that the surplus, after satisfying the debt, was real estate, and that the administrator of the mortgagor could maintain no action to recover it. And in *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478, it is held that surplus money arising from the sale of mortgaged premises is considered as part of the real estate of the deceased mortgagor, going to the heirs and not to the administrator.

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## SOUTER v. WITT.

[87 Ark. 593, 113 S. W. 800.]

**VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Relief in Equity.**—If the parties to a contract for the sale of land have so stipulated as to make the time of payment of the essence of the contract, a court of equity cannot relieve a vendee who has made default. (p. 45.)

**VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Jurisdiction of Equity.**—If persons to a contract for the sale of lands have made the time of payment of the essence of the contract, the discretion which a court of equity has to grant or refuse specific performance must of necessity be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. (p. 45.)

**APPEAL—Conflict in Evidence.**—If there is a conflict in evidence, and it is a mere difference between two witnesses detailing the same transaction, the supreme court will accept the testimony accredited by the lower court, nothing else appearing to determine the preponderance. (p. 46.)

**VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Waiver.**—If a contract for the sale of land provides that, on default in payment of the purchase money, the vendee shall forfeit his rights to purchase and become liable as a tenant for rent, the vendor's failure to demand rent after the default of the vendee and the retention by the former of the purchase money notes, does not constitute a waiver of the forfeiture. (p. 47.)

McKay & Lile, for the appellant.

Stevens & Stevens, for the appellee.

594 WOOD, J. Appellant bought of appellee a tract of land in Columbia county, Arkansas. The parties entered

upon a written contract, which, so far as may be necessary to set forth, specified: "That, in consideration of the stipulations hereinafter contained and the payments to be made as herein specified, the first party agrees to sell unto the second party the following real estate [here follows a description of the land and the contract continues as follows]. And the said second party, in consideration of the premises, hereby agrees to pay to the order of the said first party the following sums at the several times named below:

When due.	Dollars. Cents.
Dec. 1st, 1905.....	125.00
Dec. 1st, 1906.....	150.00

With ten per cent interest per annum on all notes from date until paid. For which amounts the party of the second part has executed and delivered to the said first party two promissory notes, dated on the twenty-second day of August, 1904.

"And the party of the second part hereby covenants and agrees that no timber shall be cut on this land without a special agreement, indorsed hereon and signed by the parties hereto, except for the necessary fuel for the family, erection of buildings and fences on said premises and clearing of the land for actual and immediate cultivation, and that all improvements <sup>595</sup> placed upon said premises shall remain thereon and shall not be removed or destroyed until final payment for said land; and further that he will regularly and seasonably pay all such taxes and assessments as shall be lawfully imposed upon said premises.

"In case the said party, his legal representatives or his assigns, shall pay the several sums of money aforesaid punctually and at the several times above limited, and shall strictly and literally perform all and singular the stipulations and agreements aforesaid, after their true tenor and intent, then and thereupon the first party will make up to the said second party, his heirs or assigns, upon the surrender of this contract, a warranty deed, conveying the title to said aforesaid lands and premises in fee simple. But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and at the times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally, without any failure or default, time being of the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all rights and interests hereby created or then existing in favor of the

said second party, his heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in the said first party, his heirs or assigns, without any declaration of forfeiture or act of re-entry, or without any other act by said first party to be performed, and without any right in said second party of reclamation or compensation for moneys paid or improvements made, as absolutely, fully and perfectly as if this contract had never been made.

"And it is further covenanted and agreed by and between the parties hereto that, immediately upon the failure to pay any of the notes above described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord to tenant shall arise between the parties hereto for one year from January 1st immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of forty dollars for occupying the premises from the said January 1st to <sup>596</sup> the time of default, such rent to be due and collectible immediately upon such default."

The contract was executed August 22, 1904, and on the same day appellant executed and delivered to appellee the notes according to the stipulations of the contract. Appellant went into possession of the land in December, 1904. He made improvements on the place, and paid the taxes, amounting in the aggregate to two hundred and twelve dollars and thirty-one cents. Appellant testified as follows: "I have never paid the notes given for the purchase price of said land. Just before the first of said notes was due, I went to Mr. Witt and told him that I did not know that I would be able to pay all of the first note when due; that I was making improvements on the place, and needed all the money I could get to put on the place, and that the place was good for his money. He gave an affirmative grunt, but gave no intimation that he would want his money when it was due, or that he had any objection to giving me time on it. I had been doing business with Mr. Witt before this time, and had owed him money, and he never had insisted on my paying it when due, but was always willing to extend time, and I understood from what he said and the way he acted that he was willing for me to have additional time on the land notes. About the first of January, 1907, I went to Mr. Witt to make a payment on my land notes, and asked him if he wanted it all or was willing to take just a part of it; that I could pay it all if he wanted it, but would rather pay a part of it. He then claimed that I was too late, and that he would not then let me have the

land at the price we had agreed upon. Up to that time I understood that Mr. Witt was perfectly willing to extend time on the notes. If I had not understood it that way, I would have met them when they were due. Mr. Witt has never asked me to pay anything on these notes. He has never said anything to me about paying rent. He has never returned to me my notes or indicated to me in any way that my delay was unsatisfactory to him. About the first of last February, I went to Mr. Witt's house, and offered to pay him the full amount of the purchase price with interest up to that time, and asked him for a deed to the land. He refused to give the deed or to receive the amount that I offered to pay. When I first went to Mr. Witt in January, 1907, and asked him if he would <sup>597</sup> take a part or did he want all of the money, he asked me if I had all of the money with me. I told him that I did not have all the money with me, but that I could get it. He then refused to let me have the land at the price agreed upon. He afterward told me that if I had had the money with me he would have let me have the land. Mr. Witt passed this place frequently, and knew that I was going ahead making improvements on it after the time the notes were due." The statement in the last clause was practically nullified on cross-examination.

The appellant further testified that when he first signed the contract there was a blank in that part of the printed form in regard to the description of the land and the amount to be paid for rent; that since the contract was signed the description and the word "forty" has been inserted; that there was no agreement that appellant should pay rent in case of a failure to pay notes when due.

J. M. Witt testified that "the contract and notes are as executed by me and Mr. Souter with the exception that I afterward wrote the numbers in there by agreement with Mr. Souter. I never did give Mr. Souter to understand that I waived any of the conditions of the contract. He spoke to me about being able to pay a part only, as I remember, of the first note about the time it became due, or possibly afterward. It seems to me that it was sometime just before Christmas of the year the first note became due. I do not remember what answer I gave him, but probably the one he says I made is correct. He never did after that conversation offer to pay any part of the first note until in this year. He never did speak to me again about the payment of either notes until January of this year. Mr. Souter had been in debt to me at different times before we made this contract, and was fre-



quently slow in making payments. I never pressed him for payments. I have never asked Mr. Souter for the payment of the notes given for the land involved in this suit. I have never returned the notes to him. I always told Mr. Souter, at the time of making the contract and after that, that if he would pay the notes by the time the last note was due it would be all right. At the time we made the contract I told Mr. Souter that he could have his own time to pay for the land, and he named the terms stipulated in the contract. At the time we made the contract, Mr. <sup>598</sup>Souter remarked that he expected it would be hard on him to make all of the first payment, and I told him I guess it would be all right if he didn't pay the first full payment. This was when we were talking about the land and before the written contract was signed. I expect maybe that I would have taken the money and made Mr. Souter a deed if he had come up with the money in full any time before January 1, 1907, the time I marked the contract canceled. The contract we made was a bona fide sale. The forfeiture clause was put in the contract to show that he was to pay me so much money before he could get the land according to the stipulations of the contract. I never asked Mr. Souter to pay any rent on the place. The day we signed the contract Mr. Henderson wrote it, and when he came to the rent part of it he asked what amount of rent, and I told him that it made no difference, as I didn't intend to charge him any rent no way. He then asked what the rent would be forth, and I said that if I was going to rent it I would want forty or fifty dollars, and he must have then put in the forty dollars. I never did ask Mr. Souter to surrender this place to me, never demanded any rent on it, never demanded any payment of the notes, and have never surrendered the notes to him. I took the two copies of the contract the day we made it to fill out the numbers of the land and never gave him back a copy of it. Mr. Souter has never asked for the notes, and I think I told him in January, 1907, when he spoke to me about the matter, that he could get the contract and notes at any time. Whatever I might have done since December 1st last, I would have done it outside of the contract and not under it. There was never anything said between me and Mr. Souter about paying rent."

It was shown by the witness who filled out the printed form of contract and notes that he inserted the word "forty" in the contract.

The suit was by appellant against appellee for specific performance. The court upon the above facts refused the relief

prayed in appellant's complaint and dismissed it for want of equity. Appellant seeks by this appeal to reverse that decree.

<sup>599</sup> The written contract is plain. There is a clause expressly making "time of the essence of the contract," and other clauses which clearly show that the parties intended at the time of the execution of the contract that the payments should be made at the times stipulated. From <sup>600</sup> the language of various provisions of the contract the conclusion is irresistible that payment at the time specified was made a condition precedent to the right of appellant to acquire the title, and to obtain a deed to the land. This being true, the case, so far as the written contract is concerned, comes well within the rule announced by Mr. Pomeroy and quoted by Judge Riddick in *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047, as follows: "It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt the only difficulty in determining when time has thus been made essential. It is also equally certain that, when the contract is made to depend on a condition precedent—in other words, when no rights shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times—then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent": 1 Pomeroy's Equity, sec. 455. See, also, *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498, 41 L. ed. 1180; 4 Pomeroy's Equity, sec. 1408. But it does not follow that, because there has been a forfeiture under the strict letter of the contract, the vendor is entitled to insist upon it. That depends upon his conduct with reference to it. The supreme court of the United States in *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 498, 41 L. ed. 1180, after announcing the doctrine we have mentioned as to the proper construction of a contract where time is essential, says: "The discretion which a court of equity has to grant or refuse a specific performance, and which is always exercised with reference to the circumstances of the particular case before it, may, and of necessity must, be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions." Some of our own cases to the same effect are *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562; *Morris*

v. Green, 75 Ark. 410, 88 S. W. 565; Banks v. Bowman, 83 Ark. 524, 104 S. W. 209.

The real difficulty in this case has been to determine, on the issue of fact, as to whether appellee's conduct was a waiver of the forfeiture. Appellant and appellee are the witnesses pro and con respectively on this issue, and as is said by Chief Justice Hill <sup>601</sup> in Banks v. Bowman, 83 Ark. 524, 104 S. W. 209: "Where there is a conflict, it is a mere difference between two witnesses detailing the same transaction, and the court accepts in such conflict the testimony accredited by the chancellor, nothing else appearing to determine the preponderance." There was a clear waiver of any forfeiture on account of a failure to pay the first note when it became due. The testimony of appellee himself shows that. For among other things he says: "I always told Souter at the time of making the contract, and after that, that if he would pay the notes by the time the last note was due it would be all right." The appellant, before the first note was due, went to the appellee and told him that he (appellant) was making improvements, and that he would not be able to make all of the first payment when due, and that thereupon appellee gave "an affirmative grunt." He says that he had been doing business with appellee before this time, and had owed him money, but that appellee had never insisted on payment when the money was due, and was always willing to extend the time. Therefore appellant concluded that appellee was willing for him to have additional time on the second note as well as the first. But appellant did not ask appellee about payment on the second note until after same was due. Then he found that appellee was unwilling to extend the time, claiming that appellant was too late, etc. Appellant testified that he understood from what appellee said and did that he was willing to extend the time of payment after the last note became due. But appellant fails to point out any conduct on the part of appellee before or after the time for the payment of the last note that would warrant appellant in believing that appellee would extend the time for payment beyond the date when the last note was due.

Appellee testified that his indulgence to appellant was with reference to the first payment. True, he says that "maybe he would have taken the money and given appellant a deed had he come up with the money in full before January 1, 1907," the day the contract was marked canceled. But appellee says it was a bona fide sale, and "the forfeiture clause was put in the contract to show that he was to pay me so

much money before he could get the land according to the stipulations of the contract." The fact that appellee never asked appellant to pay any <sup>602</sup> rent on the place, and that appellee retained the notes after the expiration of the time of payment cannot be taken as a waiver of the forfeiture. Appellee says that he told appellant in January, 1907, when he spoke about the matter, that he, appellant, could get the contract and notes at any time. He says that he did not intend to charge him rent, and there was nothing said about it; that what he did since December 1, 1906, the time for the final payment, he would have done outside of the contract and not under it.

The fact that appellee did not charge appellant rent may be regarded as an act of kindness to appellant rather than an acknowledgment on the part of appellee that he did not own the land. The testimony is set out in full, and it fully sustains the finding of the chancellor. His decree is therefore affirmed.

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*A Forfeiture may be Enforced in Equity*, when the parties have clearly agreed to one and no injustice or hardship is worked: Cherokee Cons. Co. v. Bishop, 86 Ark. 112, 126 Am. St. Rep. 1098; Equitable Loan etc. Co. v. Waring, 117 Ga. 599, 97 Am. St. Rep. 177.

*Equity will not Declare a Forfeiture Against a Vendee*, according to Higinbotham v. Frock, 48 Or. 129, 120 Am. St. Rep. 796, but will leave the vendor to his legal remedy.

*Time as the Essence of Contracts for the Sale of land* is the subject of a note to Boldt v. Early, 104 Am. St. Rep. 265.

*The Right of a Vendor to Recover Possession* from his vendee is the subject of a note to Brixen v. Jorgensen, 107 Am. St. Rep. 722.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IDAHO.**

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**HILTON v. STEWART.**

[15 Idaho, 150, 96 Pac. 579.]

**MARRIAGES Without the State, Statute Controlling.**—Under section 2428, Revised Statutes, "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." (p. 56.)

**MARRIAGE, Judgment Affirming, Admissibility of as Evidence.**—The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state, to be a common-law marriage and to evidence which the following certificate was issued: "John Rockey Park, born Tiffin, Seneca, Ohio, 7 May, 1833. Annie Flora Armitage born Nottingham, London, 19 February, 1853. The above parties were sealed by Prest. D. H. Wells in the presence of Emeline Free Young, at her residence in Salt Lake City, U. T., Dec. 5, 1872. The lady being on her supposed deathbed. Daniel H. Wells,"—is admissible in evidence in an action in this state, involving the marriage status between the same parties. (p. 57.)

**MARRIAGE, Decision of the Court of Another State Respecting.**—The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state to be valid, in an action involving the validity of such marriage, controls and governs the court, in an action in this state between the same parties involving the validity of such marriage and the marriage status of the parties thereto. (p. 57.)

**RES JUDICATA, Test of.**—To make the matter res adjudicata, it is immaterial that the question alleged to have been settled by a former adjudication was determined in a different kind of proceeding or a different form of action from that in which the estoppel is claimed. The test is, was the question actually and directly in issue and judicially determined in the former suit between the same parties or their privies by a court of competent jurisdiction. (p. 55.)

**JUDGMENT, Parties to, When the Same—Executor of the Same Person in Different States.**—A person nominated as executor by a will probated in the state of Utah, and appointed as such in that state, and afterward appointed administrator (with the will annexed) in this state, represents said estate in both jurisdictions, and occupies the same position with reference to all controversies

and suits by or against said estate, and in that respect, and to that extent, is the same person in both states. (pp. 55, 56.)

**DIVORCE, Decision Denying Validity and Effect of.**—The courts of Utah, having decided that a divorce granted by the Mormon church was illegal and void, and did not terminate the marriage relation between the parties thereto, in an action involving the validity of said divorce, fixed and determined the status of such parties, and controls and governs the courts of this state in an action involving the validity of such divorce. (p. 56.)

**LACHES in Asserting the Rights of a Wife.**—A wife, who does not assert her rights to or interest in the property of her husband until after his death, even though living separate and apart from such husband, but does assert such right immediately after the death of such husband, and prosecutes her action with diligence, is not guilty of laches or estopped from asserting such right. (p. 57.)

**ESTOPPEL of Wife to Show Her Wifehood.**—In an action involving the validity of a marriage and the right of a surviving wife or widow to her interest as such in her deceased husband's property, she is not estopped from maintaining such action on the ground of public policy, morality or decency, where it appears that she may have honestly believed that she had been legally divorced from her said husband, even though she has lived with another as his wife. (p. 57.)

**JUDGMENT of a Subordinate Court Conflicting with that of the Supreme Court—Evidence.**—A judgment of the district court of a state affirming the invalidity of a marriage should not be admitted in evidence if there has been a judgment of the supreme court of the same state deciding directly to the contrary. (By the editor.) (p. 58.)

(Syllabi by the court except where stated to be by the editor.)

Action to determine the right of a widow to an interest in the property of her deceased husband, and to have her interest set off to her in the final settlement of his estate. Judgment for the plaintiff and appeal by the defendant.

Barnard J. Stewart and Jesse R. S. Budge, for the appellant.

N. V. Jones and O. R. Soule, for the respondent.

<sup>156</sup> STEWART, J. John R. Park died at Salt Lake City, Utah, about August 30, 1900. He left a last will and testament, by the provisions of which all his property was devised and bequeathed to the University of Utah. Samuel W. Stewart was named as executor, under the will, and duly <sup>157</sup> qualified as such in the county of Salt Lake, state of Utah, and afterward in the county of Fremont, in the state of Idaho, and as such administered the estate of said deceased in the state of Utah, and also in the state of Idaho. He filed his final account as such executor in the county of Fremont in this state, and petitioned for a distribution of the property in said state in pursuance of the terms of said will.

Annie F. A. Hilton, respondent herein, filed objections to the distribution of said estate to the University of Utah, and claimed and alleged that she was the surviving wife of said John R. Park, and as such was entitled to a one-half in value of the real estate of which Dr. Park died seised in the county of Fremont in this state.

The issue thus presented was tried in the probate court of Fremont county, which held and decided that said Annie F. A. Hilton was the surviving wife and widow of said John R. Park, deceased, and as such was entitled to a one-half in value of all his real property situated in said county. From this decision an appeal was taken to the district court of the sixth judicial district in and for said county, where a like judgment was rendered. From this latter judgment the executor appeals to this court.

Among other things, the trial court found that Annie F. A. Hilton was the wife of John R. Park, deceased, at the time of his death, and his surviving widow, and as such was entitled to a one-half in value of all the real property of which the deceased was seised at the time of his death in said county, subject to his debts and expenses of administration.

Upon the trial, the respondent offered in evidence, and the same was admitted over the objections of the appellant, a decree of the third judicial district court in and for Salt Lake county, state of Utah, in the Matter of the Estate of John R. Park, Deceased; also the complaint, amended answer, findings of fact and conclusions of law, and a decree of the third judicial district court in and for Salt Lake county, state of Utah; in the case of Samuel W. Stewart, Executor, v. Annie F. A. Hilton; also the transcript of testimony and decree in the case of Annie F. A. Hilton v. Rosa P. Roylance, a case <sup>158</sup> tried in the same court. These three cases, to wit, In re Park Estate, Stewart v. Hilton, and Hilton v. Roylance, were all tried together, and all appealed simultaneously and heard together in the supreme court of the state of Utah. The opinions in these cases are to be found in 25 Utah, at pages 129 (95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723), 160 (69 Pac. 1134) and 161 (69 Pac. 671). Samuel W. Stewart, executor of the estate of John R. Park, deceased, prosecuted a second appeal to the supreme court of Utah, and that court affirmed the former decisions in an opinion, found in 29 Utah, at page 257 (81 Pac. 83).

It is contended upon the part of the appellant that the court erred in admitting in evidence the several decrees rendered in the courts of Utah, alleging that the same were irrele-

vant, incompetent, immaterial and hearsay, and in no way pertaining to the issues in this case, and that such decrees were of no force or binding effect upon the parties to this action.

It is also contended that the trial court erred in finding that John R. Park and Annie F. A. Hilton, petitioner and respondent herein, intermarried at Salt Lake City, in the county of Salt Lake, and territory of Utah, on December 5, 1872, for the reason, as alleged that the evidence does not support said finding.

It is next contended that the finding of the court to the effect that John R. Park and Annie F. A. Hilton were husband and wife, and that the said Annie F. A. Hilton is the surviving wife and widow of John R. Park, is erroneous, for the reason that the evidence does not support such finding.

It is next contended that the conclusion of the court to the effect that Annie F. A. Hilton is entitled, as the surviving wife and widow of said John R. Park, to a one-half in value of all the real property of which decedent died seised in the county of Fremont, state of Idaho, subject to the debts of decedent and the expenses of administration, is erroneous.

The contentions of appellant present two questions: First, is the petitioner the surviving wife and widow of John R. Park, deceased? If this question be answered by this court <sup>159</sup> in the negative, the second question becomes of no importance. If, however, this court should answer the above inquiry in the affirmative, then it becomes necessary to consider the next question, and that is, Can the petitioner, as such surviving wife and widow, maintain this action in support of her interest as such widow in the property owned by said John R. Park at the time of his death, in Fremont county, Idaho?

The court admitted in evidence the various decrees objected to, upon the theory, as contended by respondent, that they were *res adjudicata* of the marriage status of Dr. Park and Annie F. A. Hilton, and binding upon this court as such. If this court should sustain this contention, it would be unnecessary to examine as an original proposition the question of the validity of the marriage between John R. Park and Annie F. Armitage, or whether, at the time of Dr. Park's death, Mrs. Hilton was his surviving wife and widow.

The first question, then, for our consideration, is: Were the decrees offered in evidence admissible and binding upon this court? This question depends upon the force and effect to be given to such decrees by the courts of this state.



The case of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723, was an action brought by respondent as the surviving wife and widow of John R. Park deceased, claiming as such widow to be entitled to one-third of certain real estate which the deceased in his lifetime sold to the defendant, demanding that said real property be set apart to her as her separate property. The supreme court of Utah in that case rendered a very exhaustive opinion. The main question discussed and decided by the court was the effect of the "sealing" ceremony between John R. Park and Annie F. Armitage, on December 5, 1872, and the effect of a church divorce granted by the Mormon church to said parties, and the right of said Annie F. A. Hilton to succeed to an interest in the property owned by said Park at the time of his death. The marriage ceremony involved was as follows:

"John Rockey Park, born Tiffin, Seneca, Ohio, 7 May, 1833. Annie Flora Armitage, born Nottingham, London, 19 February, 1853. The above parties were sealed by Prest. D. H. <sup>160</sup> Wells in the presence of Emeline Free Young, at her residence in Salt Lake City, U. T., December 5, 1872. The lady being on her supposed deathbed. Daniel H. Wells."

In that case the court held that the "sealing" ceremony of the Mormon church, performed by a church officer, created a common-law marriage between the parties.

In the case of *Stewart v. Hilton*, 25 Utah, 160, 69 Pac. 1134, the action was brought by the executor of the last will and testament of John R. Park, deceased, against Annie F. A. Hilton, to quiet title to certain property of which disposition was made in the will, and in which the defendant claimed an interest as the widow of said deceased, and the supreme court followed the decision of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723, to the effect that Annie F. A. Hilton was the wife and surviving widow of John R. Park deceased, and therefore entitled to her widow's interest.

The case of *Estate of Park*, 25 Utah, 161, 69 Pac. 671, was an action wherein Annie F. Hilton presented a petition to the court, praying that she be adjudged to be the surviving wife and widow of John R. Park, deceased, and as such that she be allowed a certain sum per month out of the estate of the deceased for maintenance and support. The court held that the questions of law presented, except that relating to the family allowance, were the same as those presented in the case of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep.

821, 69 Pac. 660, 58 L. R. A. 723, and the decision in that case was followed.

Thus, it will be seen that in these three cases the supreme court of Utah approved the identical ceremony involved in this case, and held and decided the same to be a common-law marriage, and that Annie F. Armitage was married to John R. Park, and, after his death, was his surviving wife and widow.

In the case of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723, after full discussion of the question the court concludes:

"As a result of our investigations, the conclusion that the sealing ceremony performed in this case established the marriage status and created the relations of husband and wife, is irresistible. The marriage, then, having been lawfully created, was it in force at the time when the respondent purchased <sup>161</sup> the property in dispute? This question must be answered in the affirmative unless the marriage status had previously been lawfully dissolved. The only thing, so far as shown by the evidence, that had ever been done toward dissolving it was the procuring of the church divorce, to which reference was heretofore made."

The supreme court of Utah, in commenting upon these decisions, in the case of *In re Park Estate*, 20 Utah, 257, 81 Pac. 83, says: "In the case of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723, it was, inter alia, held and decided that the petitioner herein, who was the plaintiff therein, was the lawful wife of John R. Park, and that upon his death she became his lawful widow, and entitled to her share in his estate as such widow."

In the case of *Hilton v. Roylance*, the first question determined was whether or not the plaintiff was the widow of the deceased. In order to establish that fact, it was necessary to prove the marriage between Park and Miss Armitage. That suit involved, directly, the validity of the marriage between Park and Miss Armitage, and whether Mrs. Hilton was the widow of Park. It was necessary for the court to judicially determine that question before the court could determine her interest in the property of the deceased.

The case of *Stewart, Executor, v. Hilton*, directly involved the question of the marriage of Park and Armitage and whether or not Mrs. Hilton was the surviving wife and widow of Dr. Park at the time of his death, for, in that case, her right and interest in property disposed of by Dr. Park by his will was involved.

The case of *Hilton v. Stewart*, Executor, presented for judicial determination the question as to whether or not Mrs. Hilton was the wife and widow of John R. Park, deceased.

The case of *In re Park Estate* directly presented the question of the validity of the marriage of Dr. Park and Mrs. Hilton and whether or not Mrs. Hilton was the surviving wife and widow of Dr. Park.

It will thus be seen that in four different decisions the supreme court of the state of Utah judicially determined the <sup>162</sup> marriage status of John R. Park and Annie F. A. Hilton, and adjudged that they were husband and wife at the time of Park's death, and that the "sealing" ceremony of December 5, 1872, was a common-law marriage between said parties. This marriage relation continued up until the time of Park's death, unless the same was terminated by the divorce granted by the Mormon church. The validity of this divorce was also involved and judicially determined in the case of *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723. This divorce, granted by the Mormon church in March 1873, read as follows:

"Know all men by these presents: That we, the undersigned, John R. Park and Annie, his wife, before her marriage to him Annie Armitage, do hereby mutually covenant, promise, and agree to dissolve all the relations which have hitherto existed between us as husband and wife, and to keep ourselves separate and apart from each other, from this time forth. In witness whereof we have hereunto set our hands at Salt Lake, Utah, this 19 day of March, A. D. 1873. John R. Park. Annie Flora Park. Signed in the presence of D. McKenzie, James Jack."

In that case the court, in discussing the effect of this divorce, says: "The marriage, then, having been lawfully created, was it in force at the time when the respondent purchased the property in dispute? This question must be answered in the affirmative, unless the marriage status had previously been lawfully dissolved. The only thing, so far as shown by the evidence, that had ever been done toward dissolving it, was the procuring of the church divorce, to which reference was hereinbefore made. That divorce counsel for the respondent themselves admit to be null and void, because, while the church could solemnize a marriage, it had no power to dissolve it. Such was the decision of this court in *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409, . . . where a like divorce granted by the same church was in question. Nor is there anything to show that the marriage contract was ever

dissolved previous to the death of the husband. The mere fact <sup>163</sup> that both parties believed the church divorce to be valid, and that the plaintiff, so believing, thereafter became a party to another marriage ceremony, did not dissolve her former marriage. Such being the case, upon the death of Dr. Park she became his lawful widow, and entitled to her share in his estate as such widow."

Thus, we see that the supreme court of Utah not only passed upon the effect and validity of the marriage of Park and Hilton, but also upon the validity of the divorce granted by the Mormon church.

The case at bar involves the question as to whether or not Mrs. Hilton was the surviving wife and widow of Dr. Park at the time of his death, and as such entitled to a one-half in value of the property owned by him in Fremont county, Idaho, at the time of his death. From a comparison of the cases decided by the supreme court of Utah, with the case now under consideration, it will be seen that while the parties were not the same in all cases, yet the question of the marriage status of John R. Park and Annie F. A. Hilton was necessarily involved in all of said cases, and the court, in deciding such cases, judicially determined that question, and in each instance held that Annie F. A. Hilton was the surviving wife and widow of John R. Park at the time of his death.

To make the matter *res adjudicata* it is immaterial that the question alleged to have been settled by a former adjudication was determined in a different kind of proceeding or a different form of action from that in which the estoppel is claimed. The test is, was the question actually and directly in issue and judicially determined in the former suit between the same parties or their privies by a court of competent jurisdiction? 23 Cyc. 1215-1221. Applying this test to the decrees offered in evidence, it clearly appears therefrom that the marriage status of Dr. Park and Mrs. Hilton was directly in issue in each of said cases and judicially determined.

It is argued, however, by appellant that the parties are not the same. In the case of *Stewart v. Hilton*, 25 Utah, 160, 69 Pac. 1134, the parties were identically the same as the parties in the suit now under consideration, <sup>164</sup> and in the case of *In re Park Estate*, 29 Utah, 257, 81 Pac. 83, the parties were the same. But counsel for appellant argues that S. W. Stewart as executor in the state of Utah, is not the same as S. W. Stewart, executor, in the state of Idaho. S. W. Stewart was nominated executor by the provisions of the will, and appointed as such in the state of Utah, and upon appli-



cation also appointed as such in the county of Fremont, this state. In his capacity as executor in the state of Utah, and as administrator under the will in the state of Idaho, he represented the estate of John R. Park, and the same interests, although his appointment came from a different source. While acting as such executor, he at all times occupied the same position with reference to the estate and with reference to all controversies urged against said estate. Samuel W. Stewart, executor under the will, in the state of Utah, is the same as Samuel W. Stewart, administrator with the will annexed, in the state of Idaho, in all suits to which he is a party representing said estate. The general rule, in relation to estoppel by judgment, is that the judgment binds the parties to the action and their privies. The judgments, therefore, offered in evidence, in which the executor and the estate were parties, and in which the marriage of Mrs. Hilton and Dr. Park was directly involved and judicially determined, estop such executor from questioning such marriage status in a suit between the same parties involving said marriage status in this state: 24 Am. & Eng. Ency. of Law, 735-738.

There is another reason which requires this court to adopt and follow the decisions of the supreme court of Utah with reference to the validity of the marriage between John R. Park and Mrs. Annie F. A. Hilton and their marriage status at the time of the death of Dr. Park. Section 2428 of the Revised Statutes provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same are contracted, are valid in this state."

The marriage of Dr. Park and Mrs. Annie F. A. Hilton, having been performed in the state of Utah and held valid under the laws of that state, must also be held valid when called in <sup>165</sup> question in this state. This statute merely announces the general rule of law, as we understand it, that any contract, which is a valid marriage according to the law of the place where the contract is made, is valid everywhere: 19 Am. & Eng. Ency. of Law, 1211; 23 Cyc. 1319, 1406; 2 Elliott on Evidence, secs. 1530-1532; In re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Herman on Estoppel and Res Adjudicata, secs. 290-296; 2 Van Fleet's Former Adjudication, sec. 517.

The appellant in this case, in four different forms of action, has litigated through all the courts of the state of Utah the question as to the validity of her marriage to John R. Park, and her right and interest, as his surviving wife and widow, and the court of last resort in that state has sustained the

validity of such marriage and her marriage status. Upon her application for the wife's interest in property left by the deceased in this state, the executor again interposes the same objection, and presents to the court for consideration and determination the identical question presented to and determined by the highest court of the state of Utah. The judgment of the supreme court of the state of Utah, upon identically the same facts and with reference to the same matter involved in this case, ought to put an end to all further litigation on account of the same matter, and will control and govern this court in its decision upon the same questions involved and decided by such court: *Elliott v. Porter*, 6 Idaho, 684, 59 Pac. 360.

Counsel for appellant also argue that, even though the trial court was correct in admitting said decrees in evidence, and in holding that Annie F. A. Hilton was the surviving wife and widow of John R. Park, deceased, yet she should not be permitted to maintain this suit and have her interest in the property of Dr. Park set off to her, on the ground of laches, public policy, public morality and decency. A wife, however, is not guilty of laches because she does not commence an action against her husband during his lifetime and assert her interest or right to his property. Her right of action accrued upon his death, and the record in this case shows that soon <sup>166</sup> after his death she commenced an action in the courts of Utah to establish her right to her interest in the property of the deceased, and that she had waged such litigation persistently ever since. She has been most diligent in attempting to protect her rights as such surviving wife and widow. There is nothing in the record to indicate any laches on her part.

Counsel, however, argue that she should be estopped from asserting her rights because of public policy, morality and decency. This argument might have some force were Mrs. Hilton attempting to assert a right or interest in the property of William Hilton, the second husband, but the validity of the marriage of William Hilton and Mrs. Hilton has not been put in issue. The facts or effect of that question has not been determined. The mere fact that she did not assert her right to an interest in Dr. Park's estate until after his death is not a ground for holding that she is estopped from asserting it after his death. The parties may have accepted the divorce in good faith, because it was part of the tenets of the Mormon church, but the courts of Utah having held the divorce void, this court is controlled by such decision, and the status of the

petitioner with reference to William Hilton is not involved or called in question in this case. The claim she asserts arises out of her marriage with John R. Park, and her rights are to be determined by that marriage relation, and not her relation with Hilton.

Appellant, on the trial, introduced in evidence a decree rendered by the district court of Salt Lake county, Utah, in the case of *Hilton v. McCornick*, in which McCornick claimed to have purchased property from one of Park's grantees without any knowledge of the rights or status of the widow. The judgment in that case was directly contrary to the adjudication of this same question by the highest court of that state and at the time prior to the decision of *In re Park Estate*, 29 Utah, 257, 81 Pac. 83, which approved and followed *Hilton v. Roylance*, 25 Wash. 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723. We think that this decision of the trial court should not be received as evidence overruling the decisions of the supreme court of that state.

We conclude, therefore, that the findings and judgment of the trial court were right. The judgment is affirmed. Costs awarded to respondent.

Ailshie, C. J., and Sullivan, J., concur.

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*The Case of Hilton v. Roylance*, referred to by the Idaho court in the principal case, is reported in 25 Utah, 129, 95 Am. St. Rep. 821.

*A Marriage Valid in the State or Country Where Entered* into is valid in every other state or country, unless there prohibited by some positive rule of law or of public policy; and this rule applies to common-law marriages: See the note to *Klipfel v. Klipfel*, 124 Am. St. Rep. 106.

*The Rule of Res Judicata* extends to every proposition assumed or decided by a court, upon which the final conclusion is based, and this includes the status of a person where that is the subject upon which the judgment acts: *State v. McDonald*, 108 Wis. 8, 81 Am. St. Rep. 878.

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## WEST v. THEIS.

[15 Idaho, 167, 96 Pac. 932.]

**LIMITATIONS OF ACTIONS—Nonresidents.**—The words "return to the state" used in section 4069, Revised Statutes, providing that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state," apply to a nonresident debtor who enters into a contract in a foreign state, and thereafter comes into this state, as well as to a citizen who enters into a contract within this state, and thereafter departs from the state. (p. 64.)

**LIMITATION OF ACTIONS—Cause of Action Arising in Another State.**—The phrase "has arisen in another state" used in section 4079, Revised Statutes, providing that "when a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state," refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state or foreign country through which the debtor may subsequently travel or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state prior to coming to this state, where an action is eventually commenced. (p. 65.)

**LIMITATION OF ACTIONS, Where Deemed to have Arisen.** Under the provisions of section 4079, Revised Statutes, "a cause of action arises" at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed, and the cause of action thus arising continues and follows the debtor until such time as it is either barred by the statute of limitations of the state wherein it arose, or until the debtor has lived within the state a sufficient length of time to bar it by the statute of limitations of this state. (p. 65.)

**LIMITATIONS OF ACTIONS—Statute Neither of the Forum nor of the Place Where the Contract was Made.**—Where T. executed promissory notes in the state of Kansas and agreed to pay at a definite time and place within that state, and thereafter left the state and went to the state of Washington, and there resided a sufficient length of time to bar the right of action under the statutes of the state of Washington, and thereafter came to Idaho where he was sued upon the cause of action, and it appears that the statute of limitations of the state of Kansas has not yet run against the obligation, and that the debtor has not been in this state a sufficient length of time to bar the action here, he will not be permitted to plead the bar of the statute of limitations of the state of Washington; in such case the only inquiry is as to the statute of limitations of the state in which the debt was contracted and agreed to be paid, and of this state wherein the action is being prosecuted. (p. 67.)

(Syllabi by the court.)

Richard H. Johnson, for the appellant.

Cavanah & Blake and W. E. Borah, for the respondent.

**170 AILSHIE, C. J.** The question to be determined in this case is: Where a debtor executed a promissory note in the state of Kansas and agreed to pay the same at a specified time and place within that state, and who thereafter removed to the state of Washington and resided there until the bar of the statute of limitations of that state had run against the right of action on the contract, and the debtor thereafter came into the state of Idaho and was sued upon the obligation, can he here plead the bar of the statute of limitations of the state of Washington?

The trial court held that the plea of the statute of limitations of the state of Washington was good, and entered judg-



ment in favor of the defendant. This appeal is from the judgment so made and entered. The transaction out of which this action arose and the circumstances involving the statute of limitations are briefly as follows:

On April 2, 1888, the defendant, Charles Theis, at Richfield, Kansas, executed and delivered to I. D. West his four promissory notes for the sum of two thousand dollars each, and therein promised and agreed to pay the same at the office of Ritter & Doubleday in the city of Columbus, state of Kansas. The plaintiff here is the widow of I. D. West, and executrix of his estate. The defendant, Theis, left Kansas after the maturity of two of these notes and before the maturity of the other two, and before the statute of limitations had run as against any of <sup>171</sup> these obligations. He thereafter located in the state of Washington, where he resided continuously for a period of more than six years, which period is prescribed by the statutes of that state as the limit within which actions of this character must be commenced. He thereafter came into the state of Idaho, and this action was brought against him on May 10, 1906. The defendant answered, admitting the execution of the notes as alleged in the complaint, and pleaded the statute of limitations of the state of Washington as a bar to the action in this state under section 4079 of the Revised Statutes of Idaho. The proper solution of this question must necessarily depend upon the construction to be placed on sections 4069 and 4079 of the Revised Statutes of this state. Those sections are as follows:

"Sec. 4069. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

"Sec. 4079. When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Statutes similar to the foregoing have been considered and construed by the courts of last resort of a number of the states and different conclusions have been reached by the different courts. We shall not undertake to review or analyze the decisions to any great extent, but shall rather consider the

reasons suggested by some of them in so far as they may throw light on the statutes under consideration. In the first place, it must be conceded that the decisions from Minnesota, Illinois and Nevada sustain the contention made by the respondent in this case: *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339, 97 N. W. 1056; *Osgood v. Artt*, 10 Fed. 365, 11 Biss. 160; *Wooley v. Yarnell*, 142 Ill. 442, 32 N. E. 891; *Strong v. Lewis*, 204 Ill. 35, 68 N. E. 556; *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817. There is also some support to be found for respondent's contention in *McCormick v. Blanchard*, 7 Or. 232; *Freundt v. Hahn*, 24 Wash. 8, 85 Am. St. Rep. 939, 63 Pac. 1107; *Snoddy v. Cage*, 5 Tex. 106; *Wilson v. Daggett*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618.

On the other hand, appellant is supported in her contention by the decisions of Montana (*Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702); Oklahoma (*Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 4 L. R. A., N. S., 1029); California (*McKee v. Dodd*, 152 Cal. 637, 125 Am. St. Rep. 82, 93 Pac. 854, 14 L. R. A., N. S., 780); Utah (*Lawson v. Tripp*, 34 Utah. 28, 95 Pac. 520); Kentucky (*Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847); and Massachusetts (*McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75). There are also cases from other states that, although not directly in point, tend to support the latter contention.

In *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702, the supreme court of Montana had under consideration the identical question presented in this case, and in considering their statute, sections 50 and 55 of the Revised Statutes of Montana Territory, which correspond to sections 4069 and 4079, *supra*, of our Revised Statutes, in course of the opinion the court said:

"When an action is brought in the courts of this territory, on a cause of action arising beyond its limit, and the statutes of limitation are invoked, it is only necessary to inquire what are the statutes of Montana, and, under section 55 of the Code of Civil Procedure, to inquire, further, what are the statutes of the state or country where the cause of action arose or originated, or, it may be expressed, when the demand was created, and first became enforceable. Any other interpretation of the law would compel the creditor to trail the debtor from one country to another, and ascertain how long he resided in any particular jurisdiction, and to search the statute books of every foreign country through which he may have passed, and wherein he may have tarried, for business or

pleasure, to see if, in some one or other of them, his debt had not been barred. This could not have been the intention <sup>173</sup> of the legislature: *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393. We believe the legislature intended that the creditor should have the option to say when he would enforce his demand, and that the only statutes he need to regard are those of the former, where he brings his suit, and of the place where the debt was contracted."

The court concluded its consideration of that case by holding that under the statute the court could not consider the defendant's residence or the statute of limitations of any state or foreign country in which the defendant had resided, except that of the state or country in which the contract was entered into and of the jurisdiction in which the action was brought.

In *Doughty v. Funk*, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. N. S., 1029, the supreme court of Oklahoma had under consideration a contract entered into in the state of Kansas on which suit was brought in the territory of Oklahoma. The defendant pleaded that the action had been barred by the statutes of the state of Nebraska where he had lived for a period exceeding that constituting a bar to the action. The court cited and considered the provisions of the statutes of Oklahoma, corresponding in substance to sections 4069 and 4079 of our statute, and held that the defendant could not be heard to plead the bar of the statute of Nebraska, and that the only statutes to be considered in determining whether the cause of action was barred were the statutes of Kansas and of Oklahoma. In discussing the meaning and intent of the phrase "when a cause of action has arisen" (section 4079), the court said:

"We cannot, therefore, in determining the meaning of the phrase under consideration, hold that a cause of action has arisen only when the remedy and the right occur at the same time. But we do hold that a cause of action arises when the obligation was created which gave rise to a right of action as soon as such right accrued thereon. Following this definition of the word 'arisen,' or the words 'has arisen,' as the same are used in the limitation statute of this territory under consideration, and as the same affects the cause of action involved in this case, we must hold that such cause of action arose in the state of Kansas, and is not barred in this territory <sup>174</sup> until the same has become barred in the state of Kansas, or until he resides in Oklahoma a sufficient length of time for the territorial statute to run against the cause of action."

Section 4069 of our statute corresponds to section 351 of the Code of Civil Procedure of California, while our section 4079 corresponds with section 361 of the California code, and they were both evidently copied from the California statute. As late as January of this present year, in *McKee v. Dodd*, 152 Cal. 637, 125 Am. St. Rep. 82, 93 Pac. 854, 14 L. R. A., N. S., 780, the supreme court of California was called upon to construe these sections and determine as to whether a defendant could plead the bar of the statute of a foreign territory in which he had resided a sufficient length of time to constitute a bar within that jurisdiction. In that case the note had been executed and was payable in the state of New York where both parties resided at the time of its execution. After the maturity of the obligation, the defendant went to Europe, and finally located in Hawaii, where he resided for a sufficient length of time for the bar of the statute of limitations of the territory of Hawaii to run against the right of action. He died in Hawaii, leaving an estate in California. Action was thereafter commenced in California against the administrator of his estate, who plead the bar of the statute of limitations of the territory of Hawaii. In passing on the matter and considering the provisions of the statute, the court said:

"It is at once apparent, then, that the crux of this matter is to be found in the true interpretation to be given to the phrase 'when a cause of action has arisen.' Appellant contends that the cause of action 'arose' simultaneously in New York state at the time the promissory notes became due and payable, and also in Europe, where at that moment deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed, and arose finally in Hawaii upon his arrival there. . . . A cause of action, as Professor Pomeroy points out with his usual lucidity (*Remedies and Remedial Rights*, sec. 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the <sup>175</sup> primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term as it is used in the codes of the several states.' It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment—New York state. It was the duty of deceased to pay the debt, not only when it became due, but at the place of payment—New York state. His failure in this regard gave rise to the cause of



action, and, clearly, therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides."

The court concludes its consideration of that case by holding that the defendant could not successfully plead the bar of the statute of the territory of Hawaii: See, also, *Hiller v. Burlington & M. R. Co.*, 70 N. Y. 223; *Omaha Nat. Bank v. Lindsay*, 41 Wash. 531, 84 Pac. 11; *Drake v. Found Treasure Min. Co.*, 53 Fed. 474.

The latest judicial expression on this subject to which our attention has been called is that found in *Lawson v. Tripp*, 34 Utah, 28, 95 Pac. 520, decided by the supreme court of Utah, March 28th of this year. The court there was considering the provisions of sections 2888 and 2889 of the Revised Statutes of Utah, which correspond to our sections 4069 and 4079. Paragraphs 1 and 5 of the syllabus to that case state very clearly the holding of the court as to the meaning of these two sections when considered together, and are as follows:

"1. The word 'return,' in the Revised Statutes of 1898, section 2888, providing that 'if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state,' as applied to absent debtors, includes nonresidents as well as citizens of the state who have gone abroad and returned to the state, the words 'return to the state' being equivalent to 'come into the state.'" (In support of this holding see authorities cited in the opinion.)

176 "5. A cause of action consists in, first, the primary right and the facts from which it flows, and, second, the breach of that right and facts constituting such breach, which elements taken together create a remedial right."

We find, therefore, from an examination of the foregoing decisions of courts of last resort, in considering and passing upon the meaning and intent of these statutes, that they hold: first, that section 4069 has reference to the time when a right of action arises or the right to commence an action has arrived, and that the period excluded from the computation of time applies both to residents and nonresidents of the state, and that the words "after his return to the state" refer as well to one who comes into the state who has never before been in the state, as to one who has departed from the state and returns to its jurisdiction; second, that section 4079, in

referring to "a cause of action that has arisen in another state," has reference to the state or jurisdiction in which the contract or obligation was to be performed or discharged, and has no reference whatever to any intermediate state or jurisdiction through which the defendant may travel or in which he may reside between the time of executing the contract and the commencement of the action thereon.

We shall not attempt to review the authorities supporting the respondent's contention more than to say that the reasoning employed therein does not appeal to us as sound or logical, nor do they seem to us to portray or set forth the true meaning or intent of these statutory provisions. For example, in *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162, the court holds in substance that where a debt is made payable according to the terms of the contract in one state, and when it becomes due the debtor resides in another state, the "cause of action" cannot be said to have arisen in the state where the debt is payable, for the reason that the debtor is not personally within its jurisdiction. This is substantially the same position taken in *Osgood v. Artt*, 11 Biss. 160, 10 Fed. 365. To our minds, there is a patent fallacy in this contention. Whenever a debt becomes due, and is not paid in accordance with the terms of the contract, a cause of action thereupon arises. This exists as an absolute and unqualified right independent of <sup>177</sup> where the debtor may be. His absence from the state in no way affects the right of the creditor to commence his action. His absence from the jurisdiction simply affects the service of process, and avoids the possibility of the debtor securing a personal service on the defendant and a personal judgment against him, but it in no way affects a judgment in rem against any property he may have within the jurisdiction, nor does it affect the right to commence the action. Indeed, the action must be commenced before process can issue: Rev. Stats., secs. 4138, 4139. It seems to us a strange and novel doctrine to hold that a debtor may by his own acts without the knowledge or consent of his creditor, create for himself a defense that can defeat the creditor's right of recovery. When the debtor enters into a contract within a jurisdiction to pay a certain sum of money within that jurisdiction, a duty and obligation at once arises requiring him to discharge the act at the time and place contracted, and the creditor has a right to assume that he will be there at the time and place when and where the obligation matures ready to discharge it. The debtor, in the face of his con-

tract, should not be allowed to select the jurisdiction in which he will establish his residence and thereby set the statute of limitations of a foreign jurisdiction to running against his creditor without the latter's consent, nor should the creditor be required to keep a detective force in order to keep track of his whereabouts and the various jurisdictions in which he locates, and a law firm to keep him posted as to the statutes of limitations of those several jurisdictions. If the debtor fails to discharge his obligation in accordance with his contract and to keep faith with his creditor he ought not to be heard to plead as a bar in one jurisdiction, that he had previously acquired the defense of the statute of limitations, by residing in another state for the period establishing the bar. It should be remembered that the statute of limitations is not a defense to the action, but is rather a plea to the remedy: *Chemung Min. Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226. The fact that a man pleads the statute of limitations does not pay his debt; he still owes it just the same, but it deprives the creditor of his remedy on the theory that he has been guilty <sup>178</sup> of laches and unreasonable delay in not prosecuting his claim within the period prescribed by the statute. If, however, the debtor should not plead this statute, a valid judgment might be obtained against him even half a century after the execution of the contract. Another thing that is of vital importance in this and similar cases is that under the law of the state where the contract was made, it is still enforceable. As in this case, under the statute of Kansas, the bar of the statute of limitations ceased to run when Theis removed from the jurisdiction, and, at the time this action was commenced, it could have been maintained, under the laws of that state and a judgment in rem could have been entered against any property he might have had in that state; or, indeed, a personal judgment might have been recovered against him had he been within the jurisdiction. Now, we do not think it was the purpose or intention of section 4079 of our statute to relieve a man from his liability on an obligation incurred in a foreign state by reason of the plea of the statute of limitations of another state or of any country except that particular state in which the contract was executed, and the state in which it is sued upon. The state to which that section refers is evidently the state in which the contract was to be performed. That is clearly the state referred to by the expression "has arisen in another state." In our opinion, it is the intention of our statute to avail a debtor who has entered into a contract to be performed in a

foreign state of two, and only two, pleas of the bar of the statute of limitations: first, he may show that he has resided in this state for a period exceeding that of the bar of the statute of limitations of this state; second, he may show that the cause of action is barred by the statute of limitations of the state in which it was to be performed. Beyond this he may not go.

Counsel for respondent urge that this court approved *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162, in *Alspaugh v. Reid*, 6 Idaho, 223, 55 Pac. 300, and that on the authority of the latter case and its approval of the Minnesota decision, the trial court sustained defendant's plea in this case, and accordingly followed the line of authorities cited by respondent. It is <sup>179</sup> true that this court in the *Alspaugh-Reid* case cited and approved *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162, but anything like a close examination of that case discloses the fact that the court did not have the question here involved before it, nor was the inquiry presented as to when and where a cause of action arises within the meaning of our statute of limitations. It is also worthy of note that the quotation from *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162, contained in the original opinion is not entirely in harmony with the comment of the court in denying the petition for rehearing. There it is said that "a cause of action would arise if payment was not made as stipulated." It will also be observed that the opinion in that case denying the petition for rehearing confuses the cause of action or right of action with the power to serve process or acquire personal jurisdiction, and thereupon concludes that a creditor might have a cause of action and yet not be able to "bring his suit because of the absence of the defendant."

This expression is entirely misleading, and contrary to sound reasoning and legal principles. It only serves, however, to illustrate the unwisdom and danger of a court discussing and passing upon questions that are not involved in the case.

The trial court erred in allowing the plea of the statute of limitations of the state of Washington, and for that reason the judgment must be reversed, and it is so ordered, and a new trial is granted, and the cause is hereby remanded. Costs awarded in favor of appellant.

Stewart, J., concurs.

Sullivan, J., did not sit at the hearing and took no part in the decision.



*In Case of a Conflict of Laws, the Statute of Limitations of the forum usually governs, unless the statute is regarded as extinguishing the debt and not merely barring the remedy:* Union Stockyards Nat. Bank v. Maika, 16 Wyo. 141, 125 Am. St. Rep. 1032, and cases cited in the cross-reference note thereto.

*The Words "Where the Cause of Action has Arisen in Another State,"* as used in the statute of limitations, mean when the cause of action has accrued in the foreign state, or when the plaintiff has the right to sue the defendant there; they do not refer to the origin of the transaction out of which the cause of action has arisen: Bruner v. Martin, 76 Kan. 862, 123 Am. St. Rep. 172, and see the cases cited in the cross-reference note thereto.

*If a Note Executed in Another State is by Its Terms Payable Therein,* and the maker is a nonresident of this state when the cause of action accrues, the statute commences to run in his favor only when he comes within the state, and if afterward he leaves, the time during which he is absent is not a part of the time within which suit must be commenced: McKee v. Dodd, 152 Cal. 637, 125 Am. St. Rep. 82.

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## STERRETT v. SWEENEY.

[15 Idaho, 416, 98 Pac. 418.]

**APPEAL AND ERROR**—Disregarding Clerical Errors.—Where the pleadings and findings refer to one section of the statute when another was clearly intended, the appellate court will not permit what thus apparently appears to have been a clerical error to affect the substantial rights of the parties. (By the editor.) (p. 72.)

**LIMITATION OF ACTIONS**—Partial Payment Made Before the Statute has Run.—Under the provisions of section 4817 of Ballinger's Annotated Code of Washington, a partial payment made upon a promissory note, after due and before the statute of limitations has run, fixes the date of such payment as the time from which the statute begins to run. (pp. 72, 73.)

**LIMITATION OF ACTIONS**—Effect of the Statute of Limitations.—The statute of limitations does not mean that the debt has been paid. It is a personal privilege which the law gives to the debtor, whereby he may say that the debt is stale, and for that reason should not be enforced. (p. 73.)

**LIMITATION OF ACTIONS**—Effect of Partial Payments.—This statute of Washington, however, says to the debtor that if he acknowledge the indebtedness by making a payment thereon, it becomes an acknowledgment that the debt has not been discharged, and recognizes the debt as in existence, and fixes the date of payment as a new date from which the statute begins to run. (p. 73.)

**LIMITATION OF ACTIONS**—Partial Payments Made After the Maturity of the Debt.—This statute in effect declares that the making of a partial payment by a debtor, after the maturity of the debt and before the statute of limitations has run, is a waiver of the debtor's privilege to claim the maturity of the debt as the date from which the statute begins to run. (p. 73.)

**LIMITATION OF ACTIONS**—Partial Payments Made in Another State.—Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington con-

tract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his re-entry into this state, after such payment. (p. 74.)

**LIMITATION OF ACTIONS—Application of the Statute of Another State.**—In order to determine the application of the statute of limitations of this state to a contract entered into in the state of Washington, it is necessary to examine said contract and the laws of the state of Washington for the purpose of determining the date from which the statute runs. (p. 75.)

**APPELLATE PROCEDURE—General Findings, When will not Support a Judgment.**—A general finding that all the material allegations of the answer are supported by the evidence and true, and that all the material allegations of the complaint in conflict with the foregoing findings are unsupported by the evidence and untrue, is insufficient to support a judgment. (p. 75.)

**LIMITATION OF ACTIONS—Residence Within One State, Effect upon Contract Made in Another.**—Whether residence within this state for the statutory period will prevail as a plea in bar upon a written contract depends upon the nature of the contract, its maturity, and the date from which the statute begins to run. (p. 75.)

(Syllabi by the court except where stated to be by the editor.)

I. N. Smith, for the appellant.

George W. Tannahill, for the respondent.

**418 STEWART, J.** This action was commenced May 3, 1905. The complaint contains three causes of action. The first is founded upon a promissory note executed by defendant to plaintiff, for the sum of \$700, dated July, 1890, and payable on or before October 1, 1890. The place of payment is not stated in the note. The note, however, is dated at Walla Walla, Washington. It is alleged that payments were made upon said note as follows: December 10, 1890, \$70; December 10, 1901, \$125; that the latter payment was indorsed upon said note by the defendant himself at the time the payment was made. Then follow allegations as to nonpayment and amount alleged to be due. The statutes of the state of Washington are set forth as a part of said cause of action, as follows:

Section 4816, volume 2, of Ballinger's Annotated Codes: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this shall not alter the effect of any payment of principal or interest."

**419** Section 4817, volume 2 of Ballinger's Annotated Codes: "When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a

bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due the limitation shall commence from the time the last payment was made."

Section 4798 of Ballinger's Annotated Codes: "Within six years: 1. An action upon a judgment and, etc. . . . 2. An action upon a contract in writing or liability, express or implied, arising out of a written agreement. 3. An action for rent and, etc. . . ." (the said statute being the statute of limitations relative to contracts in writing).

The second cause of action is founded upon a promissory note alleged to have been executed by defendant to plaintiff at Walla Walla, Washington, June 8, 1893, for the sum of \$2,000, payable four months after date at the Baker-Boyer National Bank of Walla Walla, Washington. It is also alleged that payments were made upon said note as follows: November 20, 1898, \$20; November 13, 1901, \$500; that the last payment was indorsed on said note by defendant himself at the time the said payment was made. Then follow allegations of nonpayment, the amount due, and the reasonableness of the attorney's fees claimed and provided for in said note, and also the same allegations as to the statutes of Washington as set forth in the first cause of action.

The third cause of action is founded upon a promissory note alleged to have been executed by defendant to plaintiff at Walla Walla, Washington, on October 5, 1893, for the sum of \$1,700, payable sixty days after date at the First National Bank of Walla Walla, Washington. It is also alleged that payments were made upon said note as follows: January 27, 1898, \$50; November 14, 1901, \$500; that the last payment was indorsed on said note by the defendant himself at the time said payment was made. Then follow allegations of nonpayment, the amount still due, the reasonableness of the attorney's fees claimed as provided for in said note, and also <sup>420</sup> the same allegations as to the statutes of Washington as set forth in the first cause of action.

Thereafter an amendment was filed to the complaint in which the plaintiff alleged that within a period of five years last past prior to the commencement of this action, said defendant acknowledged the existence of the said indebtedness in an instrument in writing, signed by himself, and that the said defendant is the person to be charged with such acknowledgment and with such indebtedness. By such acknowledgment said defendant promised and agreed to pay the said indebtedness set out in the first cause of action. Then follow



the same allegations as to the second and third causes of action.

The defendant in his answer admits the execution of the several notes set forth in the complaint, but denies that said notes were executed or delivered in the state of Washington, and denies that they are Washington contracts; denies that there is anything due upon said notes, and denies that the payments alleged to have been indorsed upon said notes by the defendant were so indorsed by the defendant; denies that defendant acknowledged the existence of said indebtedness in writing; alleges that defendant has no knowledge or information as to whether or not the payments shown to have been made upon said notes were, in fact, made, and on that ground denies the same; alleges want of knowledge or belief as to the Washington statutes as plead, and upon that ground the defendant denies the existence of same.

As a part of said answer and as a fourth defense, the defendant alleges that each of said causes of action as set forth in the complaint was barred by the provisions of section 4051 of the Revised Statutes of Idaho, and section 4798 of Ballinger's Codes of the State of Washington.

During the trial it was admitted by counsel that the statutes of the state of Washington existed and were in force as alleged in the complaint. Trial was had by the court, and the court made its findings of fact and conclusions of law. It found the making and delivery of each of the notes set forth in the complaint; the making of the payments indorsed; <sup>421</sup> that said notes were governed by the laws of the state of Idaho, and were barred by the provisions of section 4051 of the Revised Statutes of 1887; that the letter introduced in evidence and relied upon by the plaintiff for the purpose of renewing and reviving the notes was insufficient to revive said notes or extend the statutes or remove the bar of the statutes; that all of the material allegations of the defendant's answer are supported by the evidence and true, and that all of the material allegations of plaintiff's complaint in conflict with the foregoing findings are not supported by the evidence and untrue. There was no finding as to whether said notes were Washington contracts or whether said notes were barred by the provisions of section 4798 of Ballinger's Codes.

As conclusions of law, the court found that said notes set forth in the complaint were barred by the provisions of section 4051 of the Revised Statutes of Idaho; that the defendant is entitled to have the action dismissed and recover his costs. Judgment was rendered accordingly. Motion for a new trial



was made and denied. This appeal is from the order overruling the motion for a new trial and from the judgment.

Before entering into a discussion of the merits of this case, it is proper to refer to what seems to have been a clerical error running throughout the case. It is alleged in the complaint, and the court finds, that section 4051 of the Revised Statutes is the section applicable to the contract alleged in the complaint. This evidently is a clerical error, and the reference no doubt was intended to be to section 4052. While counsel for appellant takes advantage in his argument of this clerical error, we are not inclined to permit what plainly appears to be a clerical error to affect the substantial rights of the parties in this case.

The appellant assigns as error the holding and deciding by the court that the said notes, and each of them, were and are barred by the statute of limitations, and the rendering of a decision for the defendant. These two assignments of error, in our opinion, are both well taken. Under the provisions of section 4817 of Ballinger's Annotated Codes of Washington, <sup>422</sup> supra, when any payment of principal or interest has been or shall be made upon any existing contract, whether it be by bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be after the same shall have become due, the limitation shall commence from the time the last payment was made. The first note was dated July, 1890, and was due on October 1, 1890. The statute of limitations, therefore, would begin to run on October 1, 1890, unless a new date was fixed according to the statutes of Washington by a payment on the principal or interest, after said note became due. The second note was dated June 8, 1893, and became due October 8, 1893, and the statute of limitations would begin to run October 8, 1893, unless a new date was fixed according to the statutes of Washington by a payment on the principal or interest, after the note became due. The third note was dated October 5, 1893, and was due on December 5, 1893, and the statute of limitations would begin to run December 5, 1893, unless a new date was fixed as above stated.

This statute evidently has reference to payments made on contracts, before the statute has run against them: *Creighton v. Vincent*, 10 Or. 56. If, however, the statute is complete before payment is made, and the debt becomes dead, then to revive or continue the contract, the acknowledgment should be in writing as provided in section 4816 of Ballinger's Codes. If this rule be correct, then it is apparent that the

plaintiff cannot recover in this case upon the first cause of action, as it appears that the statute was complete at the time the second payment was made. In other words, more than six years had expired between the date of the first payment, December 10, 1890, and the second payment, December 10, 1901. In order, therefore, to revive or continue this contract under the statute of Washington, it was necessary that the defendant sign some writing whereby he acknowledged or promised to pay said debt, otherwise the statute of limitations would apply to said indebtedness. This, however, is not true as to the second and third causes of action, as it will be observed that the statute was not complete between the maturity of either <sup>423</sup> of said notes and the first payment thereon, or the first payment and the second payment, or after the last payment and the commencement of this action. Under the statutes of Washington, therefore, neither the second nor the third cause of action was barred by the statute of limitations of the state of Washington.

If the notes sued upon were Washington contracts, then the laws of the state of Washington become a part of said contracts, and the effect upon such contracts of the payments made after the notes were due and before the statute of limitations had matured, was to fix a new date from which the statute would begin to run. The statute of limitations does not mean that the debt has been paid. It is a personal privilege which the law gives to the debtor whereby he may say to the creditor: "You have waited so long before action has been instituted to collect the claim, it has become stale, and for that reason you should not be permitted to maintain an action thereon." This Washington statute, however, comes to the relief of the creditor and says to the debtor: "If you acknowledge an indebtedness by making a payment thereon, it becomes an acknowledgment upon your part that the debt has not been discharged, and by reason of your recognizing the existence of the indebtedness, the law fixes such recognition as a new date from which the staleness of the claim may be determined, and from which the right to maintain an action thereon may be reckoned." The statute in effect says that by making such payment, the debtor waives the privilege of having the time, prior to such payment, reckoned as a part of the time to be computed under the statute of limitations, and denies to the debtor the right to plead the statute as a bar until the required time shall have run after such payment: *Stubblefield v. McAuliff*, 20 Wash. 422, 55 Pac. 637; *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639.

This is also true in the absence of a statute: *Hopkins v. Stout*, 6 Bush, 375; *English v. Wathen*, 9 Bush, 387; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663. If, then, the payments made were a recognition by the defendant of the existence of said contract and his liability thereon, and <sup>424</sup> fixed the date of payment as the time from which the statute of limitations should begin to run, then the defendant could not plead the statute of limitations of the state of Washington as a bar to an action upon said notes until the expiration of six years from the date of the last payment thereon.

The trial court seems to have concluded that the payments made upon the notes sued upon did not keep said notes alive in the state of Idaho or prevent the statute of limitations of this state from running against the same, and that the defendant's residence within this state for the period of five years was sufficient to sustain the plea of the statute and bar the plaintiff's right to recover upon said notes.

This position is untenable in the light of the law of the state of Washington and the effect the law of that state gave to the act of payment. When the defendant entered the state of Washington and made partial payments upon the notes sued upon, and thereafter returned to this state, he returned with his liability fixed, and a new date was established for the beginning of the statute. The statute of limitations of that state would not become complete until the expiration of six years from the date of the last payment made upon said notes, and the statute of this state would not become complete until five years from the date of such last payment, or 1906. By making such payment, the defendant recognized said notes as live contracts, and such live contracts followed him into this state, and the statute would begin to run in this state upon his re-entry into the state after such payment. The mere fact that the defendant had resided within this state for a period of more than five years prior to the commencement of this action would not be sufficient to avail him of the plea of the bar of the statute. Such plea must be determined in the light of the contracts and the statutes of the state of Washington, where the contract was made, as the statute of that state entered into and became a part of said contracts: 9 Cyc. 582; *McCracken v. Hayward*, 43 U. S. 608, 11 L. ed. 397; *United States v. City of New Orleans*, 17 Fed. 483; *Parsel v. Barnes*, 25 Ark. 261; *Collins v. Collins*, 79 Ky. 88; *Fowler v. Smith*, 2 Cal. 568.

<sup>425</sup> We think, in order to determine the questions involved in this case as to whether or not the contracts sued upon were

barred by the statute of limitations of this state, it was necessary to examine and determine the question as to whether or not said contracts were Washington contracts, and alive and binding upon the defendant at the time that he returned into this state, after making such partial payments. If said contracts were Washington contracts, and it was necessary to determine this question before the court could conclude whether the action was barred by the statute of limitations of this state, then it was necessary for the court to make a finding whether the notes sued upon were Washington contracts, and whether or not the defendant acknowledged the existence of said contracts in the state of Washington by making payments thereon, and thereby fixed the time of such payment as the date from which the statute would begin to run. Upon this question the court made no finding whatever. The court, however, did find generally that all the material allegations of the answer were supported by the evidence and true, and that all the material allegations of the plaintiff's complaint, in conflict with the foregoing findings, were unsupported by the evidence and untrue. This finding is not sufficient: *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490; *Olympia Mining Co. v. Kerns*, 13 Idaho, 514, 91 Pac. 92; *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

It follows from this discussion that the trial court failed to find upon all the material issues in the case. The judgment will be reversed and a new trial ordered. Costs awarded to appellant.

Ailshie, C. J., and Sullivan, J., concur.

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*The Statute of Limitations*, as usually interpreted, goes to the remedy without extinguishing the right: See the note to *Menzel v. Hinton*, 95 Am. St. Rep. 658. Hence, in case of a conflict of laws the statute of limitations of the forum governs: *Union Stockyards Nat. Bank v. Maika*, 16 Wyo. 141, 125 Am. St. Rep. 1032; *Gross v. Watts*, 206 Mo. 373, 121 Am. St. Rep. 662; *Arp v. Allis-Chalmers Co.*, 130 Wis. 454, 118 Am. St. Rep. 1036; *Galliher v. State Mut. Life Ins. Co.*, 150 Ala. 543, 124 Am. St. Rep. 83.



## INDEPENDENT SCHOOL DISTRICT v. COLLINS.

[15 Idaho, 535, 98 Pac. 857.]

**STATUTES, PENAL, Construction of.**—Statutes in their nature penal should not be extended by construction beyond their natural meaning. (p. 78.)

**CONTRACTS, PUBLIC, Trustees of School District not to be Interested in.**—The clear intention of the provisions of section 82 of our school laws, as amended by the Session Laws of 1905, page 71, was to prohibit a trustee from making a contract with his district in which he is pecuniarily interested. (p. 78.)

**CONTRACTS, PUBLIC—Recovery of Moneys Paid Under Void.** The penalty of prohibition in said section is that no action can be maintained or recovery had against the district on such contracts; but that does not change the rule to the effect that money paid by a municipal corporation upon a void contract may be recovered back. (p. 78.)

**CONTRACTS, VOID, Persons Retaining Advantage of, When not Bound by.**—The rule that neither party to a transaction will be permitted to take advantage of its validity while retaining its benefits, applies only to voidable contracts and not to contracts of a municipal corporation that are absolutely void. (p. 79.)

**CONTRACTS, PUBLIC, When Void—School Districts.**—Under the provisions of said section 82, school trustees are prohibited from having any interest in any contract let or made by or with the board of trustees of such district or with any officer thereof, and in case such a contract is made, the same is void and no action can be maintained or recovery had in favor of the district upon any such contract or obligation. This rule is founded in public policy, and is a salutary one to prevent the risk of abuses in the public service. (p. 79.)

**CONTRACTS, VOID, Suit by Private Citizen to Recover Moneys Paid Under.**—Where a municipal corporation has paid money on a void contract and the properly constituted authorities of such corporation refuse to bring an action to recover back the money so illegally paid, an action therefor on behalf of the corporation may be maintained by any taxpayer thereof. (p. 79.)

**PLEADING IN ACTION to Recover Moneys Paid Under Contracts Claimed to be Void.**—Where an action is brought under the provisions of said section 82 to recover money paid on a void contract, the complaint must allege that such contract was made with the defendant during the time that such defendant was a member of the board of trustees of the district. (p. 81.)

(Syllabi by the court.)

Orland &amp; Smith, for the appellant.

Morgan &amp; Morgan, for the respondents.

539 SULLIVAN, J. This action was brought in the name of Independent School District No. 5 of Latah county, upon the relation of Frank L. Moore and J. C. Richcreek, against Joseph Collins, to recover from said Collins the sum of three hundred and eight dollars and sixty-five cents, with lawful

interest thereon, alleged to have been paid by said district upon a void contract.

After alleging the corporate existence of said district, it is alleged that during the time mentioned in the complaint, the defendant Collins was a qualified and acting member of the board of trustees of said district, and from about September 14, 1905, until September 10, 1906, was chairman of said board; that during said period of time the defendant and one Orland were partners, doing business under the name of Collins and Orland Hardware Company, and that defendant Collins owned a three-fourths interest in said company; that on January 11, 1905, said Collins presented to the said board of trustees a bill for goods, wares, merchandise and supplies, which the said defendant claimed had been sold by said firm to said school district; that he procured the board to allow said bill, and received a warrant therefor upon the treasurer <sup>540</sup> of said district; that demand had been made upon said Collins to repay said money to the treasurer of said district, which was refused, and the said Collins was interested in said account to the extent of three-fourths of the value thereof. It was also alleged that a resolution had been presented to said board of trustees providing for the appointment of a committee to ascertain the amount of moneys paid out by said district to said hardware company, and that a majority of said board of trustees voted against said resolution, and then and there refused, and at all times since have refused, to make any demand upon said Collins for said money, and refused to enforce a restitution from him of said moneys, and that said district refused to bring an action to recover said sum of money so paid.

There are six separate causes of action stated in the complaint, all of which are similar in averment and predicated upon separate bills presented by said defendant Collins for goods, wares and merchandise sold by said hardware company to said board of trustees for payment. To this complaint the defendant filed a demurrer to each separate cause of action, assigning four grounds of demurrer. Upon the hearing of the demurrer, the defendant waived the second ground assigned. The court thereafter overruled said demurrer and the defendant refused to plead further. His default was entered and the cause was tried by the court and judgment entered in favor of said Moore and Richcreek for the use and benefit of said school district for the sum of three hundred and eight dollars and sixty-five cents. This appeal is from the order

overruling the demurrer and is based upon the judgment-roll and bill of exceptions.

This suit is based on section 82 of the school laws of the state, as amended by act of 1905, Session Laws 1905, page 71. That part of said section claimed to be applicable herein is as follows:

"Section 82. No trustee must be interested in any contract let, or made by, or with the board, or with any officer thereof, or in any supplies furnished to or for said district, or a surety for the performance of any contract with said <sup>541</sup> board or district, or the agent or partner of any contractor with said board or district; and no action can be maintained or recovery had against said board or district upon any contract or obligation in which any trustee is so interested, but the same is void."

It is contended that that statute is in its nature penal, as it provides for a forfeiture, and should not be extended by construction beyond its natural meaning, and cites on that proposition, Black on Interpretation of Laws, pages 242, 243, 392, 393, and *Askew v. Ebberts*, 22 Cal. 263. The rule laid down there is no doubt correct and the provisions of said statute should not be extended by construction beyond the reasonable meaning of the language used therein, and not beyond the intent of the legislature. The clear intention was to prohibit a trustee from making any contract with his district, in which he was pecuniarily interested. Said statute declares all such contracts void. This is upon the theory that it is contrary to public policy to permit a trustee to make a contract between the district and himself in which he is pecuniarily interested: *Nuckols v. Lyle*, 8 Idaho, 589, 70 Pac. 401. The rule established by said section is founded in public policy, and is in the interests of the people, and is a salutary one to prevent abuses by trustees.

It is contended that the only penalty provided in said section is that no action can be maintained or recovery had against a district on such a contract; that as the district has received the benefit of the goods so purchased and has paid the money therefor, a recovery of the money cannot be had. There is nothing in this contention, as the statute provides such contracts are absolutely void. If money is illegally paid on such void contract, the district may recover it back, and in case the district refuses to do so, any taxpayer of the district may, for and on behalf of the district, maintain an action for the recovery of money so illegally paid. However, the judgment in such cases should run in favor of the municipi-

pality whenever a recovery is adjudged. In case a taxpayer fails to recover judgment, the court should require him to pay the costs of the suit.

<sup>542</sup> The rule contended for by appellant, to the effect that neither party to a transaction will be permitted to take advantage of its invalidity while retaining the benefits, applies only to voidable contracts and not to a transaction that is absolutely void: *Nuckols v. Lyle*, 8 Idaho, 589, 70 Pac. 401; *Collier v. Munn*, 41 N. Y. 143; *Smith v. City of Albany*, 61 N. Y. 444; *Land, Log etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964; *Berka v. Woodward*, 125 Cal. 119, 73 Am. Rep. 31, 57 Pac. 777, 45 L. R. A. 420; *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431; *Goodrich v. City of Waterville*, 88 Me. 39, 33 Atl. 659; *City of Northport v. Northport T. S. Co.*, 27 Wash. 543, 68 Pac. 204.

It is contended that the only penalty provided in said statute is that an action cannot be maintained or recovery had against the district on such a contract. That being true, the money once paid on such void contract cannot be recovered back. We cannot agree with that contention. That statute was not intended to prevent the district or a taxpayer thereof for the district from recovering back any money paid by the district upon a void contract. The general rule is that money paid by a municipal corporation upon a void contract may be recovered back by such corporation; or, in case the proper authorities refuse to proceed to do so, a taxpayer thereof may do so for the corporation, and this general rule is not changed or abrogated by said statute in such cases as the one at bar.

One ground of demurrer is that the plaintiff has no legal capacity to sue. It is contended that as it is alleged in the complaint that the said board of trustees absolutely refused to bring this suit, that the relators, Moore and Richcreek, the minority members on said board, could not bring this suit. It is alleged in the complaint that said relators are not only members of said board of trustees, but also taxpayers in said district, and in such cases the general rule is that a taxpayer has a right to maintain an action to recover back money illegally paid on behalf of a municipal corporation when its officers neglect or refuse to perform their duty in that respect: 2 *Smith's Modern Law of Municipal Corporations*, sec. 1647a; 2 *Dillon on Municipal Corporations*, sec. 915; *Orr v. State Board*, 3 Idaho, 190, 28 Pac. 416; *Dunn v. Sharp*, 4 Idaho, 98, 35 Pac. 842; *Nuckols v. Lyle*, 8 Idaho, 589, 70 Pac. 401.

In *Land, Log etc. Co. v. McIntyre*, 100 Wis. 245, 258, 69 Am. St. Rep. 915, 75 N. W. 964, it is held that where a county,



by the wrongful conduct of its county board, parts with county money for something that it has no legal right to acquire or do, no equitable considerations stand in the way of recovering back such money from the mere fact that the county has received a benefit; and where a public corporation has a cause of action which should be prosecuted for its use, whether legal or equitable, and its governing body neglects and refuses to institute an action therefor, a taxpayer may, on behalf of himself or all others similarly situated, institute an action to redress the wrong to the corporation. There is nothing in that ground of the demurrer, as the plaintiffs, as taxpayers, had the right to bring the suit in the name of the district on their relation.

The fourth ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action, and under this contention counsel argue that it is not alleged in the complaint that the contract, out of which said claims arose against said school district, was made during the time that Collins was a member of the board of trustees of said district. We think this ground of demurrer is well taken. We find no allegation in the complaint to the effect that the goods, wares and merchandise sold to said district, out of which said claims arose, were sold during the time that Collins was a member of said board of trustees. It is alleged in the complaint that at all times mentioned in the complaint said Collins and one Hallie Orland were copartners, doing business under the name and style of Collins and Orland Hardware Company, and that said Collins is the owner of approximately a three-fourths interest in said hardware business, and that on January 11, 1905, the said Collins, while a member of said board of trustees, and still owning a three-fourths interest in said hardware company, acting in the capacity of a member of said copartnership, for and on its behalf, presented a bill to said board of trustees for goods, wares, merchandise <sup>544</sup> and supplies, which the said Collins alleged and pretended had been sold by said hardware company to said school district, "and unlawfully and corruptly procured the said board of trustees, of which he was then a member, to approve and allow said bill in the sum of eleven dollars and ninety cents, and unlawfully and corruptly procured the then acting chairman and clerk of said board of trustees to make and deliver to him, the said Joseph R. Collins, member of said board of trustees and of said copartnership, as aforesaid, warrant," etc.

Said statute was enacted for the purpose of prohibiting trustees of school districts from making any contract with the district, and declaring that if any such contract is made, the same is void, and in order to bring this action within said statute, it must be alleged that the contract, out of which the said claim against the district arose, was made and entered into during the time that Collins became a member of said board of trustees. If the contract was entered into prior to the time that Collins became a member of said board, he had a right to present said claim to the board of trustees for allowance, and it would not be unlawful or corrupt on his part to do so.

The judgment must therefore be reversed and the cause remanded, with instructions to sustain said demurrer. Costs are awarded to appellant.

Ailshie, C. J., and Stewart, J., concur.

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*Dealings Between a Public Officer and himself as a private citizen* which bring him into collision with other citizens equally interested with himself in the integrity and impartiality of the office are against public policy: *Goodyear v. Brown*, 155 Pa. 514, 35 Am. St. Rep. 903. A contract by a highway superintendent to labor for the contractors engaged to construct a public highway and accept pay therefor is opposed to public policy and void, though no fraud is shown: *Cheney v. Unroe*, 166 Ind. 550, 117 Am. St. Rep. 391.

*The Right to Recover Payments made to public officers upon illegal contracts* is discussed in *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, and note to *New Orleans etc. Co. v. Louisiana etc. Co.*, 94 Am. St. Rep. 424.

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## CAMAS PRAIRIE STATE BANK v. NEWMAN.

[15 Idaho, 719, 99 Pac. 833.]

**BANKS—Bank Checks and Their Character and Effect.**—A bank check is an instrument by which a depositor seeks to withdraw funds from a bank, and as between the drawer and the payee it is an evidence of indebtedness, and in commercial transactions, as well as in law, it is equivalent to the drawer's promise to pay, and an action may be brought thereon, as upon a promissory note. (p. 84.)

**BANKING—Bank Checks, Actions upon.**—The payee of a bank check may maintain an action against the drawer to recover the debt evidenced by such check upon the drawee refusing to pay the same. (p. 84.)

**GAMBLING—Bank Checks Given to Procure Money for.**—Where a bank check is given for the purpose of procuring money with which to gamble, and the person to whom the check is given has knowledge that the same is to be used for such unlawful purpose, and cashes such check with that knowledge, he cannot recover the debt evidenced thereby, from the drawer of such check. (p. 84.)

**GAMBLING—Question of Fact.**—In a suit, by a payee of a bank check, to recover the debt evidenced thereby upon the drawee refusing to pay the same, and a defense is interposed by the drawer that the money advanced upon such check was used for the purpose of gambling, and that the payee knew such fact at the time the check was cashed, the issue is one of fact to be determined by the jury, and the verdict of the jury will not be disturbed if the evidence supports the same. (p. 84.)

**PARTNERSHIP—Defense that Bank Check was Given to Procure Money for Gambling Purposes.**—Where a member of a partnership draws a check in payment of his personal obligations, or for a debt without and beyond the scope of the partnership, and the payee named in such check cashes the same without knowledge, either actual or constructive, that the check was drawn without authority, in an action by the payee to recover the debt evidenced by such check, the partnership cannot defend upon the ground that the member drawing such check had no authority to draw the same. (p. 85.)

**BANKING—Bank Checks, Payee's Duty Where He has Moneys of an Indorser in His Hands.**—The payee of a bank check may look to the drawer thereof for its collection, and is not required to apply money in its hands on deposit in the name of an indorser in payment of such checks. (p. 85.)

**PLEADING—Failure to Set Up a Defense.**—In a suit upon a bank check, the defense that the drawer was intoxicated to an extent disabling him from being himself cannot be received in evidence if not pleaded. (By the editor.) (p. 86.)

**APPEAL AND ERROR—New Trial for Newly Discovered Evidence—Want of Knowledge.**—A new trial will not be granted on the ground of newly discovered evidence, if there is no showing of diligence, nor when it appears that the alleged newly discovered evidence was in the possession and knowledge of the defendant at the time of the trial. (By the editor.) (p. 86.)

**EVIDENCE—Sufficiency to Sustain Verdict.**—The evidence in this case examined, and held to support the verdict. (p. 86.)

(Syllabi by the court except where stated to be by the editor.)

Stockslager & Bowen, for the appellants.

Sullivan & Sullivan, for the respondent.

722 STEWART, J. The facts in this case are out of the ordinary of business transactions. On July 1, 1907, H. E. Newman, Jr., a member of the firm of H. E. Newman & Sons, drew a check on the First National Bank of Shoshone, Idaho, payable to the order of the Camas Prairie State Bank, for the sum of five hundred dollars, and the Camas Prairie State Bank cashed said check and paid to H. E. Newman, Jr., the amount stated therein, five hundred dollars. The Camas Prairie State Bank presented such check to the First National Bank of Shoshone, which declined to pay the same. This action is based upon such check, in which the plaintiff, the payee of said check, brings this action to recover from H. E. Newman & Sons the amount paid upon said check.

The answer of the defendants admits that H. E. Newman, Jr., drew such check, and that the plaintiff cashed the same, and that it was presented to and not paid by the First National Bank of Shoshone. The defense made by H. E. Newman & Sons is that the check was drawn by H. E. Newman, 723 Jr., for the purpose of obtaining money with which to gamble contrary to the laws of this state, being drawn for his own individual purpose and not within the scope of the partnership, and that H. E. Newman, Jr., did not have the right or authority to draw such check, and that the plaintiff had reason to know and believe, and did know and believe, that said check was issued for such purpose, and without the authority of said H. E. Newman, Jr., to draw the same.

It is also alleged in the answer that the check was executed for the purpose of obtaining money with which to gamble with one Lee Mink, contrary to law, and at the solicitation of said Lee Mink, and that when the check was drawn and presented to the plaintiff, that the plaintiff required said Mink to indorse said check, which was done accordingly, and at the time the same was drawn the plaintiff had in its possession money of said Mink more than sufficient to pay said check, and which could have been applied in the payment of the same, but which was not done, although plaintiff knew that the money so obtained from the plaintiff on said check was to be used in gambling with said Mink, and was lost to him in gambling, and that plaintiff willfully and fraudulently conspired with said Mink, and refused to apply the money in its hands for the payment of said check, although having the right and power so to do.

Upon the issues thus presented, the cause was tried to a jury, which returned a verdict for the plaintiff for the amount sued for. This appeal is from the judgment and from an order overruling a motion for a new trial.

It is admitted by the evidence in this case that H. E. Newman, Jr., was a member of the firm of H. E. Newman & Sons; that Newman, Jr., drew the check in controversy and the plaintiff cashed the same; that H. E. Newman, Jr., received the amount named in such check to wit, five hundred dollars, from the plaintiff. It also further appears that H. E. Newman, Jr., had been gambling with one Lee Mink and had lost the sum of three hundred dollars, and had drawn checks for such sum upon the First National Bank of Shoshone payable to the order of Lee Mink, signed the same in the same amount as the check in controversy, 724 and that after drawing the check in controversy, the three checks drawn in favor of Lee



Mink were taken up and paid with the money received from the plaintiff upon the check in controversy, and that thereafter H. E. Newman, Jr., continued to gamble until he had lost the balance of the money received from plaintiff. These facts are testified to by H. E. Newman, Jr.

Thus the facts in this case are rather out of the ordinary, as it is clearly shown by the evidence of H. E. Newman, Jr., that he was engaged in violating the laws of this state in gambling, and that the money paid upon the check in controversy was used for such illegal and unlawful purposes. In this connection it may be well to observe that it was the duty of the trial court, and we assume that the trial court performed this duty, to direct that the parties engaged in such unlawful business, as shown by the evidence in this case, should be prosecuted for such offense and dealt with as provided by the laws of this state.

Under the law a check is an instrument by which a depositor seeks to withdraw funds from a bank. As between the drawer and the payee it is an evidence of indebtedness. Usually a check is given for money borrowed or a debt contracted, and in commercial transactions as well as in law it is equivalent to the drawer's promise to pay and an action may be brought thereon as upon a promissory note: 1 Morse on Banks and Banking, sec 388. The check then in controversy in this case was an obligation on the part of H. E. Newman & Sons to pay a debt to the plaintiff, and when payment was declined by the drawee, the plaintiff had a right of action to recover the debt of which such check was a mere evidence. If the check was given for the purpose of procuring money with which to gamble, and the plaintiff was a party to such transaction and cashed the check with the knowledge that it was to be used for such unlawful purpose, the plaintiff cannot recover, as the courts will not lend their aid or assistance in violation of the laws of this state, or to aid or abet in the commission of crime: 20 Cyc. 939.

<sup>725</sup> This question, however, was an issue of fact to be tried and determined by the jury under proper instructions, and in this case having been submitted to the jury and they having determined that matter against the contention of respondents, their verdict will not be disturbed unless it is not supported by the evidence. From an examination of the evidence, we think it clearly appears that while the money procured upon said check was used and lost by H. E. Newman, Jr., gambling, yet it also appears that the plaintiff had no knowledge at the time the check was cashed as to the purpose for which the

money was to be used, and that the evidence clearly supports the verdict of the jury upon this question. It is also argued that inasmuch as the check was drawn by H. E. Newman, Jr., for purposes outside of and beyond the scope of the partnership business of H. E. Newman & Sons, that for that reason the plaintiff cannot recover in this action. The check, however, appears regular upon its face, and it is admitted that H. E. Newman, Jr., had authority to issue checks in the name of H. E. Newman & Sons, and when the check was so issued, unless the plaintiff was advised or knew that the check was drawn for a purpose outside and beyond the scope of the partnership, the right to recover thereon will not be denied the plaintiff, and upon this question the verdict of the jury is conclusive, and we are satisfied the evidence is sufficient to support the verdict.

It is next argued that inasmuch as Lee Mink indorsed such check, and the drawee refused to pay the same, and as the plaintiff was then advised of the purpose for which the check was drawn, it was the duty of the plaintiff to have applied money then in the bank on deposit in the name of Lee Mink in the discharge of such check and indebtedness, and that the plaintiff, upon failure to so apply the deposit of Lee Mink, cannot recover from the defendants. The trouble, however, with this contention is that the knowledge obtained by plaintiff, with reference to the purpose for which the money was to be used, was obtained after the transaction was closed, and after the plaintiff had paid to Newman, Jr., the amount of said check. The liability of the defendants to the plaintiff <sup>726</sup> must be determined from the conditions as they existed at the time the plaintiff cashed such check, and after the check was cashed it became a debt of the defendants, and the plaintiff had a right to rely upon the defendants to pay the same, even though plaintiff might also have recovered the amount of such indebtedness from Mink by reason of his being an indorser. The fact that Mink was an indorser would not require the plaintiff to look to him to pay the indebtedness. The plaintiff in law could look to the drawer of such check, as the maker of the original obligation, and there is no principle of law which imposed upon the plaintiff the necessity of applying money in its hands upon deposit in the name of Lee Mink in the discharge of such obligation, and certainly the facts did not require it.

It is also contended that the trial court erred in denying the defendant the right to show that previous to the time the check was cashed by plaintiff that H. E. Newman, Jr., had

been drinking, and was intoxicated at the time the check was cashed. Whether Newman had been drinking previous to the time the check was cashed is certainly immaterial, and whether his condition was such at the time the check was cashed, as to make him liable upon a contract made by him, is a matter of defense which is not set forth in the answer in this case or plead as a defense. If Newman, Jr., was incapable by reason of intoxication from making the contract or entering into the obligation to pay plaintiff the money received upon the check, such facts should have been plead as a defense, and cannot be proven under the plea that the money was advanced for gambling purposes with knowledge on the part of the plaintiff of the use to which such money was to be applied.

It is next urged that the court erred in not granting a new trial upon the ground of newly discovered evidence.

The showing, however is insufficient, for the reason that it does not show diligence, but, on the contrary, shows that what is claimed as newly discovered evidence was in the possession and knowledge of the defendants at the time of the former trial. <sup>727</sup> This is not newly discovered evidence: 12 Ency. of Pl. & Pr. 804.

There are some other questions presented by the record but which we do not deem of sufficient importance to discuss in detail. We find no error in this record and believe that the verdict of the jury is fully supported by the evidence. The judgment is affirmed. Costs awarded to the respondent.

Ailshie, J., concurs.

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#### ACTIONS MAINTAINABLE ON BANK CHECKS.

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### I. Explanations and References to Former Notes.

It was held in the principal case that a bank check, in commercial transactions as well as in law, is equivalent to the drawer's promise to pay, and an action may be brought thereon as upon a promissory note.

This doctrine, as we shall presently see, has been recognized in practically all the cases where a check was the foundation of the action. True, there is great contrariety and antagonism between many of the text-writers on the question whether bank checks should fall under the same rules of law that govern those other classes of commercial paper generally designated as bills and notes, and this has led to some confusion of the decisions upon this question.

It will be found, however, that the conflicting nature of these decisions arose over the question of what constituted due diligence in presenting the various classes of commercial paper for payment, and as this, in most cases, is a mixed question of law and fact, these decisions are not in conflict with the doctrine announced in the principal case.

Many of the questions more or less incident to the subject named in the title to this note have been fully treated in former volumes of this series. In the note appended to *Holmes v. Briggs*, 17 Am. St. Rep. 807, the question of the necessity for presentment and notice of nonpayment in order to hold the maker or indorser of a check is fully treated; and the rights of the several parties when a forged check has been paid is the subject of the note appended to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 839. Also the perplexing question whether the giving of a check operates as an assignment of the amount of the check to the payee, and therefore entitles the holder to maintain an action against the bank to recover it, in case of the bank's refusal to honor the check, is fully treated in the note appended to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609, and in the one appended to *Sowden v. Craig*, 96 Am. Dec. 132. The liability of a bank to a depositor for not honoring a check received attention in the note appended to *J. M. James Co. v. Bank*, 80 Am. St. Rep. 865; and likewise the liability of one receiving payment of a check through a forged indorsement is treated at length in the note appended to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641, while the liability of a bank and of the drawer of a check after the same has been certified is discussed in the note appended to *Bickford v. First Nat. Bank*, 89 Am. Dec. 442.

It only remains for us now to consider those questions not covered by these notes, and we shall therefore confine our attention only to the questions raised by the principal case, namely: 1. The general right of the holder of a bank check to maintain an action thereon against the drawer; 2. The right to maintain such action when the check is given to secure money for gambling; 3. The right to maintain such action on a check issued in the name of a partnership when it is claimed by the firm that the member who drew it acted without the scope of the partnership; and 4. When the holder of a check can



maintain an action thereon, who could have protected himself against the refusal of the drawee bank to honor the check, by applying funds in his possession belonging to an indorser of the check.

And in discussing these questions we shall confine our investigations to those cases only where a check was the foundation of the suit, and though the number of such cases which pertain to the question under consideration are surprisingly few, they will all be directly in point, and the necessity of making the discriminations sometimes indispensable, in applying to checks the rules of law governing the various other classes of commercial paper, will be thereby avoided.

## II. Right of Action by Payee or Holder Against Drawer.

a. Nature and Ground in General.—The rule laid down in the principal case (*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, ante, p. 81, 99 Pac. 833) that a bank check is an evidence of indebtedness, and as between the drawer and the payee, in commercial transactions as well as in law, is equivalent to the drawer's promise to pay, and an action may be brought thereon by the holder against the drawer to recover the amount evidenced by the check, is so generally recognized that only a few cases need be cited: *Lester-Whitney Shoe Co. v. Oliver*, 1 Ga. App. 244, 58 S. E. 212; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Rounds v. Smith*, 42 Ill. 245; *Pollard v. Bowen*, 57 Ind. 232; *Henshaw v. Root*, 60 Ind. 220; *David v. Merchants' Nat. Bank of Cincinnati*, 103 Ky. 586, 20 Ky. Law Rep. 263, 45 S. W. 878; *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9, 41 L. R. A. 617; *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *First Nat. Bank v. McConnell*, 103 Minn. 340, 123 Am. St. Rep. 336, 114 N. W. 1129, 13 L. R. A., N. S., 616; *Harker v. Anderson*, 21 Wend. (N. Y.) 372; *Salt Springs Bank v. Syracuse Saving Inst.*, 62 Barb. (N. Y.) 101; *German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 246, 88 N. W. 480. Thus, in *Henshaw v. Root*, 60 Ind. 220, the check sued on had been given in settlement of a debt due by defendant to plaintiff, but was dishonored. The defendant contended that the action should have been brought on the original debt in consideration for which the check was given, and not on the check itself, as the foundation of the action. In overruling this objection the court said: "The natural inference from the giving of a check is, that it was given in payment of a debt due the payee from the drawer, and when payment of it has been refused, and notice of its nonpayment duly given, the drawer is as much liable upon it as if it were a dishonored bill of exchange. . . . It follows, that a dishonored check is as properly the foundation of an action as if it were a dishonored bill of exchange, and may be declared upon in the same manner."

In *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9, 41 L. R. A. 617, it was held that the drawer of a check is not relieved of his obligation as such to pay it, on failure of the drawee so to do on proper indorsement and due demand, though it was taken by the payee as an absolute payment of a debt. The

check sued on in this case had been stolen from the payee and collected upon a forged indorsement, and it was through no fault of the drawer (defendant) that the payee (plaintiff) did not get his money, but the court said: "That does not furnish sufficient reason why the loss should remain upon the payee, rather than the drawer. The check was received in payment and the debt extinguished only in consideration of the drawer's obligation as drawer, and of the payee's rights as holder, which included the right of recourse to the drawer if, upon proper indorsement and due demand, the check should not be paid by the drawee."

The recent case of *First Nat. Bank v. McConnell*, 103 Minn. 340, 123 Am. St. Rep. 336, 114 N. W. 1129, 13 L. R. A., N. S., 616, affords an excellent illustration of the nature of the obligation of a check and the liability of the drawer thereon. The defendant had drawn checks on a certain bank, and the checks had been presented by the payees, indorsed by them in blank to the plaintiff bank and cashed by it in the usual course of business. Upon cashing the checks plaintiff had forwarded them by mail to the drawee bank for payment and remittance to plaintiff. The checks were lost in transmission. Plaintiff notified defendant of this loss and demanded payment thereof, and upon defendant's refusal to pay, brought this action to recover the face value of the checks, offering to indemnify him against any bona fide holders of the checks. The defendants contended that the action could not be maintained, (1) because the checks had never been presented to the drawee bank, and (2) because the checks operated as an equitable assignment pro tanto of defendant's funds in the drawee bank to the payees, and plaintiff's remedy as assignee of the payees was against the drawee bank. Both of these contentions were overruled; the first upon the ground that "Impossibilum nulla obligatio est," and as to the second, it was held that whether the checks operated as an equitable assignment pro tanto of the drawer's funds or not, the liability of the drawer was not discharged, the presumption being that the checks were accepted by the payees conditionally.

#### b. Title to Sustain Action.

**1. In General.**—Any holder of a check who can trace a clear title to it may maintain an action upon it in his own name, whether he possesses the beneficial interest in it or not. Thus, in *Harpending's Exrs. v. Daniel*, 80 Ky. 449, 4 Ky. Law Rep. 330, the check in suit had been drawn by plaintiff's intestate on a bank, in New York in favor of a certain firm. The payee firm sold and transferred it by indorsement to a firm in Cincinnati, by whom it was presented and payment refused. The indorsees then redelivered the dishonored check to the payees (but did not erase the indorsement of the check to them), and were repaid by the payees the amount they paid for the check. Subsequently the Cincinnati firm (indorsees), at the request of the payees, indorsed the check to plaintiff. Defendants contended that the trial court erred in assuming in its instructions to the jury that plaintiff was the owner of the check, but it was held that

plaintiff's possession was *prima facie* sufficient evidence of his right to sue, and the court said: "Although the ownership of the check was attempted to be put in issue by appellants, still, in the absence of allegations or proof affecting the validity of the instrument itself, or showing that the prosecution of the action in the name of appellee deprived appellants of any defense they might have otherwise made, we do not think the court erred in assuming that appellee was the owner and entitled to maintain the action."

2. **Indorsees and Assignees.**—A suit may be brought on a check by any holder to whom it has been assigned in due course of business: *Kemp v. Northern Trust Co.*, 108 Ill. App. 242; and to same effect is *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762; *Commercial State Bank v. Rowley*, 2 Neb. (unof.) 645, 89 N. W. 765; *Mathews v. Moran*, 19 Misc. Rep. 24, 42 N. Y. Supp. 968. Thus where a check given to an auctioneer by a buyer is indorsed to the seller, the latter may sue thereon as the real party in interest: *Matthews v. Moran*, 19 Misc. Rep. 24, 42 N. Y. Supp. 968; and an indorsee in suing on a check which was not paid may disregard or cancel all indorsements carrying the check forward from it to the drawee: *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762.

3. **Trustees.**—The payee of a check may maintain an action thereon in his own name against the drawer, although another person may be interested in the proceeds; the payee is the "trustee of an express trust" within the exception to the rule that an action must be prosecuted in the name of the real party in interest: *Fish v. Jacobsohn*, 2 App. Dec. (N. Y.) 132.

4. **Delivery as Affecting Title.**—Title to a check can only be obtained by delivery: *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70; and until a check is delivered no right accrues by virtue thereof to the payee, even though the check had been certified by the bank in which it was drawn: *Buehler v. Galt*, 35 Ill. App. 225. In the latter case a check had been drawn by a firm which was indebted to plaintiff, in favor of plaintiff, on defendant's bank, and was placed in the hands of the drawer's attorney to be forwarded to plaintiff. The attorney presented the check to defendant's bank and had the same certified, and afterward inclosed it in a letter addressed to plaintiff, and deposited the letter in a United States mail-box. The check was not received by plaintiff and subsequently the drawer presented it at the bank and procured it to be canceled and the amount thereof recredited to the drawer, the bank taking possession of the check. The drawer afterward drew out the amount of the recredit. The defendant's bank had no knowledge of what had been done with the check after it was certified. This action was brought by plaintiff (payee in the check) against defendant to recover the value of the check. It was held that the action could not be maintained because plaintiff had no title to the check, the same never having been delivered to him.

Likewise in *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. 326, it was held that when a check was sent by mail and never re-

ceived by the addressee, it remained the property of the sender; and consequently an action by the assignee of the sender against the bank to recover for the amount paid out on the check on a forged indorsement was sustained.

In *Drum v. Benton*, 13 App. D. C. 245, it was held that if the drawer of a check dies before its delivery and acceptance by the payee, the check becomes a nullity, and cannot be delivered by his representatives.

### c. Consideration of Check, as Affecting Right to Maintain Action Thereon.

1. *In General.*—As between the immediate parties, a bank check must, like any other contract not under seal, be supported by a consideration in order to be enforceable against the maker: *Purcell v. Armour Packing Co.*, 4 Ga. App. 253, 61 S. E. 138. An excellent illustration of this rule is found in *Roney v. Dunleavy*, 39 Ind. App. 108, 79 N. E. 398, where the action was brought on a dishonored check against the administrator of the estate of the deceased drawer—the drawer having died after the dishonor of the check. The evidence showed that the check was delivered by the maker to the plaintiff with the intention that plaintiff should collect the same and receive the sum named therein; but it further appeared, and the jury found, that the check was delivered as a gift. Plaintiff obtained judgment, but this was reversed on appeal, the court saying that the instrument sued on “was a bank check, properly so called, and entertained nothing that could be construed as an assignment of a fund, or if any part of a fund, or of any chose in action. Its execution was not sufficient to constitute a gift *inter vivos* or *causa mortis*, and its presentation for payment in the lifetime of the drawer, with the bank’s refusal of payment, did not change its character in this regard. No right of action under it on behalf of the payee or holder could be maintained against the bank; and, being without a valuable consideration, it could not constitute the foundation of an action against the drawer in his lifetime or for a claim against his estate.”

In *Emery v. Hobson*, 62 Me. 578, 16 Am. Rep. 513, plaintiff made a loan to defendant’s father, receiving therefor the father’s check payable to defendant, under an agreement that it would be indorsed by defendant. The check was subsequently indorsed by defendant, “waiving demand and notice.” Plaintiff held the check for more than a year before presenting it for payment, during which time the drawer withdrew his funds from the bank and became insolvent, and upon presentation payment of the check was refused. It was held that plaintiff could maintain an action based upon the check, the loan being a sufficient consideration for the liability of both the drawer and the defendant.

But in *Charnock v. Anderson*, 11 N. Y. Supp. 639, the action was on a check given by defendant for a loan. The answer admitted the loan, but alleged that the understanding was that the repayment was to be made three months after a certain event which had not yet



happened, and that the check had no relation to the loan and was without any consideration and for plaintiff's accommodation. It was held that an order sustaining a demurrer to the answer was improper, as the answer pleaded a perfect defense, and if true the plaintiff had no present right of action for the loan and no cause of action whatever on the check made without consideration and for his accommodation.

In *Caren v. Liebovitz*, 99 N. Y. Supp. 952, 113 App. Div. 674, the check upon which the action was brought was given by defendant to plaintiff on the purchase price of land under a written agreement by plaintiff to convey such land, and containing a provision for the making of the contract the next day. It was held that the fact that plaintiff refused the next day to sign a contract in accordance with the terms of the first contract, but insisted on inserting therein certain restricting covenants, did not defeat the consideration of the check, and was no defense to an action thereon.

**2. Illegality of Consideration, as When Check is Given to Secure Money for Gambling Purposes.**—In the note appended to *Union Collection Co. v. Buckman*, 119 Am. St. Rep. 172, the subject of the defenses to notes and other obligations given for gambling debts is extensively treated, and on page 178 of that note, defenses to obligations given to secure loans made for gambling purposes received attention. In most of the cases cited in that note, however, the actions were founded on notes, or some of the other various classes of commercial paper other than bank checks. But the principles there stated, and the decisions given in support of them, seem to apply with equal force when it is sought to enforce collection of a check taken as security for a loan to be used in gambling. We find the rule stated in the principal case (*Camas Prairie State Bank v. Newman*, 15 Idaho, 719, ante, p. 81, 99 Pac. 833), that a person who cashes a check given to procure money to be used in gambling cannot recover the debt evidenced thereby from the drawer, has been upheld whenever the question has been before the courts in a suit on a check.

Thus in *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139, it was held that a check given in payment of a wager, as between the original parties, is void, as being in contravention of sound policy. The check in this case was given upon a wager as to whether an execution could be collected, and the court said that while under the statute, even in the hands of a bona fide purchaser, negotiable paper founded in whole or in part upon a gambling or gaming consideration would be utterly void, still, the authorities recognized a distinction between the status of negotiable paper held by a bona fide purchaser, where the original consideration is adjudged illegal by the courts, and negotiable paper held under like circumstances, where the statute declares such paper to be void. The wager in this case, therefore, having been held not to be a wager upon any game, and therefore not within the statutory prohibition, it was held that the plaintiff, who was a bona fide holder for value, would be protected, notwithstanding the fact that the court

was clearly of opinion that the wager in question was in contravention of sound policy.

In *Remer v. Ettinger*, 48 Misc. Rep. 641, 96 N. Y. Supp. 263, it was held that where one bought chips in a gambling-house and used them in a game of poker, and the proprietor, after settling the account for chips, gave his check, it was given for a gambling debt within the meaning of the statute making void every security, the whole or any part of the consideration for which shall be for money won by playing at a game, and could not be enforced at the suit of an indorsee who took it with knowledge of its dishonor.

Likewise in *Lagonda Nat. Bank v. Portner*, 46 Ohio St. 381, 21 N. E. 634, plaintiff was the bona fide owner by indorsement of the check sued on. It appeared that the consideration of the check was celluloid chips representing money, bet and lost by the defendant (drawer of the check). It was held that plaintiff could not recover, though an innocent holder for value, without notice of the vice of the consideration, the check falling within the provision of the statute avoiding "all promises, agreements, notes, bills, bonds or other contracts" given for a gaming consideration.

Also in an action on checks against the drawer and the bank, when it appears that the money for which the checks were given was borrowed for betting on a game of cards participated in by the payee in a hotel controlled by him, there can be no recovery: *Booher v. Anderson*, 35 Tex. Civ. App. 436, 80 S. W. 385.

And a bank cannot recover from the maker for money paid by it on a check given in payment of an election bet, as such a check is void under articles 371-373 of the Penal Code: *Donnelly v. Citizens' Bank*, 3 Wills. Civ. Cas. Ct. App., sec. 169.

**d. When Partner Drawing Check in Firm Name Acts Without Scope of the Partnership.**—There are no decisions which question the soundness of the rule stated in the principal case (ante, p. 81), that a payee who cashes a check issued in the name of a firm without knowledge, either active or constructive, that the partner drawing it acted without the scope of his authority, can recover from the firm the debt evidenced by such check. But, as the question whether the act of a partner is within the scope of his authority is a question of fact, it is often difficult to determine in any particular case what facts will charge the holder of such a check with that degree of knowledge which in law will deprive him of a right to maintain an action on the check against the firm. There are but a few cases where this precise question has been adjudicated.

In *Gale v. Miller*, 44 Barb. (N. Y.) 420, the action was brought upon a check made by a member of a copartnership in the firm name and payable to a third party, and subsequently transferred to plaintiff for a valuable consideration. The check was made for the purpose of paying an account due from the firm to the party, but instead of being delivered and used for that purpose, the account was paid by the partner who drew the check, by an account which he held, individually, against the payee, and payment of the balance in cash.

It was held that, as it appeared that the check was drawn in good faith to pay a partnership debt, the action could be sustained, and the judgment of the lower court granting a nonsuit was accordingly reversed.

In *Graham v. Taggart* (Pa.), 11 Atl. 652, plaintiff, trustee of a bank, took from one of the defendants, in payment of his individual note, a check of the firm of which he was a partner. It appeared that plaintiff knew that the signature and writing in the check was in the handwriting of the maker of the note. This knowledge on the part of plaintiff was held sufficient to charge him with notice that defendant was applying the firm assets to his private use and in accepting the check he took the risk of the assent of the other partner, and could not recover on the check against the firm.

In the recent case of *Merrill v. O'Bryan*, 48 Wash. 415, 93 Pac. 917, plaintiff sought to recover from the defendant firm, on a dishonored draft issued in the firm name by one of the partners for the contract price of a large quantity of lumber. The defendant partners were the owners of steamers plying the Yukon river, and were engaged in the transportation of freight on said river, and contended that at the time the lumber was bought, the drawer of the draft had no authority to purchase lumber for the firm, for the reason that the partnership was a nontrading one, and existed for the purpose of carrying on a transportation business only. A judgment in favor of plaintiff was upheld. The court remarked that while there was no evidence to show that the lumber was purchased for trading purposes, it was within the scope of the partnership to purchase lumber for the construction of warehouses at terminal points, or en route, or for the construction of barges, scows, or small boats, etc., and then said: "So far as third persons who deal with a partner without notice are concerned, the copartners are bound if the transaction be such as the public may reasonably conclude is directly and necessarily embraced within the partnership business as being incident or appropriate to such business according to the course and usage of conducting it."

e. **When Holder Could Protect Himself by Applying Funds Belonging to Indorser.**—It was said by Judge Stewart in delivering the opinion in the principal case (ante, p. 81), that the facts in that case were "out of the ordinary course of business transactions"; and for that reason, perhaps, the question there raised that the plaintiff bank which cashed the check sued on could not maintain an action thereon against the drawer, because it failed to apply money in the bank on the deposit in the name of an indorser of the check, does not appear to have been raised in any other reported case. In the absence, therefore, of any decisions contra, the ruling in the principal case that the payee of a bank check may look to the drawer thereof for its collection, and is not required to apply money in its hands on deposit in the name of an indorser on such check, must be regarded as authority.

**CASES**  
IN THE  
**SUPREME COURT**  
OF  
**ILLINOIS.**

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**McCARTHY v. CRAWFORD.**

[238 Ill. 38, 86 N. E. 750.]

**RECEIVER'S CERTIFICATES.**—The Effect of an Assignment of a receiver's certificate is to substitute the assignee for the original holder, to enable him to share in any distribution which may be made of the assets, and to enforce his rights to the same extent as the assignor. (p. 98.)

**RECEIVER'S CERTIFICATES**—Assignment Without Transfer on Books.—The fact that a receiver's certificate provides that it is transferable only on the books of the corporation and upon surrender of the certificate does not preclude its assignment without a compliance with such provision. (p. 100.)

**RECEIVER'S CERTIFICATES**—Bona Fide Purchase from Broker.—Where the owner of a receiver's certificate purporting to be transferable by assignment signs the form of transfer and letter of attorney in blank and delivers the certificate to a broker to sell, he clothes the broker with the indicia of ownership and is estopped to deny that he is an assignee for value as against a subsequent bona fide purchaser. (p. 100.)

**RECEIVER'S CERTIFICATES**—Pre-existing Debt as Consideration for Assignment.—Where brokers deliver a receiver's certificate to a customer as security for railroad stock which he has paid them for, and the customer afterward agrees with the brokers to purchase the certificate in lieu of taking the stock, the purchaser is entitled to the same protection as if he had paid a new consideration. (p. 101.)

Julie F. Brower and Samuel B. King, for the appellant.

Julius A. Johnson and Charles H. Aldrich, for the appellee.

<sup>39</sup> **DUNN, J.** In 1903 the United States circuit court for the northern district of Illinois appointed James H. Eckels and Marshall E. Sampsell receivers for the Chicago Union Traction Company. The receivers, acting under the authority of an order entered July 10, 1905, with the consent of all the parties, issued to the appellee, Henry Crawford, a certificate of indebtedness, in which the receivers certified that the



Chicago Union Traction Company was indebted to Crawford<sup>40</sup> in the sum of ten thousand eight hundred and fifteen dollars and twenty-four cents, with interest at six per cent per annum, payable to the registered holder of the certificate, quarterly, at the office of the treasurer of said company; that the certificate was one of a series executed by the receivers in conformity with the order of July 10, 1905, to which reference was had; that the registered holder had in all things complied with the conditions of said order, and the claim upon which said certificate was issued had been audited and approved by the receivers under said order as a valid claim against the Chicago Union Traction Company, and that said certificate was registered and transferable only on the books of the company by the holder thereof, or his attorney, upon surrender of the same. On the back of the certificate was a printed form of assignment and power of attorney authorizing a transfer on the books of the company, with blank spaces left for the names of the assignor, assignee and attorney. Crawford signed the certificate on the back in blank and delivered it to A. J. Whipple & Co., brokers in the city of Chicago, with directions to sell for him. On August 24, 1905, the appellant, Matthew H. McCarthy, employed Whipple & Co. to purchase for him one hundred shares of Atchison, Topeka and Santa Fe railroad stock. The brokers represented that they had purchased the stock, and on August 23, 1905, McCarthy paid them eight thousand six hundred and sixteen dollars and thirty cents, being, with five hundred dollars theretofore paid, the balance in full therefor. They told him the stock had come from New York but had to be sent back to be transferred, because it was made out in the wrong name. The statements were false. The stock was not bought and paid for, but the entire amount paid by McCarthy was appropriated by the brokers to the payment of their own debts. In response to the demands of McCarthy for the stock or for his money or security, Whipple & Co. early in September delivered Crawford's certificate of indebtedness to McCarthy to hold as security for the delivering of the stock, telling him that Whipple was the owner of the stock. A few days later<sup>41</sup> McCarthy proposed to buy the certificate of Whipple, and a sale was agreed on at a price of ninety-five per cent of its face, or ten thousand two hundred and seventy-four dollars and forty-nine cents. The money McCarthy had paid on the stock purchased was credited on the price of the certificate. The balance, eleven hundred and fifty-eight dollars and nineteen cents, McCarthy agreed to pay, and he has

ever since retained the certificate. Meanwhile, Whipple & Co. having reported to Crawford that they had been unable to obtain an offer for his certificate that they cared to submit to him, on October 9, 1905, Crawford demanded the immediate return of the certificate. Whipple answered that he could not deliver it then because it had been sent to New York, where there were some people who wanted to bid on it. On October 13th a petition in bankruptcy was filed against Whipple & Co., and they were adjudged bankrupts and a receiver appointed. On October 14th McCarthy presented the certificate to the receivers of the traction company, having first written Crawford's name as assignor and his own name as assignee and attorney in the spaces left therefor in the printed transfer on the back, above the signature of Crawford, and he requested the receivers to issue a new certificate to him, which they refused to do. McCarthy subsequently filed his bill in the superior court of Cook county against Crawford, the Chicago Union Traction Company and its two receivers, alleging that he was entitled to the transfer of the certificate by the receivers of the traction company and was the equitable owner thereof, and praying that the traction company be directed, through its receiver, to make the transfer, and that Crawford be enjoined from setting up any claim of right, title or interest to the certificate.

The answer of Crawford admitted the issue to him of the certificate, and alleged that he employed Whipple & Co., as brokers, to negotiate its sale for cash at a designated price; that it was not delivered to them when defendant employed them or for a considerable period thereafter, and was not delivered in order that any intending purchaser <sup>42</sup> could inspect it, the signature of the defendant to the blank assignment on the back having been placed there long before the employment of said brokers. He also filed his cross-bill, in which he prayed that the court would decree that he was the lawful owner of the certificate; that the assignment to McCarthy on the back of said certificate was without consideration or authority; that McCarthy should be enjoined from setting up any title or right of possession, and that the certificate be surrendered to the complainant in the cross-bill. McCarthy answered the cross-bill, and on the final hearing the court rendered a decree finding that Crawford was the lawful owner of the certificate, directing its delivery to him, and enjoining the receivers from recognizing the assignment to McCarthy or issuing a new certificate to him. The appellate

court having affirmed this decree, an appeal has been taken to this court.

<sup>44</sup> The certificate was not an ordinary receiver's certificate issued for money borrowed or a liability incurred by the receivers in the performance of their duties. It was merely evidence of the existence of a debt in favor of the appellee, against the corporation whose property the court was administering. It was not a negotiable instrument. The debt, however, of which the certificate was the evidence, was a chose in action and was assignable in equity. That it was expected and intended that the certificates, which by the order of the court were substituted for the original evidences of indebtedness of the corporation, would be transferred is manifest from the fact that it was stated on the face of each certificate that it was registered and transferable only upon the books of the company upon surrender of the certificate; that the interest was made payable to the registered holder, and that on the back of the certificate was printed, for convenience of transfer, a form of assignment and power of attorney similar to those ordinarily found on the back of certificates of corporate stock. The effect of an assignment would be to substitute the assignee for the original certificate holder, to enable him to share in <sup>45</sup> any distribution which might be made of the assets, and to enforce his rights in the pending proceedings to the same extent as the original holder. The registration of transfers enables the receivers and all others interested to know who were the parties interested.

Whipple & Co. were the agents of Crawford for the sale of his certificate. He contends that he is not bound by their sale because they were brokers, and the sale was beyond their authority because not made in the usual course of business or for cash, but in settlement of an existing indebtedness from themselves to the vendee. There can be no question of the rule that a factor cannot pledge the goods of his principal, that he cannot dispose of them by way of exchange or barter, and that he cannot sell them for a prior debt. And this is so even though the pledgee or vendee does not know that the factor is such, and though the factor is in possession of the goods and sells them as his own. But this case is not to be decided on that principle. The rule is subject to the qualification mentioned by Kent in laying down the doctrine that "to guard against abuse and fraud it is admitted that if the factor be exhibited to the world as owner with the assent of his principal, and by that means obtains credit, the principal will be liable": 2 Kent's Commentaries, 627. Whenever

the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his been the means of imposing upon the person dealing with the factor and inducing him to believe the factor was clothed with authority to dispose of the goods in the manner in which he did, the principal is bound by such disposition: *Potter v. Dennison*, 5 Gilm. 590. In *Williams v. Fletcher*, 129 Ill. 356, 21 N. E. 783, this principle was announced in language quoted from *McNeil v. Tenth Nat. Bank*, 46 N. Y. 46 325, 7 Am. Rep. 341, as follows: "It must be conceded that as a general rule, applicable to property other than negotiable security, the vendor or pledgor can convey no greater right or title than he has. But this is a truism predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in any party making the conveyance."

The law has been generally established that as between the parties the transfer of stock by delivery of the certificate, with power of attorney or indorsed in blank, passes title without transfer on the books of the company, even when the by-laws of the company provide to the contrary: *Otis v. Gardner*, 105 Ill. 436; *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087. Such blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment, and the party to whom it is delivered is authorized to fill it up. It may be filled up with the name of a remote transferee, and the name to be inserted concerns only the purchaser: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532; *White v. Vermont etc. R. R. Co.*, 21 How. 575, 16 L. ed. 221. The form in which the certificate was issued, the usage and practice indicated



thereby as to the method of assignment, the appellee's own act in signing the power of attorney, all correspond with the customary rules with reference to the assignment of similar <sup>47</sup> documents. Though this is not a certificate of stock, it is manifest that it was intended to be assigned in the same manner, and no reason is seen why it may not be so done and with the same effect.

By signing the transfer and power of attorney in blank, from whatever motive, and delivering the certificate so indorsed to Whipple & Co., the appellee clothed them with the customary indicia of absolute ownership. He had done all that was necessary for him to do—all that was possible for him to do to indicate to all persons interested that they owned the certificate. With the transfer on the books of the company he had nothing to do. It did not concern him. Its object was the protection and convenience of the assignee or the receivers. Appellee by this positive act enabled Whipple & Co. to deceive appellant, as they could not otherwise have done, to induce him to believe they were the owners of the stock and to sell the stock to him. The certificate, not being negotiable paper, was subject in the hands of appellant to all the equities existing against the certificate itself—to all equities against the original holder or in favor of the maker; but appellee could set up no equities against appellant, because by his writing he had estopped himself from claiming that Whipple & Co. were not his assignees for value.

In *Otis v. Gardner*, 105 Ill. 436, the owner of a certificate of stock in a corporation indorsed it in blank and delivered it to his brother, taking a receipt, in which the brother recited that he had borrowed the stock and agreed to return it on demand. Being indebted, the brother pledged the stock to secure his notes. The owner of the stock having died, his administrator brought suit against the pledgee to recover possession of the stock. In disposing of this question, on page 443, the court said: "The intestate placed the certificates in the hands of Chauncey T. Bowen, with a blank assignment written thereon, authorizing an absolute transfer of the stock to the assignee under the by-laws of the company. <sup>48</sup> The exact use the assignee should make of the stock does not appear from anything in the record, but as the use he might make of it was in no way limited by the terms of the assignment, it is reasonable to presume the assignee was authorized to make any legitimate use of it that a rightful owner might—that is, he might sell it or pledge it in the usual course of business. That was done in this case.

It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that anyone other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done if it would affect injuriously an innocent purchaser for value, and his personal representative can have no relief that could not be granted on a like bill by the intestate, if living. The principle is, that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest."

It is claimed that appellant's purchase was not in the usual course of business and for a valuable consideration. The certificate was first delivered to appellant in response to his demand for security to secure the delivery of the railroad stock to him. After some delay he proposed to take the certificate instead of completing the purchase of the stock. There is no basis in the evidence for supposing this was anything other than an ordinary proposition to buy the certificate, or that there was in it any concealed or unfair purpose. His proposition was accepted, and the nine thousand one hundred and sixteen dollars and thirty cents he had paid for the purpose of being used in the purchase of the stock was applied to the payment for the certificate.

Whipple & Co. were clothed with all the indicia of ownership, and appellant, with no knowledge or reason to suspect any infirmity in their title, purchased the certificate. Under such circumstances the pre-existing debt is a valuable consideration, and he is entitled to be protected to the same extent as if he had paid a new consideration: *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Schwabacker v. Rush*, 81 Ill. 310; *Kranert v. Simon*, 65 Ill. 344.

It is insisted by appellee that appellant's bill and his answer to the cross-bill are inconsistent and that the facts proved do not sustain the bill. The inconsistency is more imaginary than real. The answer sets up the facts more in detail than the bill, but they are not inconsistent. Both concede that the absolute ownership of the certificate was in appellee; that he delivered it to Whipple & Co., not as

purchasers or owners, but solely as brokers, to sell for appellee. Both allege the payment of the money to Whipple & Co., the order to buy stock, their failure to do so, their offer to appellant of the certificate instead of the stock, and its acceptance by appellant and the filing of the blank in the assignment. Both allege that by means of the premises the appellant became the equitable owner of the certificate. Whether Whipple & Co. purported to act as agents of appellee or as owners of the certificate is not alleged in either bill or answer, but the facts are stated with differences only in the extent of detail. There is no substantial difference in the claim attempted to be stated in appellant's different pleadings, and on the evidence he was entitled to the relief prayed for.

The judgment of the appellate court and the decree of the superior court will be reversed and the cause remanded to the superior court, with directions to enter a decree in accordance with the prayer of the bill upon the payment by appellant, for the use of appellee, of eleven hundred and fifty-eight dollars and nineteen cents, with five per cent interest from September 11, 1905.

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#### RECEIVERS' CERTIFICATES.\*

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#### \*REFERENCES TO MONOGRAPHIC NOTES.

- Power to create liens by receivers: 83 Am. St. Rep. 72.  
Claims taking precedence over mortgages of quasi-public corporations: 54 Am. St. Rep. 400.  
Relation of receivers to pre-existing liens: 71 Am. St. Rep. 352.

### I. Power of Court to Issue.

a. **As a General Rule.**—The law is well settled that when a court of equity takes charge of a corporation, especially of a corporation of a public or quasi-public character, it has power, for proper purposes and in a proper manner, to authorize the issuance of receivers' certificates which shall constitute a paramount charge upon the franchise, property and earnings of the corporation: *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963. This power rests in the discretion of the court, and its exercise will ordinarily not be reviewed by an appellate tribunal: *Town of Vandalia v. St. Louis etc. R. R. Co.*, 209 Ill. 73, 70 N. E. 662. Nevertheless the power thus to issue certificates displacing prior liens is liable to abuse, and hence should be sparingly exercised: *Bernard v. Union Trust Co.*, 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A., N. S., 1118. It "should be exercised with the utmost caution, prudence and reserve, and never without giving those whose interests are to be affected the opportunity to be heard": *Osborne v. Bigstone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446. "In every case the power is an extraordinary one, and is liable to abuse unless exercised with the utmost caution. The court should be satisfied by a preponderance of circumstances that no other course could be successfully adopted, and that practical ruin would ensue if the authority were withheld. All the facts should be exhibited which make the necessity apparent, all the parties affected should be notified, and a full hearing accorded to all objectors": *Lockport Felt Co. v. United Box Board & Paper Co.* (N. J.), 70 Atl. 980.

Where a court under circumstances apparently authorizing it takes possession of a street railway through a receiver, certificates issued by him under order of court are valid although there may be no jurisdiction of the rightful owner of the road: *Illinois Trust etc. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60.

The court has authority to make the certificates negotiable, but it has no power to disregard the law against usury by authorizing the receiver to borrow money by selling interest-bearing certificates at less than their face value: *Meyer v. Johnston*, 53 Ala. 237.

b. **As to Property in Another State.**—A court has no jurisdiction to authorize the issuance of receivers' certificates which shall be liens upon land without the boundaries of the state; application thereof must be made in the jurisdiction in which the property lies: *Lockport Felt Co. v. United Box Board & Paper Co.* (N. J.), 70 Atl. 980; *Pool v. Farmers' Loan etc. Co.*, 7 Tex. Civ. App. 334, 27 S. W. 744.

### II. Purposes for Which Certificates may Issue.

a. **In General.**—The power of a court of chancery to authorize the issuance of receivers' certificates that shall become paramount liens grows out of its duty to protect and preserve the property of the corporation in its hands; and hence, as a general rule, such certificates should not be issued except when necessary in order to



preserve and protect the trust property. This rule, however, has perhaps been expanded in the case of public service corporations to the end that they may be kept going concerns in the interest of the public: *Meyer v. Johnston*, 53 Ala. 237; *Credit Co. v. Arkansas Cent. R. R. Co.*, 5 McCrary, 23, 15 Fed. 46. "No limit has been fixed," says the supreme court of New York, quoting from *High on Receivers*, "to the purposes for which receivers' certificates may be issued, other than that they shall be germane to the objects of the receivership and necessary to the proper administration of the trust. Thus they have been authorized for the preservation, management and repair of the road, and for the purchase of rolling stock; for the making of repairs only; for the further construction, equipment and final completion of the road; to complete an unfinished portion of the road within the time fixed by law, and thus to prevent the lapsing of valuable land grants and franchises of the company": *Rochester Trust etc. v. Oneonta etc. Co.*, 122 App. Div. 193, 107 N. Y. Supp. 241.

**b. To Pay Operating and Other Expenses.**—Perhaps the most frequent occasion which justifies the issuance of receivers' certificates is to pay the operating and other expenses of a railroad, so as to keep it a going concern. The propriety of such a course, if the exigencies demand, is obvious, for unless the road is kept in operation, the result must be disastrous to all parties in interest, as well as interfering with the public convenience. Expenses of this sort include supplies, materials, wages and the like, and extend to those accruing a short time previous to the appointment of the receiver: *Humphreys v. Allen*, 101 Ill. 490; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 40 Hun, 80. Contra, *Central Trust Co. v. Syracuse & B. R. Co.*, 53 Hun, 638, 6 N. Y. Supp. 918; *Crosby v. Morristown etc. Co. (Tenn.)*, 42 S. W. 507; *International & G. N. R. Co. v. Coolidge*, 26 Tex. Civ. App. 595, 62 S. W. 1097; *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. 377; notes to 83 Am. St. Rep. 73; 54 Am. St. Rep. 404, 409.

**c. To Pay Rent, Taxes and Interest.**—Receivers' certificates may be issued to raise money to pay taxes on the trust property, and be given a preference among the claims against the corporation, for taxes are always a first lien upon the property, and to make certificates a first lien is only to substitute one lien for another: *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963; note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 421. But under a statute providing for a tax on the franchise or earnings of a railroad, but not making the tax a lien on the property, it has been held that payment of past due taxes of that character are not a purpose for which receivers' certificates should be issued: *Central Trust Co. v. New York City etc. R. Co.*, 47 Hun, 587. Where a railroad has been leased to another company, and a receiver thereafter appointed is directed to bring suit to recover the rents, but is unable to do so for lack of funds, receivers' certificates may properly issue to raise money for that purpose: *Town of Vandalia v. St. Louis etc. R. Co.*,

209 Ill. 73, 70 N. E. 662. Receivers' certificates will not be issued to pay interest on the bonds of an insolvent private corporation, and thus displace existing liens: *Newton v. Eagle etc. Co.*, 76 Fed. 418.

**d. To Pay for Repairs and Betterments.**—There is no doubt that a court of equity may authorize the issuance of receivers' certificates for the purpose of raising funds to make necessary repairs and improvements on a railroad over which it has appointed a receiver, and to make the certificates a first lien upon the property of the corporation: *Meyer v. Johnston*, 53 Ala. 237; *Pennsylvania Steel Co. v. New York City Ry. Co.*, 165 Fed. 455; *Kampmann v. Sullivan*, 26 Tex. Civ. App. 308, 63 S. W. 173; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. 46, 5 McCrary, 23; *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963. This power, however, should be sparingly exercised, especially where the repairs and improvements are of an extensive character approaching in practical effect the reconstruction of the road: *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. 46, 5 McCrary, 23. When bridges on the main line of a railroad have become unsafe and condemned by the railroad commissioners, and they are rebuilt under contract with the receiver, it is proper to authorize him to issue certificates for the cost: *Hilton Bridge Const. Co. v. Foster*, 26 Misc. Rep. 338, 57 N. Y. Supp. 140. And where the receiver of a street railway company has been authorized to issue certificates for betterment and equipment purposes, he may use the proceeds in making repairs on the roadbed of a leased line which is an essential part of the system: *Pennsylvania Steel Co. v. New York City Ry. Co.*, 165 Fed. 477. Receivers' certificates may be authorized to repair the plant and apparatus of a gas and electric company which are in such a state of disrepair as to be dangerous and inadequate to render public service: *Gay v. Hudson River Electric Power Co.*, 166 Fed. 771.

**e. To Pay for Reconstruction Work.**—Receivers' certificates have been issued in order to enable a railway company to complete the construction of its line and making them a lien superior to those of prior claims and mortgages. It is conceded, however, that this power should not be exercised except under unusual circumstances: *Rochester Trust etc. Co. v. Oneonta etc. R. Co.*, 122 App. Div. 193, 107 N. Y. Supp. 237; *First Nat. Bank v. Ewing*, 103 Fed. 168, 43 C. C. A. 150; *Shaw v. Little Rock etc. R. Co.*, 100 U. S. 605, 25 L. ed. 757; *Stanton v. Alabama etc. R. Co.*, 2 Woods, 506, Fed. Cas. No. 13,296. "The power of a court, which has appointed a receiver in an equity cause and taken possession of a railroad, to subordinate the existing liens upon the property to the expenses of the administration, including those of operating and maintaining it in proper repair, cannot be challenged. But the power to postpone existing liens to liens created by the court for the purpose of completing an unfinished railroad has rarely been exercised, and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders. It is to be exercised with great caution, and, if possible, with the con-

sent or acquiescence of all the parties in interest: *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Kennedy v. St. Paul & P. R. R. Co.*, 5 Dill. 519, Fed. Cas. No. 7707; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 22 L. ed. 963. In *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136, the court intimated doubt of the propriety of the exercise of the power to the prejudice of the prior lienholders without their consent; but in *Miltenberger v. Logansport etc. R. R. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27 L. ed. 117, the court upheld receivers' certificates with a prior lien to that of a pre-existing mortgage, created for the purpose of obtaining rolling stock, and for building six miles of road and a bridge, part of the main line of a road ninety-two miles long. The latter is the only reported case which has been called to our attention, in which the exercise of the power has been approved, where it was not invoked at the instance of the prior lienholders, or sanctioned subsequently by their acquiescence, or where their conduct did not create an estoppel. In that case, however, the security of the prior lienholders was augmented instead of impaired by the expenditure permitted. The value of the property was to be enhanced far beyond the cost of the new construction, and ninety-five thousand dollars of the total cost of one hundred and twenty-five thousand dollars had been donated for the purpose to the receiver by a municipal corporation and another railroad corporation, and it was upon these considerations that the court below made the order which was under review. That decision affords no support to sustain the present order. Here was a road only one-third built. No one could be found willing to complete it upon the terms which had previously been proposed, and, in view of the whole situation as it was presented to the court, the outcome of an attempt to complete it was too uncertain to authorize it to be made without the consent of the appellants. The effect of the order was certain to render their security more precarious, if not to render it worthless, and the chances that the other creditors of the corporation could realize anything by carrying out the scheme were wholly conjectural. Probably in making the order the learned judge of the court below supposed because the appellants did not appear in court at the time that they did not intend to object to it; but they had already objected to it, and we find nothing in the record to indicate that they intended to waive the objections which they had already made. Under the circumstances, we are of the opinion that the order was an erroneous exercise of judicial discretion": *Bibber-White Co. v. White River Val. Electric R. Co.*, 115 Fed. 786, 53 C. C. A. 282. To the same effect, see *Snow v. Winslow*, 54 Iowa, 200, 6 N. W. 191.

In *Rutherford v. Pennsylvania Midland R. Co.*, 178 Pa. 38, 35 Atl. 926, it is held that receivers' certificates may be issued to complete a railroad at the request of the president with the approval of holders of ninety-six per cent of the bonds, where the decree authorizing the issue provides that it shall be without prejudice to nonconsenting bondholders. According to *Street v. Maryland Cent. Ry. Co.*, 59 Fed.

25, a receiver of a local narrow-gauge railway will not be authorized to issue certificates to provide for a new equipment, additional sidings and permanent structures, to test its earning capacity if fully developed, when the measure is opposed by all other interests, and first mortgagees are pressing for a foreclosure. In *Lazear v. Ohio Valley Steel Foundry Co.* (W. Va.), 63 S. E. 772, receivers of a manufacturing plant were authorized to sell receivers' certificates, estimated as adequate to complete the plant, they to constitute a first lien on the assets and income of the corporation.

f. *In Case of Strictly Private Corporations.*—There is in principle and on authority a wide distinction between the power of a court to authorize the displacement of subsisting mortgages and liens in the case of public or quasi-public corporations and its power in the case of purely private corporations, for as to the latter there is no public interest in their continued operation. Hence it is that the power of a court of chancery to authorize the issuance of receivers' certificates in a case of a purely private corporation unaffected with any public interest, which certificates shall displace prior liens, has been doubted and by some authorities apparently denied under all circumstances: *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; *Lehman v. Trust Co. of America* (Fla.), 49 South. 502; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Merriam v. Victory Min. Co.*, 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; *Doe v. Northwestern Coal etc. Co.*, 78 Fed. 62. In accordance with doctrine it has been decided that where a land and irrigation company, the property of which is covered by a trust deed to secure its bonds, goes into the hands of a receiver who issues certificates, it is error to subordinate the mortgage bonds to the certificates, since the corporation is not one of a character with which the public has any concern in its operation: *Lamar Land etc. Co. v. Belknap Sav. Bank*, 28 Colo. 344, 64 Pac. 210. Said the supreme court of New York: "In the case of corporations engaged in a public service, like railroad, water and lighting companies, which service cannot be interrupted without inconvenience and harm to the community, courts of equity authorize its receivers of such corporations to issue certificates of indebtedness to raise money to do repairs or obtain supplies to keep the service going, and make such certificates prior liens to the mortgage indebtedness. But in the case of corporations not engaged in such a service, there is no such practice. It is justified only on the score of public necessity, and even when so exercised has become a great abuse and wrong to mortgage bondholders in many instances, as we all know": *Wiggins v. Neversink Light & Power Co.*, 93 N. Y. Supp. 853.

The New Jersey court, after reviewing the authorities on this question, comes to the conclusion "that in case of private corporations the court may authorize its receiver to borrow money upon the faith and credit of all the property of the corporation, and authorize the issuing of securities which shall displace all prior liens and



encumbrances, but only for one purpose, namely, the preservation of the property and the expenses of realizing upon it by a sale. This necessity should be imperative and paramount, and under no other circumstances can a court justify itself in attempting to undermine prior liens. The rule which forbids the displacement of prior liens by receivers' certificates, at all events in the case of private corporations, is not the reasonable rule. It goes too far. It may well be that one of the chief reasons for appealing to the court to appoint a receiver is that the property may be preserved from spoliation or destruction; and if, after the court shall have assumed to care for the property, it finds that there is no income to support it, and that the court has no power to pledge the property for its own preservation or realization, the original action in appointing the receiver would be futile. Under no circumstances would the court be justified in authorizing its receiver to borrow money and make the obligation thereof a first lien on the property of a private corporation by the displacement of existing liens for the mere purpose of continuing the business in which the company was engaged, unless possibly in a case in which it satisfactorily appeared that the continuation of the business was absolutely essential to the preservation of the property in the receiver's custody. In the case of a private corporation this necessity is made the criterion. In addition to the limitations thus set to the power of the court, it may be well to add that in every case the power now appealed to is an extraordinary one, and is liable to abuse unless exercised with the utmost caution": *Lockport Felt Co. v. United Box Board & Paper Co.* (N. J.), 70 Atl. 980.

The doctrine thus announced by the New Jersey court seems sustainable both in reason and upon authority. The question, however, is of sufficient importance to justify a review of some of the leading authorities, which we now undertake to do. In *Farmers' Loan etc. Co. v. Grape Creek Coal Co.*, 50 Fed. 481, 16 L. R. A. 603, the suit involved the foreclosure of a mortgage on the property of a coal mining company. The receiver applied for an order authorizing him to issue certificates which should be a first lien on the trust property to enable him to pay taxes then due, to take up outstanding certificates, and to continue the operation of the mine. The court, after quoting from *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262 (a case to which we shall presently address attention), further said: "Private corporations owe no duty to the public and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public."

In the case of *Fidelity Ins. Co. v. Roanoke Iron Co.*, 68 Fed. 623, the suit involved the foreclosure of a mortgage on the property of the defendant, a private corporation engaged in producing iron. A receiver was appointed, who applied for leave to issue certificates

and to borrow money thereon in order to carry on the business of the company. His application was denied upon the principle that it was beyond the authority of the court to authorize a receiver of a private corporation to issue certificates displacing the lien of a subsisting mortgage for any such purpose. This case is approved in *Union Trust Co. v. Southern S. & L. Co.*, 166 Fed. 193.

In *Hanna v. State Trust Co.*, 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201, the court appointed a receiver for a private corporation engaged in irrigating and colonizing arid lands, in a suit to foreclose a second mortgage. It was decided that the court appointing the receiver had no authority to authorize him to issue certificates to raise money to carry on the business of the insolvent corporation and to improve its lands already encumbered by a mortgage.

In *International Trust Co. v. Decker Bros.*, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A., N. S., 152, an insolvent company, a Maine corporation owning property in Alaska, mortgaged it to the complainant, a Massachusetts corporation. In proceedings to foreclose the mortgage, the receiver was authorized to issue certificates on which to borrow money with which to carry on the company's business, and which by their terms were made a first lien upon the property of the corporation. It was decided that the mortgage could not be thus displaced, following *Baltimore B. & L. Assn. v. Alderson*, 90 Fed. 142, 32 C. C. A. 542, in which case the court declared that "in case of private corporations, the court cannot authorize the issue of receivers' certificates for the purpose of improving, adding to, or carrying on the business of the company without first having the consent of the creditors whose liens would be affected thereby." This latter decision is approved in *Union Trust Co. v. Southern S. & L. Co.*, 166 Fed. 193.

These expressions show the hesitancy of the federal courts to authorize receivers' certificates in the case of purely private corporations which will disturb pre-existing liens. Something of the same hesitancy is observable, as has already been indicated, in the courts of the several states. In *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262, is found this statement: "When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safekeeping and preservation are properly payable out of the income, if there be any or if there be none, then out of the proceeds of the corpus of the estate when sold; but this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. Extensive as are the powers of these courts of equity, they do not authorize the chancellor to thus impair the force of solemn obligations and destroy vested rights."

Some of the courts appear to take a less restricted view of the authority of the chancellor in matters of this nature. Thus in *Porch v. Agnew* (N. J.), 57 Atl. 546, the suit involved the receivership of a valuable hotel property. The chief value thereof was in the build-

ing, and there was no income from it wherewith the receiver could pay insurance premiums and the services of a watchman, which were indispensable under the terms of the insurance policies. An application for authority to issue receivers' certificates was granted upon the principle that their issuance was necessary for the preservation of the property. A somewhat similar application met with a different fate in *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep 456, 13 N. E. 282. There a hotel company bought mortgaged land and mortgaged it again in trust to raise money to build. The company became insolvent and a receiver was appointed who was authorized by the court to and did borrow money on his certificates to pay employes, and the certificates were declared by the order to be a lien on the land prior to the trust mortgage. On a foreclosure of the original mortgage a surplus arose. It was decided that the order was void as to the priority provided, although it appeared that the employes had become riotous and threatened to destroy the hotel and other property of the company unless they were paid.

In *Dalliba v. Winschell*, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107, it is stated that courts of chancery have power to direct their receivers to care for, protect and preserve the property, and to decree that the charges and expenses thereof be prior and preferred liens over other existing liens, but to go beyond the preservation of the property and to issue certificates for money to be used in paying running expenses is beyond the power of the court. The property involved in that case was mining property; and in the course of its opinion the court observed: "It is clear to us that a court of equity has no authority to place its receiver in charge of such property and operate the same, carrying on a general mining business, and when it turns out to be a loss, as is likely to be the result in such cases, charge the same up as a preferred claim and lien against the property to the prejudice and loss of the holders of prior recorded liens on the same property."

In *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431, the property in question consisted of a mine having no marketable value independently of a railroad constructed and operated by its owner for the transportation of ore. The court authorized its receiver to protect the title to the railroad and repair it, and to borrow money on certificates which should be a first lien on all the property of the company, giving this reason therefor: "It was necessary to raise money in some way to preserve the property from destruction or serious injury and to put it in salable condition, and the only practical mode of accomplishing the fact was by issuing receivers' certificates." A subsequent Virginia case dealing with these questions is *Osborne v. Big Stone Co.*, 96 Va. 58, 30 S. E. 446.

### III. Proceedings Preliminary to Issue.

a. *Application for Order.*—Ordinarily a court should not authorize receivers' certificates to be issued unless a detailed statement is first made, specifying the items of the sum needed and the purpose

to which it is to be applied, supported by clear proof of the correctness thereof and of the necessity for raising the money: *Meyer v. Johnston*, 53 Ala. 237.

b.\* **Notice, Issue and Hearing.**—Before certificates are issued displacing prior liens, notice or its equivalent with opportunity for hearing should be given the parties to be affected. The court should not issue certificates, which are to be a first lien, on an *ex parte* application, but should give to existing lien and security holders notice and opportunity for hearing: *Lockport Felt Co. v. United Box Board & Paper Co.* (N. J.), 70 Atl. 980; *Ex parte Mitchell*, 12 S. C. 83; *State v. Port Royal etc. Ry. Co.*, 45 S. C. 464, 23 S. E. 380; *Bibber-White Co. v. White River Val. Elec. R. Co.*, 115 Fed. 786, 53 C. C. A. 282; *Osborne v. Bigstone Gap Colliery Co.*, 95 Va. 58, 30 S. E. 446; *Laughlin v. United States Rolling Stock Co.*, 64 Fed. 25. Yet it is not necessary that there should be a formal issue or formal notice, if it appears that the equivalent thereof has been enjoyed by the contesting parties. "Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice": *Crosby v. Morristown etc. R. R. Co.* (Tenn.), 42 S. W. 507; *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963.

"The power has generally been exercised only after notice to all parties to the litigation; and if, without such notice, or if before the time when the prior lienholders become parties to the suit, receivers' certificates are issued by authority of the court, such prior lienholders, when they are subsequently brought before the court will always be given the opportunity to contest the priority of the receivers' certificates over their lien": *Third Street & Suburban Ry. Co. v. Lewis*, 79 Fed. 196, 24 C. C. A. 482. To quote from *Crosby v. Morristown etc. R. R. Co.* (Tenn.), 42 S. W. 507: "Where practicable it would be best, of course, that the hearing should be had before the certificates are ordered; but it can readily be seen that, where a great railroad is concerned, the most disastrous consequences might result from the delay incident to such a hearing: *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. And if a hearing is afterward granted upon the merits before the certificates are effectually declared to be a proper lien upon the property, no inconvenience or harm can result. The only person to take any risk under such circumstances are the holders of the certificates, inasmuch as these instruments are not negotiable securities, and are taken subject to the action of the court." And to quote from the opinion of Justice Blatchford in *Union Trust Co. v. Illinois etc. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963: "Those who take receivers' certificates must be deemed to have taken them subject to the rights of the parties who have prior liens upon the property, and who have not, but should have, been brought before the court. While the court, under some circumstances and for some purposes, and in advance of the



prior lienholders being made parties, they have jurisdiction to charge the property with the amount of receivers' certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, the validity, effect and amount of all such certificates as fully as if such questions were then for the first time presented for determination. If it appears that they ought not to have been made a charge upon the property superior to the lien created by the mortgages, then the contract rights of the prior lienholders must be protected. On the other hand, if it appears that the court did what ought to have been done, even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it in good faith for its protection and preservation."

When the court authorizes a receiver to issue certificates for borrowed money, the holders take them subject to the rights of persons having a prior lien who have not been brought before the court; and when they are brought before the court, they are entitled to contest the necessity, validity, effect and amount of the certificates: *Hervey v. Illinois M. R. Co.*, 28 Fed. 169. But the lien of certificates continues so long as the order authorizing them remains in force, notwithstanding the order was made without notice to interested parties: *Mercantile Trust Co. v. Kanawha etc. Ry. Co.*, 50 Fed. 874. The fact that the trustee in a mortgage securing railroad bonds has been notified of an application by the receiver appointed in a cause wherein the trustee has not appeared or been served with process, for authority to issue certificates, does not make an order authorizing the certificates and making them a lien superior to that of the mortgage, binding on the trustee and the bondholders which he represents. They have the same right to attack the validity of the certificates and to assert the superiority of their lien, when subsequently brought into court, as though these questions were then for the first time presented for adjudication: *Farmers' Loan & Trust Co. v. Centralia R. R. Co.*, 96 Fed. 636, 37 C. C. A. 528, rehearing denied 100 Fed. 11, 40 C. C. A. 248.

#### IV. Validity of Certificates.

a. **Compliance with Order of Court.**—In issuing certificates, the receiver must conform to the order of the court, and issue them only in the amount, in the number, and for the purpose ordered. For him to transcend the terms of the order in these matters is to invalidate the issue: *Newbold v. Peoria etc. R. R. Co.*, 5 Ill. App. 367; *Bank of Montreal v. Chicago etc. R. R.*, 48 Iowa, 518; *State v. Edgefield etc. R. R. Co.*, 74 Tenn. (6 Lea) 353; except perhaps where the corporation uses the proceeds and enjoys the benefit thereof: *Wesson v. Chapman*, 77 Hun, 144, 28 N. Y. Supp. 431. In *Stanton v. Alabama etc. R. R. Co.*, 31 Fed. 385, where receivers used and disposed of certificates in a manner not in accordance with the order of court

authorizing their issuance, the same were declared invalid and of no effect. And in *Fidelity Ins. etc. Co. v. Shenandoah Iron Co.*, 42 Fed. 372, it is decided that under an order authorizing receivers' certificates to pay taxes, "wages and freights due and to become due," certificates given to secure a debt to a merchant incurred by giving orders upon him to employés in payment of wages are invalid. An insolvent estate is not liable for money loaned to a person acting as its receiver, on receivers' certificates, when the orders appointing him and authorizing the certificates were subsequently pronounced void: *Ludington v. Thompson*, 4 App. Div. 117, 38 N. Y. Supp. 768.

**b. Consideration for Certificates.**—It is essential to the validity of a receiver's certificate of indebtedness, issued by order of court, that it be based upon a consideration: *Turner v. Peoria etc. R. R. Co.*, 95 Ill. 134, 35 Am. Rep. 144. In *Bank of Montreal v. Chicago etc. R. R. Co.*, 48 Iowa, 518, it was held that certificates issued by the receiver of a railroad company for material contracted for but never delivered were unenforceable.

**c. Proceeds Coming into Hands of Receiver.**—In order to hold the body of the trust liable for receivers' certificates which are sold, the proceeds must come into his custody or control. But this rule is satisfied when the president of a bank in which a receiver in foreclosure proceedings has an account, after revocation of authority from the receiver to sell certain receivers' certificates, sells them and deposits the proceeds in the bank, crediting the amount to the receiver on the books of the bank and in his passbook; and when thereafter the receiver does not repudiate the sale, but draws checks against the deposits, and reports the transactions to the court, which charges the property and the proceeds with the payment of the certificates: *Alabama I. & Ry. Co. v. Anniston Loan & T. Co.*, 57 Fed. 25, 6 C. C. A. 242.

**d. Estoppel to Deny Validity.**—Lienholders affected by receivers' certificates may, through consent or acquiescence inducing bona fide investments, lose the right, on principles of estoppel, to question the validity of these certificates: *Humphreys v. Allen*, 101 Ill. 490; *Langdon v. Vermont & C. R. R. Co.*, 53 Vt. 228, 54 Vt. 593; *Central Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. Rep. 575, 32 L. ed. 985; *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. Rep. 32, 35 L. ed. 830. In *Central Trust Co. v. Sheffield etc. Ry. Co.*, 44 Fed. 526, it is decided that when, by consent of all parties, the receiver of a railroad not engaged in operating it is authorized to issue certificates constituting a lien paramount to prior mortgages, and the money obtained on these certificates is used in preserving and improving the property, purchasers of the property at a subsequent foreclosure of the mortgages are estopped to deny the validity of the certificates. But in *Stanton v. Alabama etc. R. R. Co.*, 31 Fed. 585, it is affirmed that the fact that a purchaser of a railroad property at a receiver's sale agrees to pay to the holders certain invalid certificates issued by the receiver does not estop him, in the event of his subsequent

appointment as receiver of the same railroad, from questioning the claim under such agreement. A creditor is not in position to contest the validity of certificates constituting prior liens upon the trust property when the relief he is seeking is based on the certificates: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15.

#### V. Lien of Certificates and Its Priority.

The relation to pre-existing liens of the lien of a receiver's certificate, in the matter of priority, has been considered at length in the notes to *International Trust Co. v. United Coal Co.*, 83 Am. St. Rep. 72; *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 400; *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 352; it has also been considered in various connections throughout the present note. When a certificate is prior in time to another, and for an actual cash loan, and is declared a prior lien by order of court, a subsequent certificate is subject to it although there is no recital of the first certificate in the second: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15. And when a receiver borrows money to operate works on certificates which are made a prior lien, and subsequently the holders voluntarily surrender these certificates for later ones issued without any priority, the substituted certificates have no preference over debts contracted by the receiver for materials necessary to carry on the works: *Lewis v. Linden Steel Co.*, 183 Pa. 248, 38 Atl. 606. It is the duty of a court to pay an indebtedness, which it has authorized its receiver to contract in administering railway property, before any indebtedness of the company, from the proceeds of the property, and receivers' certificates representing such indebtedness are entitled to priority of payment over those issued by order of court for preferential debts of the company: *Bank of Commerce v. Central Coal etc. Co.*, 115 Fed. 878, 53 C. C. A. 334.

When certificates are issued on which the court impresses a preferential lien, good faith requires that the lien should be enforced. Indeed, the rights of the holders of the certificates are so far vested that the court ordinarily cannot divest them without the consent of the lienors: *Lazear v. Ohio Val. Steel etc. Co. (W. Va.)*, 63 S. E. 772; *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. Rep. 32, 35 L. ed. 830.

Receivers' certificates issued under authority of an order entered in railroad foreclosure proceedings after the entry of a decree plainly contemplating a sale free from liens, which order provides that the certificates are to be paid out of the earnings of the receivership "or out of the proceeds of the sale of such property when the same is sold, after the payment of the costs," do not constitute a lien on the property after the sale in the hands of the purchaser, but are a charge only upon the proceeds of the sale, and the holders must depend for their ultimate rank and payment upon the final decree made in the cause in which they were issued: *Appeal of Columbus S. & H. R. R. Co.*, 109 Fed. 177, 48 C. C. A. 275.

The lien of a certificate, or its priority over other liens, may be waived or lost by estoppel: *Fletcher v. Waring*, 137 Ind. 159, 36 N.

E. 896; *Mercantile Trust Co. v. Kanawha etc. R. R. Co.*, 58 Fed. 6, 7 C. C. A. 3. On the other hand, mortgagees or other lienholders may be estopped to deny that the lien of a receiver's certificate is paramount to their liens: *Miltenerberger v. Logansport etc. R. R. Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140, 27 L. ed. 117.

## VI. Transfer of Certificates and Rights of Holders.

a. **Rights of Holders in General.**—Persons who purchase or advance money upon receivers' certificates are under no obligation to see to the application of the money by the receiver as directed by the court: *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963; *Stanton v. Alabama etc. R. R. Co.*, 2 Woods, 506, Fed. Cas. No. 13,296; and their lien is not affected by the fact that the receiver appropriates the money to his own use: *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 Fed. 874.

It is said that a holder of receivers' certificates is put upon inquiry as to all that has been done in the litigation in which they have been authorized, and is chargeable with notice of all subsequent proceedings therein, and that the court's final action may prejudicially affect the validity or security of the certificates: *Mercantile Trust Co. v. Kanawha etc. Ry. Co.*, 58 Fed. 6, 7 C. C. A. 3. It is also held that in taking certificates purporting to have been issued for the payment of materials, the holder is bound to inquire whether the receiver had power to issue them in payment of materials to be delivered at a future time: *Bank of Montreal v. Chicago etc. R. R. Co.*, 48 Iowa, 518.

In *Newbold v. Peoria etc. R. R. Co.*, 5 Ill. App. 367, where the receiver of a railroad was authorized to issue certificates in a certain amount the proceeds to be used in operating the road, and he issued certificates beyond the amount specified using the proceeds in the payment of coupons due on the corporation's bonds, it was decided that bona fide purchasers of the certificates should be subrogated to the rights of the holders of the coupons. Where a court is compelled for lack of jurisdiction to dismiss a cause, in which receivers' certificates have been issued, the parties having brought the suit therein by collusion, the court has power, preliminary to the dismissal, to protect the certificates by directing a sale of so much property in the hands of the receiver as may be necessary therefor: *Electrical Supply Co. v. Put-in-Bay etc. Ry. Co.*, 84 Fed. 740.

When certificates are issued for debts contracted by the court to persons who invest their money in good faith, they should be paid according to their tenor, as authorized by order of the court; and a discount allowed by the order to the purchasers is presumed to have induced them to rely upon the promise of payment of the full face value, when they would not in the purchase have trusted the receiver: *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, 29 L. ed. 963.

The assignment of a receiver's certificate usually has the effect of substituting the assignee for the original holder, so that he may share in any distribution of the corporate assets to the same extent



as his assignor, and may compel the registration of the transfer which is contemplated by the original contract: *McCarthy v. Crawford*, 238 Ill. 38, ante, p. 95, 86 N. E. 750. In this case the certificates were made assignable very much after the fashion of certificates of stock.

b. **Negotiability of Certificates.**—The authorities are unanimous in holding that ordinary receivers' certificates are not negotiable instruments. Hence, if invalid in their inception they are unenforceable in the hands of all subsequent takers, whether with notice of the infirmity or not. Equities existing between the original parties are not cut off by a transfer to a bona fide purchaser: *Turner v. Peoria etc. R. R. Co.*, 95 Ill. 134, 35 Am. Rep. 144; *Newbold v. Peoria etc. R. R. Co.*, 5 Ill. App. 367; *McCurdy v. Bowes*, 88 Ind. 583; *Montreal Bank v. Chicago etc. R. R. Co.*, 48 Iowa, 518; *Stanton v. Alabama etc. R. R. Co.*, 2 Woods, 506, Fed. Cas. No. 13,296; *Union Trust Co. v. Chicago etc. R. R. Co.*, 7 Fed. 513; *Stanton v. Alabama etc. R. R. Co.*, 31 Fed. 585; *Gordon v. Newman*, 62 Fed. 686, 10 C. C. A. 587. "Receivers' certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value and without notice; and when they are negotiated at a discount, which the receiver is not authorized to allow a bona fide holder will be protected only to the amount actually advanced by the first purchaser": *Central Nat. Bank v. Hazard*, 30 Fed. 484. It would seem, however, that a court of equity has authority, after proper notice to and hearing of interested parties, to authorize the issue even of negotiable certificates: *Meyer v. Johnston*, 53 Ala. 237. Yet it has been held that when "negotiable" certificates are authorized, they nevertheless lack negotiability in the true sense of that term: *Bernard v. Union Trust Co.*, 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A., N. S., 1118. "As to the claim of Bernard that he is an innocent purchaser without notice and for value," said the court in this case, "it is sufficient to say that although it be true that by the terms of the order the receiver was authorized and empowered to issue a negotiable receiver's certificate, he cannot claim to hold as an innocent purchaser without notice, in the sense which that phrase imports, for certificates of this kind have not the quality of negotiable instruments under the law-merchant. They are not commercial paper, and the purchaser or assignee can recover upon them only to the extent of the rights of the first payee. He is put upon inquiry as to all that was done in the cause wherein the certificates are issued and chargeable with notice. As said by the court in *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 456, 6 Sup. Ct. Rep. 809, 29 L. ed. 963, 'the receiver and those lending money to him on certificates issued and orders made without prior notice to the parties interested take the risk of the final action of the court in regard to the loans. The court always retains control of the matter; its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments.'"

## MAPES v. VANDALIA RAILROAD COMPANY.

[238 Ill. 142, 87 N. E. 393.]

**EJECTMENT Lies Against a Railroad Company** for a portion of its right of way used in the performance of its duties as a common carrier; and it is no defense to show that the company took possession of the premises before the plaintiff acquired his title. (p. 118.)

**EJECTMENT.**—Notice and Demand are Unnecessary Before Bringing ejectment where the possession is unlawful and there is no privity between the parties. (p. 119.)

**EJECTMENT.**—When a Judgment is Recovered Against a Railroad Company in ejectment for a portion of its right of way, the company should not be required summarily to surrender possession, but execution should be stayed to enable it to make compensation or institute condemnation proceedings. (p. 119.)

Joseph E. Dyas, for the appellant.

F. W. Dundas, for the appellee.

<sup>142</sup> DUNN, J. Appellee brought ejectment against appellant for the northwest quarter of the northeast quarter and the north half of the northeast quarter of the northeast quarter of <sup>143</sup> section 11, town 12 north, range 11 west of the second principal meridian, in Edgar county. There was a trial and judgment for the plaintiff. A new trial having been granted under the statute, the plaintiff again recovered a judgment, from which the defendant has appealed.

The appellant pleaded the general issue, a denial of possession except as to a strip of twelve hundred and forty-eight and one-quarter feet long and fifty feet wide, running diagonally across said land in a southeasterly direction, and used and occupied by said defendant as a right of way for its railroad, and a plea that no demand of possession was made before suit brought.

The facts are all contained in a stipulation of the parties, whereby it appears that the appellee is the owner in fee of the premises described in the declaration; that the said premises were assigned as dower in 1868 to Edna Knight, who died in 1900; that the said Edna Knight, in 1874, while in possession of the said premises, gave written permission to the Paris and Terre Haute Railroad Company to enter upon said land and construct a railroad thereon, which said railroad company did; that the said railroad company and its successors and assigns have ever since its construction been in possession of and operated the railroad so constructed, and that the appellee has succeeded to the right of the Paris

and Terre Haute Railroad Company and is in the possession of and is operating said railroad.

It is insisted by appellant that because of the interest of the public in the continuous operation of a railroad, ejectment will not lie against a railroad company for a portion of its right of way used in the performance of its duties as a common carrier. Cases are cited from other jurisdictions sustaining this position, but our decisions have determined this contention adversely to appellant's claim: *Chicago etc. R. R. Co. v. Knox College*, 34 Ill. 195; *Smith v. Chicago etc. R. R. Co.*, 67 Ill. 191; *Chicago etc. R. R. Co. v. Smith*, 78 Ill. 96; *Chicago etc. Ry. Co. v. <sup>144</sup> Vaughn*, 206 Ill. 234, 69 N. E. 113; *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377.

It is next said that a purchaser of land over which a railroad has previously been constructed cannot recover damages for depreciation in the value of the property on account of the construction of the railroad because such damages accrued to the former owner, and it is to be presumed that the purchaser made allowance for the amount of the depreciation in the price paid for the land. It is then argued that in acquiring the title the appellee is presumed to have bought the land with the disadvantage of the railroad upon it, and to have paid a decreased price on account of it, and cannot therefore be permitted to recover the part of the land occupied by the railroad for the existence of which he has already been compensated in the purchase price for the land. The argument is not applicable in this case. The controversy here is in regard to the title to the land. Whether appellee paid much or little or anything for the land, or whether it has been damaged by the construction of the railroad, are questions which do not affect the issue. Appellee being the owner is entitled to the possession unless appellant has proved a defense, and it is not a defense to show that the appellant took possession of the premises before appellee acquired his title: *Postal Tel. Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722. In fact, however, it does not appear that the appellee is a subsequent purchaser. For all that appears he was the owner of the premises, subject to the dower right of Edna Knight, when the railroad company entered upon the land, in 1874.

It is finally contended that notice and demand of possession were necessary to entitle the appellee to maintain the action. Where possession of land has been acquired by the assent of the owner and has been long continued, the holding of possession may not be wrongful until demand of

possession has been made. A different rule, however, prevails where the entry was wrongful in its inception or has <sup>145</sup> become so afterward: *Holston v. Needles*, 115 Ill. 461, 5 N. E. 530; *Murphy v. Williamson*, 85 Ill. 149; *Harland v. Eastman*, 119 Ill. 22, 8 N. E. 810. Here there was no consent to the entry by the owner, no relation of landlord and tenant. The consent of the life tenant made the original entry lawful but did not extend the right of the licensee beyond her own estate. At her death the appellant's possession became unlawful, and there being no privity between appellant and appellee, no notice was required before suit could be brought for the possession. The cases of *Chicago etc. Ry. Co. v. Vaughn*, 206 Ill. 234, 69 N. E. 113, and *Chicago etc. R. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622, which have been cited by appellant do not hold that ejectment could not be maintained by the remaindermen in such case after the death of the life tenant.

The judgment was for the possession of the whole sixty acres, while the stipulation shows that appellant was in possession only of a strip of fifty feet wide, used for its right of way. The appellee concedes the error and offers to remit the excess of his recovery. The judgment will therefore be reversed and the cause remanded, with directions to enter judgment in favor of the appellee for the recovery in fee of the strip of land occupied by the appellant as a right of way for its railroad. The appellant ought not, however, to be required summarily to surrender the possession of a portion of its right of way and thus stop the operation of its railroad. The circuit court is therefore directed, upon entering judgment, to stay the execution thereof for thirty days, to enable the appellant to agree with appellee upon the compensation to be paid for the property, or to institute a condemnation proceeding for the purpose of ascertaining such compensation. The costs of this court will be taxed against the appellee.

Reversed and remanded, with directions.

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*Estates and Properties for Which Ejectment will lie are considered in the note to Butler v. Frontier Telephone Co., 116 Am. St. Rep. 568.*



## KEITHLEY v. STEVENS.

[238 Ill. 199, 87 N. E. 375.]

**TO AN ACTION for Malicious Abuse of Legal Process Two Elements are Necessary:** The existence of an ulterior purpose, and an act in the use of the process not proper in the regular prosecution of the proceeding. (p. 120.)

**ATTORNEYS—Damages for Disbarment Through Conspiracy.** A judgment disbarring an attorney is an adjudication that material charges in the information against him were established by truthful evidence, and so long as it stands he cannot recover for an alleged conspiracy to bring about the entry of the judgment. (p. 122.)

Arthur Keithley, pro se.

John S. Stevens, Joseph A. Weil and Francis H. Tichenor, pro se.

**199** SCOTT, J. This is an appeal by Arthur Keithley from a judgment of the appellate court for the second district affirming a judgment of the circuit court of Peoria county for costs **200** rendered against him in favor of John S. Stevens, Joseph A. Weil, Francis H. Tichenor, Eugene F. Baldwin, William E. Hull and the Peoria Star Company, a corporation, the appellees, in an action on the case instituted by Keithley against the appellees to recover damages for certain acts alleged to have been done by them in and about the prosecution of a suit for his disbarment as an attorney at law.

The declaration as amended, consisting of three counts, alleges, in substance, that at the time of the commission of the grievances thereafter complained of the appellant was a regularly licensed attorney in the state of Illinois, and that he then had a large and lucrative practice; that on October 1, 1905, there was pending in the circuit court of Peoria county a number of civil suits brought by the appellant against the said Peoria Star Company, Eugene F. Baldwin and William E. Hull to recover damages for libel of the appellant in his said professional capacity, and that there was also pending in said court an indictment against each of the said three defendants in said civil suits; that for the purpose of preventing appellant from recovering more than nominal damages in said civil suits, and to prevent a conviction upon said indictments and to punish appellant and to extort money from him, the appellees formed a conspiracy to procure the disbarment of appellant; that in pursuance of said conspiracy, and to accomplish the object thereof, the

appellees committed and were guilty of barratry, maintenance, bribery, subornation of perjury and perjury; that in collusion with the state's attorney of said county they prepared and filed in the supreme court of this state a petition for the disbarment of appellant, and that to accomplish the disbarment appellees provided a large corruption fund, a part of which was paid to the state's attorney and a part to witnesses; that a part of this money was paid to the commissioner before whom the evidence in said disbarment proceeding was taken, and other methods, improper in character, were used to influence him to make a report <sup>201</sup> unfavorable to appellant, and that he did make a report adverse to appellant; that appellees paid costs of the proceeding and hired witnesses to testify against appellant; that these witnesses testified falsely, and that pursuant to the said report a judgment was entered in the said supreme court striking the name of appellant from the roll of attorneys for the state of Illinois, by means of which several premises the appellant was greatly damaged, etc. It is not averred that the commissioner was paid any amount in excess of his proper charges or that his report was not warranted by the evidence introduced.

Appellees interposed demurrers, which upon a hearing were sustained, and appellant elected to abide his declaration. It is contended by him that the circuit court erred in sustaining the demurrers.

The appellant regards his declaration as one seeking damages for an abuse of the process of this court in the disbarment proceeding against him, resulting from a conspiracy among appellees. The suit to disbar was civil in its character and the process was a rule against the respondent to show cause.

In *Bonney v. King*, 201 Ill. 47, 66 N. E. 377, we said: "Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and second, an act in the use of the process not proper in the regular prosecution of the proceeding: 19 Am. & Eng. Ency. of Law, 2d ed., 630, 631. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process. The declaration does not aver <sup>202</sup> either that the plaintiff was arrested or his property seized. The mere institution of civil suits does not constitute a malicious abuse of process. That action lies for the improper use of process after it has been issued—not for maliciously causing

process to be issued." The declaration fails to contain a single averment indicating that process was used for any purpose except the purpose for which the law intended it should be used. So far as other causes of action suggested by the declaration are concerned, it is not charged that the alleged conspirators did or attempted to do anything that could have resulted in damage to the appellant had a judgment striking his name from the roll of attorneys of this court not been entered. It clearly appears from the declaration that the thing which occasioned the damage was the disbarment. Appellant's pleading states that the judgment of disbarment was entered, and there is no averment but that it is still in full force and effect. That judgment is an adjudication that material testimony offered against appellant in the proceeding to disbar was true, and that material charges in the information against him were established by truthful evidence. The judgment imports verity, and so long as it stands appellant cannot be permitted to recover for the alleged conspiracy, the purpose of which, according to his charge, was to bring about the entry of that judgment: *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625; *Lyford v. Demeritt*, 32 N. H. 234. To permit him to try an issue of fact raised by pleas to his declaration in the suit at bar would be to allow him to relitigate the question already determined against him in the earlier suit. He cannot recover financial losses occasioned by the entry of a just judgment against him.

The judgment of the appellate court will be affirmed.

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*Grounds for Disbarment of Attorney* and proceedings therefor are considered in the notes to *State v. Kirke*, 95 Am. Dec. 333; *Matter of Philbrook*, 45 Am. St. Rep. 71; *Matter of Thresher*, 114 Am. St. Rep. 839.

*Actions for the Malicious Prosecution* of legal proceedings are considered in the notes to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454; *Ross v. Hixon*, 26 Am. St. Rep. 127.

## SMITH v. ROATH.

[238 Ill. 247, 87 N. E. 414.]

**EASEMENTS BY PRESCRIPTION—Maintenance of Gates.—**

The fact that a private passageway was for a number of years closed at both ends by gates does not negative a claim of easement by prescription if they did not interfere with the use of the passageway for the purpose for which it was intended. (p. 126.)

**EASEMENTS BY PRESCRIPTION—Merger of Estates.—**

In order to have the unity of title of the dominant and servient estates work an extinguishment of an easement by prescription existing between them, the ownership of both must be coextensive; where the owner of an undivided one-third of the servient estate obtains full title to the dominant estate this does not extinguish the easement. (p. 126.)

**PARTITION—Fees of Solicitor as Costs.—**

When there is a substantial contest in partition proceedings over an easement to which the defendant is entitled, the solicitor's fees of the complainant should not be charged as costs. (p. 128.)

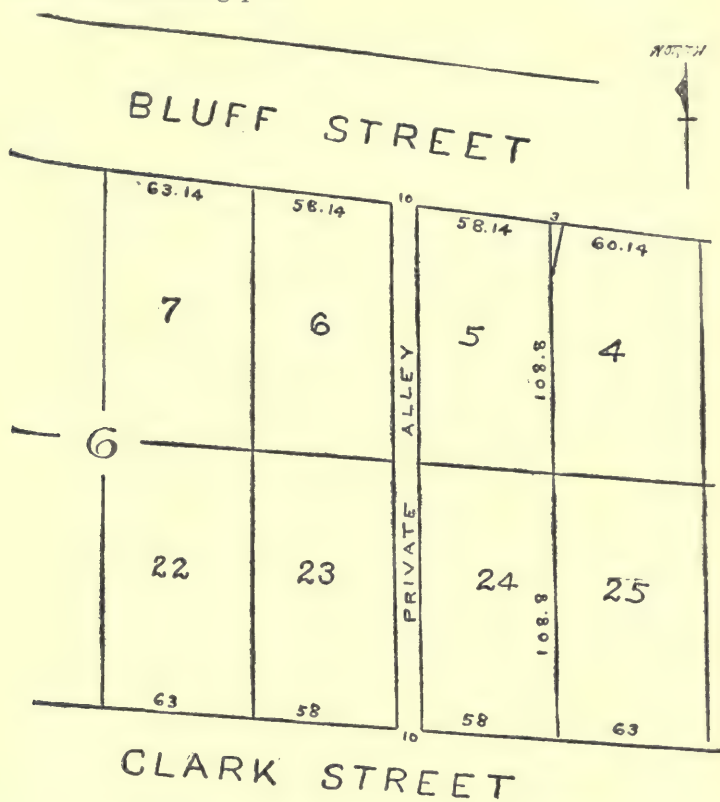
Peter M. McArthur and Butters, Armstrong & Ferguson, for the appellant.

Elmer E. Roberts and McDougall & Chapman, for the appellee.

<sup>247</sup> CARTER, J. May 20, 1907, a bill was filed in the circuit court of La Salle county by defendant in error and her husband for the partition of lot 5 in block 6, in Clark & Underhill's addition to Marseilles, Illinois. Byron A. Roath answered, admitting the substantial facts set forth in the bill, except that he claimed that five feet on the west side of said lot 5 was set apart as a portion of an alley between lots 5 and 6 in said block, and had been used as an alley for more than forty years with the knowledge and consent of all the parties to this litigation. The answer further alleges that said Byron A. Roath is the owner in fee simple of lots 6, 23 and 24 in said block 6, and that without the use of said five feet on the west side of lot 5 the use and occupation of lots 6, 23 and 24 would be seriously impaired, because the access  
<sup>248</sup> to the out-buildings on said lots would be entirely cut off.



The relative situation of the lots and the alley may be seen from the following plat:



The cause was referred to a master to take proof, and he reported, among other things, that there was an alleyway running from Clark to Bluff street, as set forth in said answer, which had been in open and continuous use of the persons occupying the buildings upon said lots for more than forty years, and was a necessary and valuable means of access to said buildings; that said boundary line as to said <sup>249</sup> alleyway on lot 5 had been well known to all the parties since Hannah A. Roath's death; that said defendant in error, Lucina A. Smith, had known of its existence for upward of forty years, and that said lots were subject to the burden and servitude of said alley. The circuit court sustained objections to the finding of the master as to this ease-

ment, but in all other respects approved the master's report and entered a decree of partition.

The commissioners appraised the value of the property at fifteen hundred dollars, and reported that it was not susceptible of division, and recommended a sale. This report was approved and the court ordered the property sold by the master. On June 4, 1908, after duly advertising in accordance with the requirements, the master sold the property to said defendant in error, Lucina A. Smith, for fifteen hundred and seventy-five dollars, she being the highest bidder. Thereafter, upon petition filed by the solicitors for defendant in error, the chancellor allowed one hundred dollars as complainant's solicitor's fees, to be taxed as costs. Plaintiff in error entered a motion to vacate the order taxing solicitor's fees and prayed an appeal, which was not perfected. Thereupon a decree of distribution was entered, the balance, after paying costs, fees and expenses, being divided, approximately two-thirds to Byron A. Roath and approximately one-third to Lucina A. Smith. A writ of error has been sued out to review the findings of the circuit court.

The main contention in this cause is as to whether a passage or alleyway existed across the west five feet of said lot 5 by prescription. Plaintiff in error, Roath, contends, <sup>250</sup> and so testified, that the four lots in question were purchased with money sent home by him from the army in 1865; that in the winter of 1865 and 1866, on his return home, he built on lot 23 and his father built on lot 5; that at that time he, plaintiff in error, owned all four lots, and that they agreed between them that there should be a private alley, composed of five feet from the west side of lots 5 and 24 and five feet from the east side of lots 6 and 23, and that the coal-houses, barns, etc., should be so placed as not to obstruct said ten-foot alleyway; that there was a fence built on said lot 5, five feet east of the west line, in the latter part of 1866, which is there yet; that trees came up and were allowed to grow along the line of that fence, and that some of them have now been there over twenty years; that said alley has been a private passageway forty-three years, and that coal-houses and barns were so built as not to obstruct it. No record evidence was offered showing that Byron A. Roath had even held title to lots 5 and 24 in 1865 or 1866, but the deed was introduced showing that he obtained title to lots 6 and 23 November 6, 1865, and it appears that he has owned them ever since. The deeds offered in evidence also show that in February, 1872,

R. M. Roath, the father of Byron A. Roath, deeded, through Lewis H. Harris, said lots 5 and 24 to his wife, Hannah A. Roath, and that the title remained in her name until her death; that the heirs of said Hannah A. Roath, to wit, Byron A. Roath, Eva R. Roath and Lucina A. Smith, on March 9, 1874, quitclaimed said lot 5 to William H. Wilson, and that Wilson and wife reconveyed said property to said heirs on May 27, 1874; that the title remained in said three children up to January 24, 1894, when Eva Roath Hay, one of them, with her husband, conveyed to said Byron A. Roath an undivided one-third interest in said lot 5. The evidence shows that in the spring of 1874 William H. Wilson and his wife, having bought said lot 24, built a house on it, in which they lived for many years; that at <sup>251</sup> the time they purchased said lot there was a fence five feet east of the west line of said lot 5, as heretofore set out, and that it has remained there ever since that date.

There is evidence tending to show that this private passageway or alley between Bluff and Clark streets, during a portion of the past forty years, had gates at both ends, but the gate has been removed next to Clark street for eighteen years or more. The evidence is not very definite as to how long these gates existed, but it is very evident from all the testimony that they did not in any way interfere with the free access to this passageway for the delivery of coal and groceries, and for any other use to which it might be properly put by the residents of said four lots. The evidence is also very clear that defendant in error, Lucina A. Smith, had lived in Marseilles within a short distance of this property during all of these years and never objected to such use of this passageway. It will be presumed from this record that the use of this passageway or alley was so open and notorious that she had knowledge of the claim of right by the parties residing on said lot to such use: Jones on Easements, sec. 266. Under the circumstances shown in this record, the fact that this private passageway was closed at both ends by gates does not in any way negative the claim of an easement by prescription, as the gates never interfered with the use of the passageway for the purposes for which it was intended: *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Truax v. Gregory*, 196 Ill. 83, 63 N. E. 674. Indeed, the only serious question raised on this record as to the right to use the passageway across said west five feet of lot 5 is whether such use in the past by plaintiff in error, Byron A. Roath, was an adverse user, he being since 1874 a tenant in

common as to said lot 5. Manifestly, from the evidence, when lot 24 was sold by plaintiff in error, Byron A. Roath, and his two sisters, Lucina A. Smith and Eva R. Hay, in 1874, to Wilson the existence of this passageway, made during the unity of seisin by the original owners, was so apparent<sup>252</sup> and so necessary to the reasonable enjoyment of lots 5 and 24 that upon the severance of title of said two lots each of said lots would pass subject to the burdens and advantages imposed or conferred by said easement: *Powers v. Heffernan*, 233 Ill. 597, 122 Am. St. Rep. 99, 84 N. E. 661, 16 L. R. A., N. S., 523, and cases there cited.

There can be no question that had the title to said lot 24 remained in the Wilsons up to the present time they would have a prescriptive right to a passageway or private alley across said west five feet of lot 5. Wilson having died, his wife, Ella S. Wilson, deeded said lot 24 to Byron A. Roath on June 21, 1900. No question is raised as to this deed conveying good title as to said lot 24, but counsel for defendant in error argue that this was such a merger of title in Byron A. Roath of said lots 24, and 5 that the easement that existed in favor of said lot 24 across said lot 5 was extinguished. The law is settled that where there is a unity of absolute title to and possession of the dominant and servient estates in the same person, it operates to extinguish such easement absolutely and forever, for the reason that no man can have an easement in his own land; but it is also true that in order to have the unity of title of the dominant and servient estates work an extinguishment of an easement existing between them, the ownership of both must be coextensive: Washburn on Easements and Servitudes, 4th ed., \*518.

In *Reed v. West*, 82 Mass. 283, that court had before it the precise question here under discussion. One Bliss obtained full title of the dominant estate and at the same time was the owner of an undivided one-third of the servient estate. The court said (page 284): "It is contended that this ownership created such a unity of title as to extinguish the right of way. The subsequent deeds, and user under them, would be a sufficient answer to this position. But it is further to be considered that a unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate in land a qua and in the land in qua,<sup>253</sup> equal in duration, quality and all other circumstances of right: *The King v. Hermitage*, Carth. 241; *Viner's Abridgment*, 'Extinguishment,' C; *Thomas v. Thomas*, 2 Crompt.



M. & R. 34, and 5 Tyrw. 804; *Ritger v. Parker*, 8 Cush. 145, 54 Am. Dec. 744. The title of Bliss to one undivided third part of the defendant's close as tenant in common did not constitute such a unity, for it did not authorize him to set apart any portion of the close for a private way for himself as if he had been sole owner, but his use of the way during the time of his tenancy in common must have been adverse to his cotenants." This same doctrine was laid down by that court in *Atlanta Mills v. Mason*, 120 Mass. 244, and has been referred to with approval in 14 Cyc. 1154, and 22 Am. & Eng. Ency. of Law, 2d ed., 1206. The following authorities also tend to uphold the rule of law laid down in that case: *Dority v. Dunning*, 78 Me. 381, 6 Atl. 6; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Washburn on Easements and Servitudes*, 4th ed., \*518; *Jones on Easements*, sec. 168.

In this connection our attention has been called to *Crippen v. Morss*, 49 N. Y. 63, and *Pfeiffer v. University of California*, 74 Cal. 156, 15 Pac. 622, where it is contended a contrary rule is laid down. While there are some expressions in those opinions that tend to uphold such contention, we are of the opinion that those cases discussed facts so very different from those here, that those decisions do not necessarily conflict with the rule of law laid down in *Reed v. West*, 82 Mass. 283. Be that as it may, the weight of authority, as well as the sounder reasoning, supports the rule laid down in the *Reed* case.

It must, therefore, be held that the purchase of lot 24 by the plaintiff in error, *Byron A. Roath*, in 1900, did not bring such a unity of title in him, as to lots 5 and 24, as to extinguish the easement in favor of said lot 24 in said five-foot strip for an alleyway over said lot 5. The circuit court erred in overruling the master's finding in this regard.

<sup>254</sup> From our conclusion on the question of easement it necessarily follows that the circuit court was in error in charging a portion of the solicitor's fees in said partition proceedings as costs, to be divided in proportion to the interests. There was a substantial contest over this easement, and under the reasoning of this court in *McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041, and *Jones v. Young*, 228 Ill. 374, 81 N. E. 1042, plaintiff in error, *Byron A. Roath*, should not be compelled to pay a part of defendant in error, *Lucina A. Smith's*, solicitor's fees.

For the reasons indicated the findings of the circuit court are reversed and the cause remanded, with directions to enter a decree in accordance with the views herein set forth.

*To Establish a Right of Way by Prescription* the use ordinarily must be adverse, uninterrupted, exclusive, continuous, and under claim of right: *Schmidt v. Brown*, 226 Ill. 590, 117 Am. St. Rep. 261; *Graham v. Walker*, 78 Conn. 130, 112 Am. St. Rep. 93; *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

*A Right of Way is Extinguished* upon a unity of title to the dominant and servient estate in one owner: *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449; *Lebus v. Boston*, 107 Ky. 98, 92 Am. St. Rep. 333. This rule, however, is not without its exceptions: *Zell v. Universalist Society*, 119 Pa. 390, 4 Am. St. Rep. 654; *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408. It is said that to extinguish an easement by unity of title and possession in the same person, he must have an estate in fee in both tenements: *Ritger v. Parker*, 8 Cush. 145, 54 Am. Dec. 744.

## STRAFFORD v. REPUBLIC IRON COMPANY.

[238 Ill. 371, 87 N. E. 358.]

### CHILD LABOR STATUTE—Purposes and Interpretation.—

One of the purposes of a statute forbidding the employment of children is to protect them from their own immaturity, inexperience and heedlessness; and such construction should be given it as will effectuate its purpose if this can be done without violating the letter of the act. (p. 131.)

**CHILD LABOR STATUTE—Notice of Age.**—An Employer must know at his peril that children employed by him are of an age that he may lawfully employ them. (p. 132.)

**CHILD LABOR STATUTE.—One Who Employs a Child in Willful Violation** of a statute forbidding the employment of children cannot escape responsibility for injuries to the child by showing that he left the work given him to perform and negligently undertook to do something else which resulted in the injury. (p. 133.)

**CHILD LABOR STATUTE.—A Liability for Damages** resulting from the violation of a statute forbidding the employment of children is created whether the act expressly so declares or not. (p. 134.)

Richard Jones, Jr., William A. Meese and Peek & Dietz, for the appellant.

W. R. Moore, for the appellee.

**373 FARMER, J.** This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court in favor of appellee for ten thousand dollars for personal injuries. Appellee is a minor, and was employed by appellant to work in its steel mill or manufacturing establishment about the middle of May, 1906. On the twenty-fifth day of October, 1906, while feeding angle-irons into the "straightening machine," he received injuries that resulted in the loss of his left arm and one finger of the right hand. At the time of said injury appellee was thirteen years, eleven months and

eight days old. The first two counts of the declaration are based on section 1 of the act of 1897 (Hurd's Stats. 1908, p. 1038), which provides "that no child under the age of fourteen years shall be employed, permitted or suffered to work for wages at any gainful occupation hereinafter mentioned." The occupations thereafter mentioned in the act embrace manufacturing establishments, factories and workshops. The third count is based on section 6 of said act, which provides that "no child under the age of sixteen years shall be employed, or permitted or suffered to work by any person, firm or corporation in this state at such extrahazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved." Each count of the declaration charged that the employment of appellee by appellant was unlawful and was the proximate cause of his injuries. Appellant pleaded the general issue, and a trial by jury resulted in a verdict in favor of appellee for ten thousand dollars, upon which the circuit court, after overruling a motion for a new trial, rendered judgment, and the appellate court for the second district has affirmed that judgment.

It was a controverted question of fact on the trial whether appellee was set at the work he was performing when injured, by appellant's foreman, or whether he had been set to do other work which he quit without orders to <sup>374</sup> do so, and, without any directions from the foreman but against his orders, began the work of feeding angle-irons into the machine, which he was engaged in doing when injured. The proof offered by appellee tended to show he was set at the work he was engaged at when injured by the foreman, while the proof offered by appellant tended to show he was set at other work and ordered not to work at the straightening machine. Appellant's contention is that it was incumbent upon appellee to prove his injury was the direct and proximate result of the unlawful employment, and that if he had of his own accord left the work he was employed for and directed to do and attempted to do a different character of work which he was forbidden to do, and was injured while so engaged, and his own negligence contributed to the injury, then there can be no recovery.

The second instruction given on motion of appellee is as follows: "The jury are instructed that in this case the law is that no child under the age of fourteen years shall be employed, permitted or suffered to work at any gainful occupation in any mercantile institution, store, office, laundry,

manufacturing establishment, factory or workshop within this state; and in this case it does not make any difference whether the plaintiff was or was not told by the foreman to work on the straightening machine, if you believe, from the evidence, the plaintiff was under the age of fourteen years at the time he was injured and was at that time working for defendant in its manufacturing establishment for a compensation to him to be paid by defendant."

The court refused instructions asked by appellant to the effect that it was incumbent upon appellee to prove that he was in the exercise of due care, and that he could not recover if at the time of the accident he was doing work he was not authorized to perform or which he had been forbidden to do. The correctness of the court's ruling in giving appellee's instruction No. 2 and refusing those asked by <sup>375</sup> the appellant are the only questions presented for our consideration.

In *American Car & F. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, it was held that one of the purposes of the statute was to protect children from their own immaturity, inexperience and heedlessness, and that where a child under fourteen years of age employed in violation of the statute was injured while engaged in the performance of the work he was directed to do, the negligence of the child, though it may have contributed to the injury, was no defense to the liability of the employer. In that case the child was injured while engaged in doing the work it was directed to do by the employer. After stating the rule announced in the opinion that contributory negligence was not a defense where the injury resulted while the child was performing the work he was directed to do, the court said: "If the child left the task which he had been directed to perform, and, while not engaged in doing work which he had been directed to do by his master, was injured through an accident to which his own negligence contributed while he was still in or upon the premises of the master, a different question would present itself." This language, appellant insists, indicates the view of the court was, that in such cases contributory negligence would constitute a defense. We do not think it means any more than it said—i. e., that the court had no such question as that before it for consideration—and is not to be accepted as an expression of the court's view of the law if such question had been presented. The statute in express and positive language forbade the employment of appellee in the business appellant was engaged in, in any capacity, and in the *Armentraut* case it was



said such construction should be given the act as to effectuate its purpose, if it can be done without violence to the letter of the statute. The validity of such statutes has been sustained as an exercise of the police power of the state upon the ground that the state is interested in the protection of children, and <sup>376</sup> to that end may pass laws preventing their employment at a tender age, when they should be in school, in occupations that expose them to danger of being crippled and maimed for life, and thereby rendered less capable of taking care of themselves and discharging the duties of citizenship on arriving at maturity. The wisdom and humanity of the statute cannot be questioned, and in the Armentraut case we held that an employer must know, at his peril, that children employed by him are of an age that he may lawfully employ them. It is a matter of common knowledge and experience that boys under fourteen years of age are less cautious and careful than persons of more mature age, and cannot be expected to observe and follow directions and instructions given for their protection, like older persons. This lack of appreciation of danger and regard for authority are matters which, no doubt, had an influence on the legislature in the adoption of so sweeping an act. There may be, and doubtless are, positions in the industries in which children under fourteen years of age are forbidden by the statute to be employed, where there would be little or no hazard to life or limb if the child confined himself exclusively to the duties of such position; but the childish inclination to experiment and do something he has seen others do is so well known as to make it dangerous to permit his employment in establishments, especially where machinery is used, and the legislature has therefore seen fit to prohibit his employment in any capacity in such establishments; and we are of opinion that to hold that a child who is employed in violation of the statute and directed to perform a certain line of work, but who temporarily abandons it and attempts to do something else in the master's business, whereby he is injured, is precluded from recovering if his negligence contributed to his injury, would seriously affect the purposes sought to be accomplished by the statute. Nor, in such case, can it reasonably be said that there is no causal connection between the employment and the injury.

<sup>377</sup> Appellant, assuming the fact to be as contended by it, that appellee had of his own accord left the work he was employed and directed to do and engaged in work he was forbidden to perform when injured, argues that there is no more reason for saying his injury resulted from his employ-

ment than there would be if he had, while in appellant's employment, been struck by lightning. It is true, liability does not depend alone upon the employment, but the injury must be a consequence of such employment. The mere fact that a child employed in violation of law receives an injury in no-wise resulting from the employment would not create a liability. But such is not the case here. The vital and distinguishing fact here is that appellee was employed by appellant to labor in its manufacturing establishment, and while engaged in performing services for it in said establishment he was injured. He was in appellant's plant by virtue of his employment to work for it, and the fact that he may have temporarily abandoned the work he was employed and directed to do and engaged in a forbidden line we think does not destroy the causal relation between the employment and the injury, and if it does not, contributory negligence of appellee would constitute no defense, and the court did not err in refusing to submit that question to the jury. It is imposing no harsh burden on appellant to hold that having unlawfully employed the appellee to labor in its plant, it is liable to him for any injury received by him resulting from the performance of services for it, whether those services were in the line he was directed to perform or not. The law forbids, and was enacted for the purpose of preventing, the employment of children in any capacity in such establishments as appellant's and it is contrary to the spirit of the law to say that the consequences of its willful violation may be avoided by showing that the child left the work given it to perform and negligently undertook to do something else, which resulted in the injury. If appellant thought it had set appellee to perform work he could <sup>378</sup> safely perform and had forbidden him to perform other work thought to be dangerous to him, it was bound, at its peril, to see to it that appellee did not attempt to engage in a forbidden line. Appellant was bound to know that on account of appellee's tender years he was not capable of a proper appreciation of danger, and was also bound to know that on account of his immaturity he was incapable of a proper comprehension of the necessity for obedience to orders of those in authority, and, under such circumstances, if it chose to violate the law by employing him, it assumed the burden of protecting him against his own negligence while engaged in such employment. The fact that the statute under consideration does not in express terms provide a liability in damages for its violation, as is done by certain statutes relating to mines and miners, can make no difference

under the construction given the statute in *American Car & F. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766. The statute was enacted for the protection of the health and safety of children, and a liability for damages resulting from its violation is created whether it is expressly so declared in the statute or not.

Appellant cites cases from other jurisdictions which tend to support its contention that the court should have submitted the question of appellee's contributory negligence to the jury, notably *Evans v. American Iron etc. Co.*, 42 Fed. 519, which squarely decides the question as contended for by the appellant. The reasoning of other cases cited, while not so precisely in point, tends to support that view. Some of them are in conflict with our decision in the *Armentraut* case (214 Ill. 509, 73 N. E. 766), and the reasoning in none of them appeals to us with such force as that we would feel justified in following them.

*Ornamental Iron etc. Co. v. Green*, 108 Tenn. 161, 65 S. W. 399, we think in point in support of our view. The code of Tennessee prohibited the employment of any child under twelve years of age in any workshop, <sup>379</sup> mill, factory or mine, and provided a penalty for its violation. A boy under the prohibited age, employed by the iron and wire company, was injured by some panels of iron fence which had been stacked up, falling upon him. The contention of the plaintiff was that he was passing the stack of iron fence on his way to deliver a message to another employé of defendant, under the directions of his superior, when he accidentally stumbled against the panels of fence and the pile toppled over on him. The defendant's contention was that the plaintiff went to the place where he was hurt without orders and not on any matters connected with his employment, and was playing with the stack of fence panels when he lost his balance, fell backward and drew them down upon him. On the trial the defendant requested the court to instruct the jury that if the injury occurred to plaintiff while not engaged in and about any work for defendant, but while playing with the panels of fence, he could not recover. The court held that this request was properly denied, and that, even upon defendant's theory, it was liable, for the reason that the employment was a violation of the statute, and that every injury resulting from such employment is actionable. The court said: "In the case presented by the plaintiff below, as well as in that adduced by the defendant company, the connection between the employment and the injury is that of cause and effect and brings the com-

plaint within the operation of the statute." Appellant has endeavored to explain this case as not being in conflict with its position, but we do not so understand it. Instruction No. 2 given at the request of appellee did not take from the jury the question whether his injury was the result of his employment by appellant, but instructed them that whether appellee was or was not told by appellant's foreman to work on the straightening machine could make no difference as to the liability, if the evidence showed that he was under fourteen years of age and was at the time of <sup>380</sup> his injury working for appellant in its manufacturing establishment for compensation to be paid him by appellant.

We are of opinion there was no error committed by the court in giving and refusing instructions, and the judgment of the appellate court is affirmed.

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*A Boy, Employed in Violation of a Statute fixing the age limit under which boys shall not be employed in a certain business, is not chargeable with contributory negligence, or with having assumed the risks of employment in such business: Lenahan v. Pittston Coal Min. Co., 218 Pa. 311, 120 Am. St. Rep. 885. For other authorities bearing upon this question, see Whelan v. Washington Lumber Co., 41 Wash. 153, 111 Am. St. Rep. 1006; Perry v. Tozer, 90 Minn. 431, 101 Am. St. Rep. 416; note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 891.*

*The Employer of a Minor is Charged with Notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to the employer: Bare v. Crane Creek Coal etc. Co., 61 W. Va. 28, 123 Am. St. Rep. 966.*

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## FROHMAN v. FERRIS.

[238 Ill. 430, 87 N. E. 327.]

**COPYRIGHT.**—At the Common Law the Author of a Literary Composition has an absolute property right in his production, of which he cannot be deprived so long as it remains unpublished, and he cannot be compelled to publish it. (p. 137.)

**COPYRIGHT.**—Upon the Publication of a Literary Production the author's common-law rights cease and it becomes public property unless protected by statute. (p. 138.)

**COPYRIGHT.**—Public Performance of Drama in Manuscript.—There is no provision in our copyright statute for securing to the author of a drama the exclusive right to perform it except when it is printed in a book, but the common law applies in such cases, and the author does not lose his rights in the manuscript production by a public performance thereof. (p. 138.)

**COPYRIGHT.**—Performance of Manuscript Drama in England. The exclusive right in the United States of the author of a drama in manuscript, or of his assignee is not extinguished by its public performance in England, which in that country is equivalent to publication. (p. 139.)



Mayer, Meyer & Austrian, for the appellants.

Aldrich & McRoberts and L. E. Chipman, for the appellee.

<sup>431</sup> FARMER, J. This is an appeal from a judgment of the appellate court reversing a decree of the superior court in a proceeding begun in the circuit court by plaintiffs in error for an injunction and other relief against defendant in error.

There is no controversy as to the facts. In 1894 Charles Haddon Chambers and B. C. Stephenson, dramatic authors and playwrights, citizens and residents of London, England, created and invented a dramatic composition entitled "The Fatal Card." Said composition was original with said Chambers and Stephenson, possessed considerable literary merit, and was of substantial value to the authors as a literary product. It was a melodrama in five acts, written in manuscript form and was never printed. It was with the consent of the authors publicly performed at the Adelphi Theater, London, England, September 6, 1894, by A. and S. Gatti, theatrical managers, who had acquired an interest from the authors in the royalties to be derived from a performance of the play. Plaintiff in error Charles Frohman is a citizen of the United States, and on March 25, 1895, purchased all the right, title and interest of Stephenson in said melodrama, with the exclusive right to produce and perform it in the United States of America and Canada. The play was never copyrighted in the United States. <sup>432</sup> It was publicly produced under the supervision of Frohman in cities of the United States and Canada and appears to have met with popular favor and to have been a success financially. Afterward, George E. MacFarlane adapted the composition of Chambers and Stephenson, called it by the same name, "The Fatal Card," and transferred it to defendant in error, who caused it to be copyrighted in the United States, and thereafter produced and performed it in various cities of the United States until enjoined from so doing under the bill filed in this case. It is not denied that the master's conclusion that the MacFarlane play "is substantially identical with the play claimed by the complainants" was justified by the evidence.

The bill alleged that at the time Ferris obtained from MacFarlane the pirated copy of "The Fatal Card" he had full knowledge of complainants' rights; that he deceived the public by inducing them to believe that the play produced was the play of said Charles Frohman and his associates; that he made large profits by the production of said play, to the injury of the complainants, and the bill prayed for an accounting and

that the further production of the play by defendant in error be enjoined. After answer and replication filed the case was referred to a master in chancery to take the testimony and report his conclusions of law and fact. The master reported that in his opinion complainants failed to establish an exclusive right to produce the play in the United States and that the prayer of their bill should be denied and the bill dismissed. Objections to this report filed by the complainants were overruled by the master, and the cause was heard by the chancellor on the report of the master and exceptions filed thereto by complainants. A decree was entered disapproving the master's report and finding that complainants had the exclusive right in the United States to represent and perform, and to allow others to represent and perform, and said melodrama, "The Fatal Card," and to otherwise use and enjoy the same, <sup>433</sup> and it was ordered that the temporary injunction theretofore issued be made perpetual, and that the defendant Ferris account to the complainants for the profits and royalties received by him through the production of the play. From this decree the defendant prosecuted an appeal to the appellate court for the first district, and that court reversed the decree of the superior court and remanded the case, with directions to dismiss the bill. Complainants in said bill have sued out a writ of error from this court to review the judgment of the appellate court.

<sup>435</sup> Plaintiffs in error base their exclusive title and right to perform said play upon what they contend to be their rights under the common law. Defendant in error contends that the public performance of the play in England with the consent of its authors, without causing it to be copyrighted in this country, was, so far as this country is concerned, such an act of dedication to the public as to extinguish the common-law rights of the authors or their assignees in the United States.

At common law the author of a literary composition had an absolute property right in his production which he <sup>436</sup> could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc., and the author may permit the use of his productions by one or more persons to the exclusion of all others, and may give a copy of his manuscript to another person without parting with his property in it: Drone on Copyright, p. 101 et seq. "So, also, without forfeiting his rights he may communicate his work to the general public, when such communication does not amount to a pub-

lication within the meaning of the statute. . . . It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred": Drone on Copyright, 104. Upon the publication of the production the author's common-law rights ceased, and it became public property unless protected by statute.

To protect the rights of authors in their productions after publication, statutes in various countries have been enacted. Prior to 1891 an alien could not, under the copyright statutes in the United States, obtain a copyright upon his production, and the publication by an author in a foreign country by printing his production was held to have the effect of destroying his common-law rights in his production in this country and it became public property here. In March, 1891, Congress passed an act which extended to citizens of foreign countries the privilege of copyright in this country when such foreign countries granted the same privilege to citizens of the United States, and the statute provided that the existence of the conditions that authorized citizens of foreign countries to avail themselves of the privileges of copyright in this country "shall be determined by the President of the United States by proclamation made from time to time, as the purposes of this act may require." On July 1, 1891, the President of the United States by proclamation announced that the laws of Great Britain and the British possessions permitted citizens of the United <sup>437</sup> States the benefit of copyright on substantially the same basis as citizens of those countries, and the act of Congress therefore became effective and its benefits available to citizens of Great Britain and the British possessions. Section 4956 of our copyright statute provides that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article . . . for which he desires a copyright, nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book or other article." Even after the taking effect of the act of 1891 an English author could not, after publication of his production in England, secure a copyright in this country, but in order to avail himself of that privilege it became necessary that simultaneously with his publication and securing a copyright in

England he also comply with the copyright statutes in this country. A publication of his production without such compliance with our statutes prevented him from afterward securing the benefits of our copyright statutes and rendered the publication public property in this country. There is no provision in our statute for securing to the author of a drama the exclusive right to perform it except where the drama is printed in a book, but the common-law rights apply in such cases, and the author does not lose his rights in the production by public representation: *Drone on Copyright*, p. 119.

By the English statute 3 and 4 William IV, chapter 15, which was amendatory of an act passed in the thirty-fourth year of the reign of his late majesty King George III, it was provided: "And whereas it is expedient to extend the provisions of the said act, be it therefore enacted by the <sup>438</sup> king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey and Guernsey, or in any part of the British dominions, any such production, as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall from the time of passing this act or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same, and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof." This act was amended



by the act 5 and 6 Victoria, chapter 45, passed in 1842, which was a comprehensive enactment covering the subject of copyright in England, one provision of which, relating to dramatic pieces and musical compositions, reads as follows: "Be it therefore enacted that the provisions of the <sup>439</sup> said act of his late majesty, and of this act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof, and his assigns, for the terms of this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."

The effect of these statutes was to substitute, after the first publication, for the common-law right of the author the statutory right to represent or perform his production for the period limited by the statute. The public performance of the play in England had the effect of divesting the authors of their common-law rights and investing them with the right conferred by the statutes. The act of 5 and 6 Victoria, above quoted, provides "that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book." Before the adoption of said act the public performance of a dramatic piece was not equivalent to the publication of a book, and as we have said, the common-law rights of the author were unaffected thereby. When the statutory conditions were complied with, the rights conferred thereby attached and the common-law rights ceased. Drone, in his work on Copyright, says (page 100): "Property in intellectual productions is recognized and protected in England and the United States both by the common law and by the <sup>440</sup> statute, but as the law is now expounded there are important differences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute, and the latter only in works which have not been so published. In the former case ownership is limited to a term of years; in the

latter it is perpetual. The two rights do not coexist in the same composition. When the statutory right begins the common-law right ends. Both may be defeated by publication."

It is not disputed that a performance of "The Fatal Card" in England was, by the statute referred to, a publication, and that in that country the author's common-law rights thereupon ceased. Defendant in error contends that when the authors of the drama surrendered their common-law rights in England for the rights conferred by the statutes they ceased to have any common-law rights in the production, in England or elsewhere. The plaintiffs in error contend that as under our laws the performance of the manuscript drama is not a publication of it and does not deprive the author of his common-law rights, and as our statute provides no means for copyrighting a drama unless it is printed and published in a book, our courts, in deciding what is such a publication as to divest the author of his common-law rights, are not to be governed by what the English statute declares shall constitute a publication thereof. It is not by virtue of any statute that it has been decided the publication of a book, either in this country or in England, is a surrender by the author of his common-law rights and a dedication to the public unless protected by copyright under the statute. The basis of such decisions is, that by causing the book to be printed without the protection of the copyright the author is deemed to have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; and this applies to books published in foreign countries as well as in this country. In the absence of the provision of the English <sup>441</sup> act referred to, that the first public representation or performance of a dramatic piece shall be deemed equivalent, in the construction of that act, to the first publication of a book, it could not be claimed that the performance of "The Fatal Card" in England was a publication, any more than would its performance in this country, while it remained unprinted, be deemed a publication. The object of copyright statutes is to protect the authors' rights to their own productions. There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas, and we have seen "The Fatal Card" could not have been copyrighted in this country without printing.

In *Drone on Copyright* the author says there are essential differences between the right to multiply and dispose of copies of an intellectual production and the right to represent a literary or musical composition, though both are often called

copyright. On page 553 the author says: "A dramatic composition is capable of two distinct public uses: It may be printed as a book and represented as a drama. With respect to the former use, there is no distinction, in law, between a dramatic and any other literary composition. The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation. As these two rights are wholly distinct in nature, it is not only important, but necessary, that they should be distinguished in name. The property in a dramatic composition is often called dramatic copyright. But this expression is faulty and inaccurate. If it refers to the exclusive right of printing a drama it would be equivalent to the name poetic copyright, prose copyright or historical copyright, as applied to works in poetry, prose or history. If its use is restricted to the right of representing a drama it is not accurate, because this is not a right to multiply copies in the proper meaning of that expression, and cannot, therefore, strictly be called copyright. If it is intended as a <sup>442</sup> name for both rights together, it can serve only to increase the confusion which should be wholly removed. The sole liberty of publicly performing a dramatic composition might more properly be called dramatic right or acting right. The expression 'stageright,' coined by Charles Reade, is not uncommon, but there are objections to this word with respect both to its formation and the purpose which it is required to serve. I have adopted playwright as being, in my judgment, the best name for the purpose. It is a convenient, euphonious word, and its formation is analogous to that of copyright. As the latter word literally means the right to copy a work or the right to the copy, so playwright means the right to play a drama or the right to the play; and it may properly be used to mean not only the right of representing a play, but also the right of performing a musical composition."

It would seem, therefore, that there is a logical distinction to be observed in dealing with the effect upon the authors' rights of the public performance of an unprinted drama and the publication of a printed book. It is not contended that the English statute has any extraterritorial effect, but, as we have said, the contention is that as under the English statute a performance of the drama was made a publication of it so that the authors' common-law rights ceased and their statutory rights attached in that country, it necessarily follows that the authors and their assignees can claim no common-law right in this country.

A case much in point upon the question here involved is *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441. That was, like this, a bill to enjoin the defendant, the manager of a theater in Chicago from producing a play owned by the complainant. The play was a drama entitled "Mary Warner." Its author, Tom Taylor, was a subject of the queen of Great Britain. The play was written for the plaintiff's wife, who was an actress and intended to impersonate the principal character. It was not intended for publication but for representation <sup>443</sup> on the stage. After completion of the play the author transferred to the complainant all his right thereto and in the manuscript thereof, together with the exclusive right of representation on the stage in the United States for five years from June 1, 1869. The play was first represented at the Haymarket Theater, in London, in June, 1869, and afterward the complainant and his wife came to the United States and performed it in the city of New York. The bill alleged that the play had never been printed by the complainant nor the author nor with their consent, nor published otherwise with their consent than by representation on the stage; that the defendant did not produce it at his theater by means of the memory of those who had witnessed it on the stage, but by a copy wrongfully and surreptitiously obtained from the manuscript or from a printed copy wrongfully and fraudulently printed. The case came before the court on a motion to dissolve the preliminary injunction, and on the hearing an affidavit of one DeWitt was read, in which he stated he furnished defendant with the copy of the play used by him; that he procured it from a person in London, etc., and that he (affiant) was advised that by section 20 of 5 and 6 Victoria, chapter 45, "the first representation or performance of any dramatic piece in England is deemed equivalent to the first publication of a book." It will thus be seen that the facts in that case make the decision applicable to the case at bar. The opinion was by Judge Drummond, and while almost the entire discussion therein is pertinent to the present case, we quote a part of it, as follows: "Mr Taylor, then, was the proprietor of the drama 'Mary Warner' when finished, and when transferred to the plaintiff the latter became the proprietor on the terms of the transfer. Has the right of property been lost? It is conceded that it would be lost by any general publication of the play by the proprietor which could be regarded as a dedication to the public, but save this it is difficult to fix on any rule which shall meet <sup>444</sup> the case. The giving of a copy, or of several copies, of a manuscript will not neces-



sarily be a publication. The representation of a play on the stage was decided in England, before the statute of 5 and 6 Victoria, not to be a publication. . . . There was some question whether the author of a play had, at common law, the sole right of representation; but so long as the play existed in manuscript and was unpublished, and not in some way dedicated to the public, the sole right of representation or performance would seem to follow from the exclusive right of property. But the twentieth section of the statute of 5 and 6 Victoria, chapter 45, put an end to this question by declaring that the first public representation or performance of any dramatic piece should be deemed equivalent, in the construction of the act, to the first publication of any book; and I understand it has been decided in England that the public performance, even in a foreign country, of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes. It is insisted that as by this statute representation was publication, the play 'Mary Warner,' by performance in England, was published there, and all right of property in the play was consequently lost, as well there as in the United States. This necessarily leads to the conclusion—and that is substantially the position of defendant's counsel—that there is no right of property in this country in the play except that conferred by the statutes, and particularly that of August 18, 1856. I do not understand that the authorities have gone that far, and it does not follow because his claim under the statute is gone that everything is lost. He may still stand on his natural, inherent right as the author and creator of the play, and maintain that right until in some mode, in reason or by statute, it is dedicated to the public. . . . Neither, perhaps, can there be any doubt that Congress can declare what sort of publications of a literary or dramatic work shall constitute a dedication to the public. It follows <sup>445</sup> from what has been said that a definition of the word 'representation' by a British statute is not operative as such in this country, and in all the cases which have arisen here recently upon the rights of authors to unpublished plays written by Englishmen, the objection that their rights in this country were destroyed in consequence of the clause already referred to in section 20 of 5 and 6 Victoria, chapter 45, seems not to have been taken either by counsel or the court." The court found that the copy of the play had been obtained in an unlawful way, overruled the motion to dissolve the injunction and continued it in force.

*Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, was also a bill for an injunction to restrain the defendant from representing at his theater in Boston a drama called "The World." The opinion states that the drama was originally composed in England, where, after being presented, it was sold to one Colwell, of New York. After being successfully produced in New York it was assigned to the complainant, with the exclusive right to represent it in the New England States. It was never copyrighted or printed. While being represented at Wallack's Theater, in New York, two men, Byron and Mora, attended at the theater, and Bryon committed as much of the play as he could to memory and after each performance dictated it to Mora until the copy was completed. Byron then made an agreement with the defendant to produce the play at defendant's theater known as the Alhambra. As produced by the defendant it was called "The World" and was in all substantial particulars identical with complainant's drama of the same name. It is true, as stated by the defendant in error, the greater portion of the opinion of the court is devoted to a discussion of *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426, and the reasons given for overruling that case. *Keene v. Kimball* held "that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience maintain an objection to any such literary or dramatic <sup>446</sup> republication by others as they may be enabled, either directly or secondarily, to make from its being retained in the memory of any of the audience." The court did, however, refer to and comment upon the English statutes, including 5 and 6 Victoria, and held that the complainant was entitled to the relief prayed and to damages sustained by reason of the unauthorized production by the defendant.

In *Palmer v. DeWitt*, 2 Sweeney, 530, 40 How. Pr. 293, affirmed 47 N. Y. 532, 7 Am. Rep. 480, an English author of a drama sold to complainant prior to February 1, 1868, the exclusive right to perform and print it throughout the United States. The drama was performed the first time in the Prince of Wales Theater, London, February 15, 1868, with the consent of the author. The defendant, without authority of complainant, printed the drama and offered it for sale. The complainant sought to enjoin these acts of the defendant and the defense was that the common-law rights in the play were lost by the performance of it in London. The court held con-

trary to this contention and sustained the complainant's right to the injunction.

Defendant in error contends that *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441 and *Palmer v. DeWitt*, 2 Sweeney, 530, 40 How. Pr. 293, affirmed 47 N. Y. 532, 7 Am. Rep. 480, are not in point, for the reason that the author in each of those cases had assigned to the complainant his rights in America before the first public representation of the play in England. Neither of those decisions appears to be based on any such distinction and in the former it was distinctly stated that a definition of a representation by the British statutes is not operative as such in this country.

It is also claimed by defendant in error that it is not stated in *Tompkins v. Hallack*, 133 Mass. 32, 43 Am. Rep. 480, whether the presentation in England was a public representation of the play. While the word "public" is not used in the opinion where it is stated that the play was presented in England, we think it very clearly appears from reading the opinion that the court could have meant nothing but a public representation,<sup>447</sup> and as the court was dealing with the effect of a representation of the play in England upon the rights of the author and his assignee in this country, we cannot but consider the decision in that case applicable to the present case. In *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, the court applied to the decision of the case the rule announced in the opinion, that "the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein." When it is borne in mind that the court was applying this rule to the play of an English author which had been represented in England, and therefore, by force of the statute, published in that country, it cannot reasonably be said, we think, that the case is not in point. Moreover, in that case the assignment of the author's rights was made after the play had been represented in England, and it cannot be said that the English statutes were overlooked, for 5 and 6 Victoria is referred to in the opinion of the court.

In *Boucicault v. Delafield*, 1 H. & M. 597, and *Boucicault v. Chatterton*, L. R. 5 Ch. D. 267, the English courts held that the performance of a drama in the United States should be considered as a publication. These cases were decided subsequent to the passage of the act 5 and 6 Victoria, and subsequent to the passage of the act 7 and 8 Victoria, chapter 12. Section 19 of the latter act provided that the author of a dramatic piece which should be first published out of



her majesty's dominions should have no copyright therein nor any exclusive right to the public representation or performance thereof. In both the cases referred to Boucicault was the author of dramas that had been first performed in this country and sought to prevent their production in England by persons acting them without his consent or authority. He was denied the relief asked, on the ground that the public representation of the dramas in this country was a publication of them, and by the nineteenth section of 7 and 8 Victoria he was not entitled <sup>448</sup> to the protection of the British statutes, and it was said that this was true whether the author of the play was a British subject or an alien. It would follow, therefore, that if "The Fatal Card" had been first performed in this country the English courts would have treated it as a dedication to the public and to have had the effect of divesting the author of any rights whatever, under the laws of England, to its exclusive production.

As the English decisions appear to be based upon provisions of the statute referred to, and there is no such statute in this country, we are of opinion they are not decisive of the question here involved, and this view is sustained, we think, by the cases first above cited. The view of the appellate court was, that in *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441, the learned chancellor did not have in mind the construction of the English statute adopted by the courts in the decisions we have cited. *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441, was decided in 1870 and *Boucicault v. Chatterton*, L. R. 5 Ch. D. 267, was not decided until 1876, but *Boucicault v. Delafield*, 1 H. & M. 597, was decided in 1863, and Judge Drummond said in *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441: "I understand that it has been decided in England that the public performance, even in a foreign country, of the play of which an English subject is the author, defeats his claim to the copyright under the British statutes." From this expression it would seem clear that the author of the opinion was familiar with the doctrine announced in the *Delafield* case (1 H. & M. 597), so that the opinion in that respect could not have been based upon any misapprehension. To our minds it is squarely in point and its reasoning sound. Besides, it is in harmony with sound principles of justice, and we are disposed to follow it rather than adopt the rule that we are bound by the decisions of the English courts made under their statute.

The judgment of the appellate court will therefore be reversed and the decree of the superior court affirmed.



*For Decisions upon Facts Somewhat Similar* to those involved in the principal case, see *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. St. Rep. 480. A copyright and the common-law right of an author or publisher of a book cannot exist at the same time. The acquisition of the former terminates the latter. The publication of a book defeats the common-law right of its author or publisher, whether a copyright is secured or not. After that, everyone may make use of the book, if he sees fit: *Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666. If the owner of a dramatic work having no copyright therein causes it to be represented and exhibited for money, he thereby publishes it: *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426. See the note to *McCrea v. Marsh*, 71 Am. Dec. 751.

## MERRIFIELD v. WESTERN COTTAGE PIANO and ORGAN COMPANY.

[238 Ill. 526, 87 N. E. 379.]

**JUDGMENT**—Opening Default as to One Defendant.—A default should be set aside as to all defendants or none; it is error to set it aside as to one only. (p. 150.)

**EXECUTION**—Issuance Against One Defendant.—An execution must conform to and follow the judgment; hence it is error, where default has been entered in assumpsit brought against several defendants jointly, to issue execution against only two of them. (p. 150.)

**APPEAL**—Time from Which Pending.—An appeal is in contemplation of law pending in the appellate tribunal the moment the appeal bond is executed and filed with the clerk as provided in the order of appeal, and thereafter the question whether the order appealed from is final or interlocutory is for the appellate court. (p. 151.)

**EXECUTION**—Whether must be Against All Defendants.—An execution on its face must appear to be against all defendants, notwithstanding that from death, bankruptcy or some other cause no levy can be made on the property of some. (p. 151.)

**APPEAL**—Effect of Taking.—When an appeal is perfected the jurisdiction of the court below ceases, and the appeal becomes a stay of all proceedings to enforce execution of the judgment. (p. 152.)

**APPEAL**—Amendment of Execution Pending.—Pending appeal the trial court should not permit an amendment of the execution by adding the name of one of the defendants. (p. 152.)

Jarvis R. Burrows, Eddy, Haley & Wetten and Butters & Armstrong, for the appellant.

McDougall & Chapman, for the appellee.

**527** CARTER, J. At the June term, 1907, of the circuit court of La Salle county, appellee, Mary C. Merrifield, obtained a judgment by default in an action of assumpsit against the Western Cottage Piano and Organ Company, L. W. Merrifield and T. W. Burrows for twenty thousand and eighty-four dollars and forty-nine cents. June 29th, eight days after the judgment was entered, the defendant T.

W. Burrows entered a motion to set aside the default and open up the judgment and for leave to plead. After hearing the motion the court "orders that execution herein be and the same is hereby restrained, and grants leave to said defendant to plead, and orders that the judgment entered herein stand as security for the debt." Burrows filed a plea of general issue with notice of special matters to be relied on, and an affidavit that he had a good defense upon the merits as set forth in the notice as to special matters. At the October term, 1907, counsel for Burrows gave notice that on the next day leave would be asked to file an additional plea for him, and counsel for said company gave notice that at the same time leave would be asked to file a plea for the defendant company, but the record fails to show that any such motion was made on behalf of said company. The next day defendant Burrows moved for leave to withdraw the notice under the general issue and for leave to file special pleas. This motion having been granted, defendant Burrows filed three special pleas and appellee filed a replication. February 8, 1908, an execution was issued on this judgment against the company and L. W. Merrifield only, and delivered to the sheriff of La Salle county. February 11, 1908, at the January term, the attorneys for said company moved to recall and quash the execution, and at the same time counsel for appellee made a cross-motion to "set aside <sup>528</sup> the order entered herein on June 29, 1907, setting aside the default as to the defendant T. W. Burrows, opening up the judgment and granting leave to said defendant to plead." February 18th the court sustained the motion made by appellee to vacate the order setting aside the default as to T. W. Burrows and overruled the motion to recall the execution. Thereupon defendants, and each of them, prayed an appeal from the ruling of the court to the appellate court for the second district, which said appeal was granted on their filing their appeal bond in thirty days in the sum of two hundred dollars, to be approved by the clerk. The record shows that February 21, 1908, the defendants filed their bond in the circuit court in said last-mentioned appeal and the bond was approved by the clerk. Thereafter, on February 25, 1908, appellee moved the court to amend the execution so as to make it conform to the judgment by inserting the name of Thomas W. Burrows. This motion was allowed by the court and an order entered accordingly. Burrows excepted to the ruling of the court and prayed an appeal to the appellate court for the second district from this order amending the exe-

cution, which was allowed on his filing a bond in thirty days in the sum of two hundred dollars. This bond was filed March 6, 1908, and approved by the circuit clerk. The record is not entirely clear as to the steps thereafter taken. Apparently, on March 17, 1908, a writ of error was sued out of the appellate court in this cause bringing up the entire transcript, including both of the orders appealed from, and afterward one or both of the appeals were, on motion, consolidated with the writ of error. The appellate court in its opinion states there were two writs of error and that said court had filed an earlier opinion covering the entire case as consolidated, and that after the first opinion was filed defendant Burrows practically abandoned the consolidation by petitioning for a rehearing on that branch of the case which decided the motion of February 18th, setting aside the default formerly entered and overruling the motion <sup>529</sup> to recall the execution, and at the same time appealing from that part of the decision of the appellate court which affirmed the decision of the lower court entered February 25th, allowing the amendment to the execution. The appellate court granted a certificate of importance as to only one of the two causes theretofore consolidated, so that by this appeal now before us the only question for decision is the legality of the order of February 25, 1908, allowing the amendment of the execution by adding the name of defendant T. W. Burrows. The appeal was allowed only as to T. W. Burrows.

<sup>531</sup> Appellant contends that the stay order entered by the trial court June 29, 1907, applied to all the defendants in that court, while appellee contends that it clearly applied only to defendant T. W. Burrows, and the appellate court so held. If the order be construed as setting aside the default only as to defendant Burrows, then it was erroneous, as the default should have been set aside as to all the defendants or none: *Gould v. Sternburg*, 69 Ill. 531, and cases cited; *Fuller v. Robb*, 26 Ill. 246. It is conceded that the execution as issued on February 8, 1908, against two of the defendants below and not against the third defendant, Burrows, was erroneous, as the execution must conform to and follow the judgment: *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Kinkade v. Gibson*, 209 Ill. 246, 70 N. E. 683; 1 *Freeman on Executions*, 3d ed., sec. 42; *Herman on Executions*, sec. 56; 8 *Ency of Pl. & Pr.* 418.

The appellant contends that the appeal to the appellate court of all the defendants in the court below from the order of February 18, 1908, which vacated the order setting aside

the default as to T. W. Burrows and overruled the motion to recall the execution, was perfected by the filing <sup>532</sup> of their bond and its approval by the clerk, in accordance with the order. An appeal allowed by the trial court is, in contemplation of law, pending in the appellate tribunal the moment the appeal bond is executed and filed with the clerk of the court, as provided in the order of the appeal: *Reynolds v. Perry*, 11 Ill. 534; *Owens v. McKethe*, 5 Gilm. 79; *Simpson v. Alexander*, 5 Gilm. 260.

Appellant contends that said order of February 18th was a final and appealable one, while appellee contends that it was interlocutory and not appealable. However that may be, the appeal was allowed as prayed, and after the filing and approval of the appeal bond that question was transferred to the appellate court for its decision.

Appellant contends, as has been stated, that the stay order applied to all of the defendants in the court below, and that therefore the appeal affected all of these defendants, while appellee insists that the order of February 18, 1908, and the appeal therefrom, only affected defendant Burrows, and did not in any manner affect or apply to the other defendants in the court below. Whatever the construction, so long as the question is fairly open to dispute the only proper course for the trial court was to refrain from acting until the appeal had been finally disposed of. As has been repeatedly held, when an action is brought on a joint contract the rule is that the judgment must be rendered against all the defendants or none (*Kingsland v. Koepe*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649), unless a defense is interposed by one or more of the defendants personally, of such character as infancy, bankruptcy or the like, and then the defense must be alleged and proved: *Byers v. First Nat. Bank of Vincennes*, 85 Ill. 423. The execution on its face must appear to be against all defendants, notwithstanding that from death, bankruptcy or some other cause no levy can be made on the property of some: 1 *Freeman on Executions*, 3d ed., sec. 42; *Farmers' and Mechanics' Nat. Bank v. Crane*, 15 <sup>533</sup> Abb. Pr., N. S. 434; *Stewart v. Cunningham*, 22 Ala. 626; 2 *Tidd's Practice*, \*1120.

The issuing of the execution February 8, 1908, pending the stay theretofore granted by the court, if the stay applied to all the defendants below, was irregular and the execution might be quashed on motion: 1 *Freeman on Executions*, 3d ed., sec. 33. This irregularity in issuing would not render the execution void, but voidable: *Oakes v. Williams*, 107 Ill.



154; *Shirk v. Metropolis & N. C. Gravel Road Co.*, 110 Ill. 661. When an appeal is perfected the jurisdiction and control of the court below ceases and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree: *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Bowar v. Chicago West Division Ry. Co.*, 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81; *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 402, 122 Am. St. Rep. 129, 83 N. E. 932, 14 L. R. A., N. S., 1150. The trial court should not have permitted the amendment of the execution pending the appeal from the order of February 18, 1908, in the appellate court.

Our attention is called by appellee to the case of *Sheetz v. Wynkoop*, 74 Pa. 198, where it was held that under a special act in that state the court could stay the execution as to one of the defendants and allow it to remain against the other joint defendants. But the reasoning in that decision plainly shows that this conclusion was only reached because of the special statute in question. The same may be said as to *Brem v. Jamieson*, 70 N. C. 566. We have no such statute in this state that controls in this case. Manifestly, the court was without authority to enter the order of February 25, 1908, amending the execution.

The judgments of the appellate and circuit courts will be reversed and the cause remanded to the circuit court for further proceedings in harmony with the views herein expressed.

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*An Execution must Correspond with the Judgment* as to the parties; if it is issued against two when the judgment is against one only, it will be quashed: *Thompson v. Bondurant and King*, 15 Ala. 346. 50 Am. Dec. 136. And a joint execution upon two separate judgments in favor of two plaintiffs is void, and so also is the sale made thereunder. The result cannot be avoided by amending the writ: *Bigham v. Dover*, 86 Ark. 323, 126 Am. St. Rep. 1096.

*Amendments of Executions* are discussed in the note to *Kipp v. Barton*, 101 Am. St. Rep. 550; and the amendment of writs of scire facias are discussed in the note to *Bank of Eau Claire v. Reed*, 122 Am. St. Rep. 96. See, also, the subsequent case of *Dorminey v. De Lang*, 130 Ga. 618, 124 Am. St. Rep. 193.

## MOORE v. UNITED STATES BARREL COMPANY.

[238 Ill. 544, 87 N. E. 536.]

**CORPORATIONS—Unpaid Subscriptions, Person Liable Therefor.**—Where one who has an option to sell a patent organizes a corporation to make the purchase and advances five thousand dollars of the necessary money, the remainder of which is to be paid by the corporation, an arrangement whereby he receives stock of the face value of fifty thousand dollars in return for the five thousand dollars and the benefit of the option, amounts to an issue of stock at one-tenth of its value, and he is liable to creditors of the company for the unpaid amount. (p. 157.)

**CORPORATIONS—Stockholders' Liability.**—The Illinois statute makes every stockholder and assignee of stock liable for the debts of the corporation to the extent of the amount unpaid on his stock, and such amount constitutes a fund to which creditors of the company have a right to resort for the satisfaction of their debts, without regard to when they accrued or the creditors' knowledge of the fact that the stock has not been paid for. (p. 157.)

**CORPORATIONS.**—Stockholders cannot Escape Their Liability to pay the full amount unpaid upon stock held by them so long as any creditor of the corporation remains unpaid. (p. 157.)

**CORPORATIONS—Release of Stockholders by Company.**—A corporation cannot release a stockholder from liability to existing creditors for his unpaid subscription by rescinding the transaction whereby the stock was acquired and restoring him to his original status as creditor of the corporation. (p. 157.)

**CORPORATIONS.—Rescission of a Contract Between a Stockholder and the corporation effected by a resolution adopted by himself and two other directors under his domination does not bind the company.** (p. 158.)

**CORPORATIONS—Persons Liable for Unpaid Subscriptions.**—A creditor of a corporation who with full knowledge receives in payment of his debt stock of a face value ten times greater than his claim is liable for the unpaid subscription, and cannot insist upon the postponement of his liability to that of other stockholders. (p. 158.)

**CORPORATIONS—Stockholder's Liability.**—The Assignee of a Judgment against a corporation may enforce its collection by a bill to enforce the liability of stockholders for unpaid subscriptions. (p. 158.)

O'Bryan & Marshall, Espy L. Smith and Hiram T. Gilbert, for the appellants.

Whitman & Miller, Orville Peckham and Edwin White Moore, for the appellees.

**545 DUNN, J.** The branch appellate court for the first district reversed a decree of the superior court of Cook county and remanded the cause, with directions to enter a decree in accordance **546** with the recommendation of the master's report. A writ of error and two appeals have been prosecuted to review the judgment of the appellate court, and they have been consolidated.

The object of the original bill filed by William V. Moore was to enforce the liability of the appellant, Espy L. Smith, the plaintiff in error, John F. Palmer, and others, as stockholders of the United States One Stave Barrel Company, an Illinois corporation, to pay a judgment recovered by George A. True, receiver of the Frontier Iron Works, and assigned to the complainant. The First National Bank of Chicago by leave of court became a co-complainant and filed an intervening petition, alleging the recovery of a judgment against the barrel company for \$11,304.86, adopting the averments of the original bill, and seeking to enforce the stockholders' liability for the payment of its judgment also.

The United States One Stave Barrel Company was organized under the laws of Illinois, the final certificate of the Secretary of State being issued on April 7, 1896. Its capital stock was \$100,000, all of which was subscribed in equal amounts by Espy L. Smith, Lutellus Smith, Heylin T. Smith and James K. McGill. The two hundred and fifty shares subscribed by McGill afterward came to the possession of the plaintiff in error, Palmer, under the circumstances hereinafter stated. The master found that there were balances of \$16,779.69 and \$17,695.28, respectively, due from Espy L. Smith and Palmer on account of their stock. It is claimed on behalf of Smith that his stock was fully paid for, and on behalf of Palmer that he was a creditor of the corporation; that he took the stock, which was worthless, in payment of his debt; that such action was for the benefit of the company and its creditors, and he cannot, therefore, be held for the unpaid subscription. It is further claimed by Palmer that even if he should be held liable for any amount, the liability of Smith should first be exhausted before Palmer should be called on to pay.

<sup>547</sup> First, in regard to Smith's stock: Louis Reed was the owner for two patents for improvements in machinery for manufacturing staves for barrels, covering all of the United States except Mississippi and Louisiana, and on March 7, 1896, entered into a written agreement with Lutellus Smith giving to him the sole right, option and privilege of selling said patents for \$15,000 within thirty days. At the same time another agreement was entered into whereby Reed agreed to pay Smith \$5,000 for his services in case he sold the patents for \$15,000. On March 24, 1896, a statement was filed in the office of the Secretary of State by James K. McGill, Espy L. Smith and Lutellus Smith, and a license was issued to them to open books for subscription to the

capital stock of the United States. One Stave Barrel Company, whose object was "to manufacture, buy and sell the barrel and the sheet of which what is known as the one stave barrel is made and any article to be made from said sheets." On April 3d, before the issue of the final certificate of organization, the appellant, Espy L. Smith, and Lutellus Smith, who upon the organization of the company became, respectively, president and secretary thereof, entered into a contract in the name of the barrel company with Louis Reed for the assignment of the entire interest in the above-mentioned patents except in the states of Mississippi and Louisiana, and paid him \$5,000 cash and gave him six notes executed in the name of the company, five for \$1,000 each and one for \$5,000. On July 29, 1896, the board of directors of the company adopted a resolution reciting the matters just stated in relation to the contract for the patents, expressly ratifying and adopting the contract as that of the company, ratifying the notes and assuming the payment thereof, and crediting the \$5,000 cash to Espy L. Smith and Lutellus Smith. The notes were afterward paid by the barrel company and the patents assigned to it by Reed. The resolution further recited that at the time of said transaction Lutellus Smith held an option for the purchase <sup>548</sup> of the interest of Reed in said patents, under which option the transaction was had and the company thereby given the benefit of the option, which option and the patents were of great value to the company and essential to the performance of the functions and purposes for which it was organized. The resolution then declared the sum of \$45,000 to be "a fair, just and equitable sum to be paid to Lutellus Smith and his confrere, Espy L. Smith," for giving the company the benefit of the option acquired from Reed for the purchase of the patents, and ordered that the sum of \$22,500 be severally credited to the said Lutellus Smith and Espy L. Smith as subscribers to the capital stock of the company, and that the stock be issued accordingly. Four of the five directors of the company were present at the adoption of the resolution, two of whom were Espy L. Smith and Lutellus Smith, the president and secretary of the corporation. It is claimed that by this transaction the \$50,000 of stock subscribed by Lutellus Smith and Espy L. Smith was paid in full.

The evidence shows that the only contract between Reed and the Smiths, or either of them, is that of March 7th, whereby Reed gave Lutellus the option, not to purchase, but to sell the patents for \$15,000, and agreed to pay him



\$5,000 for doing so. This gave no interest in the patents and no right to buy them. The evidence shows clearly that the Smiths never had any ownership in the patents, any right to acquire an ownership in them or any connection with them which was capable of being transferred. It is manifest that the corporation was formed for the purpose of taking over these patents. Indeed, Espy L. Smith so testifies in so many words. It was intended that the company should pay for the patents and the Smiths receive half the capital stock and pay only the cash payment of \$5,000. The company not being fully organized before the authority to sell expired, the contract was made in the name of the company and afterward lawfully ratified by it. The barrel company <sup>549</sup> paid the whole consideration for the assignment of the patents except the first payment of \$5,000, and the effect of the resolution of July 29th, adopted by the votes of the interested parties themselves, was to direct the issue of half the stock of the corporation for ten per cent of its face value. The remaining ninety per cent is still unpaid and Espy L. Smith is liable for half of it.

Palmer's connection with the barrel company began by his lending it \$2,500 in August, 1896, for ninety days, with the agreement that instead of payment in cash he should have the option of receiving two hundred and fifty shares of the capital stock of the company legally full paid and non-assessable. Before the maturity of the debt he determined to avail himself of the option. Thereupon the two hundred and fifty shares of stock which had been originally subscribed for by James K. McGill, and which had never been issued, were surrendered by him, a certificate therefor was issued to Douglas Dyrenforth, and on the same day this certificate was canceled and a new certificate issued to Palmer for the two hundred and fifty shares. Palmer at the time gave to Dyrenforth his check for \$25,000, with which Dyrenforth paid the company for the stock, and this \$25,000 was immediately returned to Palmer pursuant to an agreement with the company to that effect. It is not claimed that the stock was paid for by this arrangement, though Palmer testifies that the issue of the stock in this manner to Douglas Dyrenforth was made with the idea that the stock could thus be made fully paid for. As set forth in a written statement dated May 14, 1897, signed by Palmer and Espy L. Smith, the end sought was that Palmer should be put on the same footing as Espy L. Smith and Lutellus Smith "in original stock holdings and cost thereof, viz., twenty-five per cent of

total stock at ten per cent of full value." The evidence satisfactorily shows that Palmer was thoroughly informed as to the business and condition of the corporation, its assets and liabilities; that he knew the stock issued to him was wholly unpaid for except to <sup>550</sup> the extent of his \$2,500 debt, and that it was the intention of all the parties that he and the two Smiths should stand on the same footing; that each should own one-fourth of the stock but only pay one-tenth of its face value. He purchased the stock, not because he was then trying to collect a debt, but because he considered it a desirable investment, and his position is not any different from that of the Smiths. The statute (Hurd's Stats. 1908, sec. 8, p. 526) makes every stockholder and assignee of stock liable for the debts of the corporation to the extent of the amount unpaid on his stock, and such amount constitutes a fund to which creditors of the corporation have a right to resort for the satisfaction of their debts, without regard to when they accrued or the creditor's knowledge of the fact that the stock has not been paid for: *Sprague v. National Bank of America*, 172 Ill. 149, 64 Am. St. Rep. 17, 50 N. E. 19, 42 L. R. A. 606; *Root v. Sinnoek*, 120 Ill. 350, 60 Am. Rep. 558, 11 N. E. 339. Stockholders cannot escape their liability to pay the full amount unpaid upon stock held by them so long as any creditor of the corporation remains unpaid: *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725.

Some months after the stock was issued to Palmer an attempt was made to rescind the transaction whereby the stock was taken in payment of the \$2,500 debt and to restore Palmer to his status as a creditor of the corporation for that amount. The debts to each of complainants had then accrued. To the extent of the amount unpaid on his stock Palmer was then liable to them and the corporation had no power to release this liability: *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334. The resolution purporting to do so was adopted by the votes of three directors, of whom Palmer was one. The entire board of directors consisted of five members, of whom one was absent and one voted against the resolution. One of the other directors voting for the resolution was Douglas Dyrrenforth, who owned no stock but had been elected a director at Palmer's request to represent him in his absence, <sup>551</sup> and the third was Espy L. Smith, who had made a written agreement that Palmer should have the voting power of Smith's stock, so that, the two owning a majority of the stock, Palmer

should have the sole direction of the policy of the company so far as it could be controlled by the owner of the majority of the stock. Palmer thus dominated the board of directors, two of whom were subservient to his wishes, and their rescission of the contract induced by his influence was not binding on the corporation: *Adams v. Burke*, 201 Ill. 395, 66 N. E. 235.

The claim of Palmer that the Smiths should be first exhausted before he is called on to pay is without merit. He was not deceived. He was as fully informed as were the Smiths in regard to all the facts affecting the transaction. He received exactly what he expected to receive. The fact that he was mistaken as to the legal effect of the transaction or the liability he incurred gives him no equity against the Smiths. He bought the stock for ten cents on the dollar and knew the other ninety cents had not been paid. To that extent he is liable for the debts of the corporation, and there appears no reason for postponing his liability to that of the other stockholders.

It is contended that Moore's only interest being that of an assignee of a creditor, he cannot maintain this suit, because the right to impeach a transaction for fraud is not assignable in equity. The debt of the barrel company to the Frontier Iron Works was reduced to judgment by the receiver of the latter. This judgment was assignable in equity and was assigned to W. V. Moore. The assignment carried with it the right to enforce the collection of the judgment by any appropriate legal or equitable remedy which might have been employed by the judgment creditor: *Dimond v. Rogers*, 203 Ill. 464, 67 N. E. 968; *Crawford v. Logan*, 97 Ill. 396.

It is contended that William V. Moore had no title to the judgment, but that the same was transferred to Darius D. Thorpe, the purchaser at the receiver's sale, and that he <sup>552</sup> has never transferred it. Even so, the evidence shows that Thorpe's purchase was made at the request and for the benefit of Moore, who paid all the purchase money and has ever since the receiver's sale been the equitable owner of the judgment.

It is insisted that the complainants have been guilty of laches which should bar them of relief. The bill seeks to enforce the liability of stockholders. The statutory period of limitations has not run against the action, and no equitable

circumstances are shown as a reason why any shorter period should bar it. There is no basis for any claim of estoppel.

The judgment of the appellate court will be affirmed.

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*Each Stockholder of a Corporation* is answerable for its debts to the extent of the amount unpaid on his stock, and he cannot escape this liability by assignment of the stock: *Sprague v. National Bank of America*, 172 Ill. 149, 64 Am. St. Rep. 17; *Warfield, Howell & Co. v. Marshall County Canning Co.*, 72 Iowa, 666, 2 Am. St. Rep. 263. And it is not necessary to charge fraud in order to subject a stockholder's unpaid liability to a creditor's judgment: *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529.

*The Stockholders in a Corporation are Liable* to its creditors in an amount equal to the unpaid balance due on nominally paid-up certificates of stock issued to them: *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

STATE v. LESLIE.

[138 Iowa, 104, 115 N. W. 897.]

**MALICIOUS MISCHIEF** is not mischief or injury done to the property through mere wantonness, or a mere intent to injure it, but is mischief or injury inflicted with the malicious intent to injure some person, ordinarily the owner of the property; and it need not be shown that the offender knew who the owner was, as it is sufficient if it be established that he was bent on mischief against the owner, whoever he might be proven to be. (p. 161.)

**MALICIOUS MISCHIEF.**—In the crime of malicious mischief or injury to property the idea of malice toward the owner or some other person is an essential element. (p. 162.)

M. Anderson and Turner & Cullison, for the appellant.

H. W. Byers, attorney general, and C. W. Lyon, assistant attorney general, for the state.

<sup>104</sup> **WEAVER, J.** The first point made in appellant's argument is grounded upon the theory that the indictment fails to allege that the act charged against the defendant was done maliciously. An amended abstract has been filed by the state, showing that counsel has misapprehended the record in this respect, and that the indictment does in fact charge malice, and is therefore not open to the criticism made upon it in the appellant's brief.

2. The point is next made that the court gave to the jury an erroneous instruction as to the definition and nature <sup>105</sup> of the malice necessary to be proved in order to justify a conviction. The court told the jury that to convict the de-

fendant they must find, among other things, "that such act upon the part of the defendant in setting fire to the pile of ties and burning the same was willful and malicious." In another paragraph the court charged as follows: "(11) If you find from the evidence, however, that the defendant did set fire to and burn said pile of ties, under the rules above given you, and that in so doing he intended to destroy the same, and that he did such act deliberately, without authority from his superior officer or said railway company to do so, and without any justification or excuse therefor, then you will be justified in finding that such act upon his part was willful and malicious." We think the instruction cannot be approved. The definition of the word "malicious," as it is used in criminal law, varies somewhat with the particular offense to which it is applied. With but few exceptions, most of which grow out of the particular statute being construed, malicious mischief, which is made punishable as a crime, is not mischief or injury done to the property through mere wantonness, or a mere intent to injure the property, but is mischief or injury inflicted with the malicious intent to injure some person, ordinarily the owner of the property. It need not be shown that the offender knew who the owner was; but it will be sufficient if it be established that he was bent on mischief against the owner, whoever he might be proven to be. But the malice must have some object other than the thing injured: *State v. Phipps*, 95 Iowa, 491, 64 N. W. 411; *State v. Linde*, 54 Iowa, 139, 6 N. W. 168; *State v. Williamson*, 68 Iowa, 351, 27 N. W. 259; *State v. Lightfoot*, 107 Iowa, 344, 78 N. W. 41; *Northcot v. State*, 43 Ala. 330; *Hobson v. State*, 44 Ala. 380; *Duncan v. State*, 49 Miss. 331; *State v. Hill*, 79 N. C. 656; *Goforth v. State*, 8 Humph. (Tenn.) 37; *State v. Wilcox*, 3 Yerg. (Tenn.) 278, 24 Am. Dec. 569; *State v. Newby*, 64 N. C. 23; *Commonwealth v. Williams*, 110 Mass. 401; *Commonwealth v. Walden*, 3 Cush. (Mass.) 558; *United States v. Gideon*, 1 Minn. <sup>106</sup> 292 (Gilm. 226); *Stone v. State*, 3 Heisk. (Tenn.) 457; *State v. Johnson*, 7 Wyo. 512, 54 Pac. 502; *State v. Foote*, 71 Conn. 737, 43 Atl. 488; *Dawson v. State*, 52 Ind. 478.

It is not to be denied that, in many cases where malice is a matter of material inquiry, it has been said that a wrongful act, intentionally or wantonly done, without justification or excuse, is malicious within the meaning of the law; and this, we think, is the substantial effect of the charge given by the trial court. Without denying that there are many cases in-

volving malice where such an instruction would be correct, it remains true that by the vastly greater weight of authority in the crime of malicious mischief or injury to property the idea of malice toward the owner or some other person is an essential element of the crime, and that an instruction defining malice in its more general sense is insufficient. Without stopping to quote therefrom, an examination of the cases above cited and of many others referred to therein will demonstrate the correctness of the proposition above stated, and sustain the appellant's contention that the jury should have been instructed accordingly. In *Commonwealth v. Walden*, 3 Cush. (Mass.) 558, the trial court defined the word "maliciously" to mean "the willful doing of any act prohibited by law, for which the defendant had no lawful excuse; that moral turpitude of mind was not necessary to be shown." And this was held to be prejudicial error, although the statute of Massachusetts inhibits wanton, as well as malicious, mischief: See, also, *Commonwealth v. Williams*, 110 Mass. 401. We would not be understood to hold, as do some of the cases, that the malice toward the owner must be actual or express, and will not be inferred from the act itself: *State v. Robinson*, 20 N. C. 129, 32 Am. Dec. 661; *State v. Newby*, 64 N. C. 23. On the contrary, we think that in this as in most other cases where the mental and moral attitude of the accused at the time of the alleged wrong is an essential element of the offense, it may and ordinarily must be inferred from the nature of the act itself and from the circumstances <sup>107</sup> which accompany and characterize it. But the inference is not one of law for the court, but of fact for the jury. The defendant may have done the act under the very conditions enumerated in the instructions; that is, he may have fired the pile of ties intending to destroy the same, the act may have been deliberate and without authority from his superior officer or from the railway company, and such act might be without justification or excuse, and still not have been with malice, express or implied, against the owner or any other living person. If so, he was not guilty as charged.

The exception to the instructions as given must be sustained, and a new trial ordered, for which purpose the cause will be remanded.

The judgment appealed from is reversed.

**MALICIOUS MISCHIEF.**

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**I. Nature and Elements of Offense.**

Perhaps the best definition of the crime of malicious mischief is that found in *State v. Robinson*, 3 Dev. & B. 130, 32 Am. Dec. 661, where it is said that the crime consists in the willful destruction of personal property from actual ill-will or resentment toward the owner or possessor. It is the willful and malicious doing of any act to the injury of the property of another prohibited by law, and for which the defendant has no lawful excuse: *Commonwealth v. Walden*, 3 Cush. 558. A trespass upon property, although it may be willful and malicious, is not within the offense of malicious mischief at common law, unless it was in the night-time, or secretly, without the hope of gain, or unless it consisted of some act of cruelty to domestic animals: *Williams v. People*, 24 How. Pr. 350.

Under the Alabama statute malicious mischief or injury to property is made a felony, although the statute, upon conviction for the crime, permits punishment less than imprisonment in the penitentiary, and under it a person may be fined, imprisoned in the county jail, or sentenced to hard labor for the county: *Clifton v. State*, 73 Ala. 473.

To sustain a conviction for malicious mischief a destruction or injury to the property must be shown: *Pollet v. State*, 115 Ga. 234, 41 S. E. 606; *State v. Martin*, 141 N. C. 832, 53 S. E. 874; *Patterson v. State*, 41 Tex. Cr. App. 412, 55 S. W. 338. A malicious act, however wanton or dangerous, which does not result in any destruction or even injury to property, does not constitute the misdemeanor known as "malicious mischief": *Wait v. Green*, 5 Park. C. C. 185. It is immaterial whether the injury complained of is alleged to have been done to the property or to the owner of the property: *State v. Sparks*, 60 Ind. 298; *State v. Pitzer*, 62 Ind. 362. The word "injury" in malicious mischief may consist in staining a building with discolored matter, though such stains need not be of a permanent or lasting character: *Mitchell v. State* (Tex. Cr. App.), 62 S. W. 572. The crime is not an offense against the possession and does not in-



volve the ownership; and one charged with malicious mischief in injuring a building is not entitled to inquire into the right of the possession of the person in actual possession at the time of the injury: *Perry v. State*, 149 Ala. 40, 43 South. 18.

## II. Acts Under Claim of Right.

Malice is an ingredient of the crime of malicious mischief; hence if on a trial for malicious mischief in killing a hog, the jury believe that the defendant acted under instructions from his employer, and that he believed that he had a right to kill the animal in pursuance of such instructions, and that he had no malice toward the owner of the animal, he should be acquitted: *Hobson v. State*, 44 Ala. 380. On the other hand, one may be guilty of malicious mischief in wantonly destroying crops on land over which the defendant is authorized to open a way, if he uses such right maliciously: *Harris v. State*, 73 Ga. 41. But if one acts in good faith, under an honest claim of right, a conviction for maliciously and mischievously injuring the property of another will not stand: *Barlow v. State*, 120 Ind. 56, 22 N. E. 88; *State v. Flynn*, 28 Iowa, 26. If one cuts down the hedge of another, he is not guilty if he cut the hedge properly as an act of husbandry, believing it to be on his own land: *State v. Zinn*, 26 Mo. App. 17.

A person cannot be guilty of malicious mischief in injuring his own property. Hence an owner or his lessee cannot be found guilty of the crime for tearing down his house if done with his permission during the continuance of the lease: *State v. Mason*, 13 Ired. 341; *State v. Mace*, 65 N. C. 344. The statute does not embrace the case of the destruction or damage to buildings by the owner himself, and in law the lessee is the owner during the continuance of his term: *State v. Whitener*, 92 N. C. 798. A person is not guilty of malicious mischief in throwing down the fences of another, unlawfully and without right, if he was under the impression that he had the legal right to do so: *Goforth v. State*, 8 Humph. 37.

If a mere trespasser erects a building on the land of another, without right of property or occupancy, the building becomes at once a part of the freehold, and the owner of the land may tear it down or remove it without being guilty of malicious mischief: *Malone v. State*, 11 Lea, 701; but one may be guilty of such crime in pulling down a fence, although he claims title thereto, if the fence is in the peaceable possession of another: *Carter v. State*, 18 Tex. App. 573.

The fact that a toll-gate erected on a public road under the authority of the county court is such an obstruction as may be regarded as a nuisance will not justify a traveler upon the road in destroying it, and in doing so he is guilty of malicious mischief: *Smart v. Commonwealth*, 27 Gratt. 950; but if on a trial for this crime in breaking the lock on a church door it appears that there was a difference amongst the membership of the church on certain matters, and that the prosecutor had locked the door in opposition to the wishes of the majority, and that the defendant, who was one of that majority,

was an officer of the church and acted under a reasonable claim of right in so breaking the lock, he is not guilty: *Woodward v. State*, 33 Tex. Cr. Rep. 554, 28 S. W. 204. One who leases his land to another and upon going there finds hay made of "Johnson" grass stacked thereon, and being apprehensive of the spread of such grass, it being admittedly noxious, burns the hay, is not guilty of malicious mischief, though it is shown that there was no seed in the grass: *Brady v. State* (Tex. Cr. App.), 26 S. W. 621.

### III. Malice.

Although the authorities are in conflict, the majority of them tend strongly to establish that malice is an essential ingredient in the crime of malicious mischief, and that in the absence of proof thereof, either express or implied, no crime is established. In a late case it was said that "malice, either express or implied, is an essential ingredient of the offense of malicious mischief. This is evident from the very name of the offense. The act must be done with wicked or malicious intent or motive—wrongfully and intentionally done without just cause or excuse": *Carstarphen v. State*, 112 Ga. 230, 37 S. E. 423.

The following authorities will support the proposition that malice toward the owner of the property injured or toward someone else is a necessary element of the offense, and must be shown to support a conviction: *Hobson v. State*, 44 Ala. 380; *State v. Foote*, 71 Conn. 737, 43 Atl. 488; *State v. Minor* (N. D.), 117 N. W. 528; *Harris v. State*, 73 Ga. 41; *Dawson v. State*, 52 Ind. 478; *Gaskill v. State*, 56 Ind. 550; *State v. Flynn*, 28 Iowa, 26; *State v. McBeth*, 49 Kan. 584, 31 Pac. 145; *Commonwealth v. Williams*, 110 Mass. 401; *Funderburk v. State*, 75 Miss. 20, 21 South. 658; *People v. Ferguson*, 119 Mich. 373, 78 N. W. 334; *United States v. Gideon*, 1 Minn. 292; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *State v. Newby*, 64 N. C. 23; *State v. Switzer*, 59 S. C. 225, 37 S. E. 818; *State v. Tarlton* (S. D.), 118 N. W. 706; *Stone v. State*, 3 Heisk. 457; *Hampton v. State*, 10 Lea, 639; *State v. Wilcox*, 3 Yerg. 278, 24 Am. Dec. 569; *State v. Rector*, 34 Tex. 565; *Branch v. State*, 41 Tex. 622.

The crime of malicious mischief may be inferred from the nature of the act and the circumstances surrounding it, and the malicious intent essential to constitute the crime may be inferred in the same manner, and generally the act must not only be done willfully and maliciously, but for the purpose of avenging some wrong sustained by the person charged with the offense: *State v. Tarlton* (S. D.), 118 N. W. 706. And an act of absolute recklessness will supply both malice and willfulness, and warrant a conviction, though there is no specific spirit of revenge against the owner or wanton cruelty to the property injured, or any specific purpose to maliciously or mischievously injure that particular piece of property. If the result arises out of a spirit of general abandoned deviltry, which is tantamount to willfulness, as to all men and all animals the actor may confront, he is guilty: *Porter v. State*, 83 Miss. 23, 35 South. 218.

There is a line of decisions holding that proof of malice toward the property injured or its owner is not indispensable to a conviction for malicious mischief: *Johnson v. State*, 37 Ala. 457; and it has been decided that under a statute providing against the willful or malicious injury to cattle, the property of another, it is not necessary to show malice against the owner, but merely an intention to injure the property: *Territory v. Crozier*, 6 Dak. 8, 50 N. W. 124. And it has also been determined that to constitute the offense of malicious mischief it is not necessary to prove actual malice, ill-will, or resentment toward the owner or possessor of the property, and that if the act is done wantonly and recklessly, or under circumstances showing a mind prompt and disposed to the commission of mischief, it is sufficient: *Moseby v. State*, 28 Ga. 190; *Lowery v. State*, 30 Tex. 402. The better rule is, however, that to convict of the crime of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge: *Commonwealth v. Walden*, 3 Cush. 558. And this is the rule supported by the weight of authority. It is no defense to show that the defendant was not actuated by any actual ill-will toward the owner of the property injured, or anyone else: *State v. Boies*, 68 Kan. 167, 74 Pac. 630. Nor is it any defense to a prosecution for malicious mischief in injuring property to show that the defendant had no malice against the owner nor intent to injure him, but that his purpose was to commit the crime against another: *Funderburk v. State*, 75 Miss. 20, 21 South. 658. If the act is done maliciously, and for the purpose and with the intent of injury to the owner of the property, it is sufficient, though such owner be unknown, and the malice may be inferred from the acts of the party doing the injury: *State v. Linde*, 54 Iowa, 139, 6 N. W. 168. In a prosecution for malicious mischief, it is not necessary to show express malice toward the owner of the property injured, but merely that the act was done intentionally and without just excuse, as malice will be inferred from the latter acts: *State v. Roscum*, 128 Iowa, 509, 104 N. W. 800; *State v. Gilligan*, 23 R. I. 400, 50 Atl. 844.

#### IV. Property Subject of Offense.

Statutes making it a crime known as malicious mischief to maliciously or wantonly injure or destroy the property of another generally have reference to personal property alone, and not to such property as may be considered realty or a part of the realty, but malicious mischief done to any kind of personal property is generally deemed a misdemeanor, and may be prosecuted criminally: *Loomis v. Edgerton*, 19 Wend. 419.

Under a majority of the statutes the malicious and wanton killing of or injury to a dog is malicious mischief: *State v. Sumner*, 2 Ind. 377; *Kinsman v. State*, 77 Ind. 132; *Nehr v. State*, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771; *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516; *State v. Latham*, 13 Ired. 33; *McDaniel v. State*, 5 Tex. App. 475. On the other hand, it is maintained, with equal

force, that a dog is not property, and that the malicious killing or wounding of the dog of another is not a crime, and that one, though guilty of such act, is not guilty of malicious mischief: *Patton v. State*, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732. Some of the decisions are based upon the ground that a dog is not a "domestic animal" nor a "beast": *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423; *United States v. Gideon*, 1 Minn. 292; *Taylor v. State*, 6 Humph. 285; *State v. Marshall*, 13 Tex. 55; *Commonwealth v. Maclin*, 3 Leigh, 809; *Davis v. Commonwealth*, 17 Gratt. 617.

But a person may be guilty of malicious mischief in killing the hog of another willfully and maliciously: *Shubrick v. State*, 2 Rich. (S. C.) 21. And the unlawful and malicious killing of a cow or cows is indictable as malicious mischief: *People v. Smith*, 5 Cow. 258; *Taylor v. State*, 6 Humph. 285. And it makes no difference that such stock is running at large: *State v. Brigeman*, 94 N. C. 888; *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779.

An indictment for malicious mischief will lie only for the malicious injury to, or destruction of, personal property as a rule, and growing trees, grain, or the like are generally regarded as part of the realty, and malicious injury to them is not malicious mischief: *Parris v. People*, 76 Ill. 274; *In re Brown*, 3 Greenl. 177; *State v. Helmes*, 5 Ired. 364.

A statute which makes it a misdemeanor and malicious mischief to "willfully burn or destroy any other person's corn, cotton, shucks or other provender, in a stack, hill or pen, or secured in any other way out of doors, grass or sledge on the land," does not embrace cotton stored in a car standing on a railroad track: *State v. Avery*, 109 N. C. 798, 13 S. E. 931.

Under a statute punishing as malicious mischief any injury toward "any growing fruit, corn, grain, or other agricultural product or property, real or personal," belonging to another, an indictment will not lie for injuring a locomotive-engine: *Murray v. State*, 21 Tex. Ct. App. 620, 57 Am. Rep. 623, 2 S. W. 757.

Under a statute providing a punishment for throwing stones at, or into, any train car or locomotive, it is malicious mischief to throw stones at street-cars drawn by horses: *State v. Lang*, 14 Mo. App. 247.

Under a statute punishing one for defacing certain buildings and any house or building not mentioned in the above section, one may be indicted for defacing a jail: *State v. Bryan*, 89 N. C. 531.

#### V. Acts Constituting Offense.

Malicious mischief includes all injury to the property or rights of another which impairs or materially diminishes its value. Hence the maliciously tearing down, injuring and breaking telephone wires is indictable as malicious mischief: *State v. Watts*, 48 Ark. 56, 3 Am. St. Rep. 216, 2 S. W. 342. The malicious and willful cutting of a rope suspending a banner, to the injury of both articles, being the



property of other persons, constitutes the offense: *State v. Webster*, 17 N. H. 543. Willfully destroying and injuring a cable to which a fish-car is moored and fastened, by cutting such cable, is malicious mischief: *Commonwealth v. Soule*, 2 Met. 21. Maliciously cutting off the hair of the tail or mane of a horse of another makes one guilty of the offense: *Boyd v. State*, 2 Humph. 39. Or to maliciously and in a spirit of wantonness and revenge cut and mutilate the harness of another is malicious mischief: *People v. Moody*, 5 Park, Cr. Rep. 568. The malicious maiming of a domestic animal, thus lessening its value, makes the offense complete: *State v. Harris*, 11 Iowa, 414. Willfully and maliciously injuring dresses so as to make them unfit for further use as such, although they are not totally destroyed, constitutes the offense: *Commonwealth v. Sullivan*, 107 Mass. 218. The malicious and willful destruction of the personal property of another by poison is malicious mischief: *Commonwealth v. Falvey*, 108 Mass. 304. Or to confine animals and from motives of wicked and malicious mischief fix some sharp instrument at the place of their escape, and then with intent to wound, maim or destroy them, to force them over such instrument, causing them to be wounded, constitutes the crime: *State v. Briggs*, 1 Aiken, 226. Discharging a gun, with knowledge and warning that the report will injuriously affect the health of a sick person in the neighborhood when such effect is produced by such discharge, is indictable as malicious mischief: *Commonwealth v. Wing*, 9 Pick. 1, 19 Am. Dec. 347.

A prisoner who, while confined in a county jail, defaces the wall of his cell by making a hole therein, may be convicted of malicious mischief under a statute making it a crime to wantonly deface or disfigure any county building: *Allgood v. State*, 95 Tenn. 471, 32 S. W. 308; and under a statute punishing any person who shall pull down or destroy, in whole or in part, any dwelling-house, a partial pulling down of the dwelling of another constitutes mischievous mischief: *Samanni v. Commonwealth*, 16 Gratt. 543. And the same rule applies to a church or private building: *State v. Brant*, 14 Iowa, 180. Under the Indiana statute the mere maliciously carrying away and conversion of the goods of another without injury thereto, by which their value is diminished, is not a crime: *State v. Cole*, 90 Ind. 112. The fact that defendant knocked and kicked down certain trunks and goods which had been piled upon the sidewalk by a storekeeper, so as to obstruct the walk, is not sufficient to support a conviction: *Rose v. State*, 19 Tex. App. 470.

## VI. Defenses.

In an action for malicious mischief in killing an animal it is not necessary to set out the particulars of the testimony to be introduced, and it is competent to admit evidence to show that the fence of the defendant around the field where the killing took place was not of the lawful height: *Arnold v. State*, 70 Ga. 723.

The injuring or wounding of trespassing animals cannot be justified on the ground that they were doing damage at the time: *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582.

If, in a trial for malicious mischief, there is a controversy between the parties in regard to a certain lot of ground, the defendant being in actual possession, it appears that upon the prosecutors attempting to run a division fence across the lot, the defendant took up the posts and tore off the boards while the fence was in course of erection, and forbade them from making the fence, protesting that they had no right to do so, as he was paying rent for the whole premises, he is entitled to an instruction that if the jury believe from the evidence that he was in possession of the premises and paying rent he was not guilty: *Sattler v. People*, 59 Ill. 68.

Under a statute providing that a penalty for mischievously injuring any cattle "shall not apply to any person who may injure animals found in the act of trespassing within his inclosure, and who has paid or tendered to the owner of the animal full compensation for the injury inflicted," the person against whom an award has been made for wounding an animal, in order to avail himself of the benefit of the statute, must show that he has paid or tendered to such owner the amount of the award: *Murphy v. State*, 62 Miss. 97.

It is no defense against malicious mischief in destroying a boat that it was destroyed under the advice of counsel: *People v. Kane*, 60 Hun. 585, 15 N. Y. Supp. 612; but a conviction for the mischievous and willful destruction of a boat will not stand if it appears that the defendants openly and on the advice of counsel destroyed it by order of the owner of a pond, in an effort to protect his possession of the pond from the trespasses of the owner of the boat, who repeatedly took the boat back to the pond after the defendants had hauled it away: *People v. Kane*, 142 N. Y. 366, 37 N. E. 104.

A person charged with malicious mischief in injuring stock running at large cannot, as matter of defense, set up the provisions of the "stock law," making it unlawful for the owner to permit his stock to run at large: *State v. Rivers*, 90 N. C. 738.

If trees are growing in a highway of which an abutting owner holds the fee, a telegraph corporation, acting under a statutory grant of authority to construct its lines from a point to points along and upon such public road or highway, has no right to injure such trees, whether the injury is necessary to the use of the lines of the corporation or not, and an injury to such trees is a malicious mischief, and if the landholder, without objection, permits the telegraph line to be erected upon the public highway, the fee of which belongs to him, he is not thereby estopped from subsequently objecting to injuries done, or about to be done, by the corporation to trees growing in such highway by trimming or cutting them off to further facilitate the stringing of wires: *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578, 37 N. E. 710, 24 L. R. A. 724. In an action for malicious mischief in willfully and maliciously breaking a waste-weir, malice

is a term of art imputing wickedness and excluding a just cause or excuse. It is implied from an unlawful act willfully done until the contrary is proved, so that the malice implied from the willful breaking of the weir is not rebutted by defendant's showing that he did not act wantonly or spitefully, but was moved by a prospect of the advantage that he would derive from obtaining at little cost materials for his mill: *State v. Dorg*, 2 Rich. 179.

#### VII. Evidence—Admissibility.

In a prosecution for malicious injury to animals, it has been held that evidence of malice to a son of the owner of the animals should not be received: *Northcot v. State*, 43 Ala. 330. And on a trial for malicious mischief in killing a mule if it appears that there was no lawful fence around the defendant's premises, evidence that such animal was breachy and had previously trespassed on the same land is admissible only in mitigation of damages: *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790; but such evidence is admissible to show that the animal was a trespasser: *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790. And such evidence is admissible to show an absence of malice on the part of the person killing the mule: *Wright v. State*, 30 Ga. 325, 76 Am. Dec. 656. On the trial of an action for malicious mischief in poisoning the prosecutor's horse, evidence that shortly before defendant was convicted of whipping the prosecutor's child is admissible to show his ill-will toward the defendant: *State v. Sheets*, 89 N. C. 543. If, in a prosecution for malicious mischief in maiming a horse, it is set up as a defense that the defendant tied the horse by the jaw to prevent his roaming over his lands to the injury of his crops, the manner in which he tied the horse, and the character and extent of the injury inflicted, may be considered in determining whether the injury was willfully and maliciously inflicted: *State v. Williamson*, 68 Iowa, 351, 27 N. W. 259.

Evidence is always admissible in justification and to show want of malice: *People v. Kane*, 131 N. Y. 111, 27 Am. St. Rep. 574, 29 N. E. 1015; *State v. Bush*, 129 Ind. 110; *State v. Roseman*, 66 N. C. 634; *Commonwealth v. Drass*, 146 Pa. 55, 23 Atl. 233. On the other hand, on the trial of an indictment for malicious mischief in killing an animal, the defense may prove the animus of the accused, even though such testimony includes declarations made by him after the killing: *State v. Graham*, 46 Mo. 490.

In a criminal prosecution under the statute for willfully and maliciously destroying the property of a person without his consent, it is immaterial whether the property came rightfully into the possession of the defendant or not, and evidence on that point is not admissible: *State v. Pike*, 33 Me. 361.

On the trial of such an indictment against several for injuring a sloop in taking her from her moorings, evidence is not admissible to prove that, several hours after taking the sloop, the defendants were pursued in a steamboat and, when overtaken, one of them made threats of personal violence against anybody who should lay hands

on him, if there is nothing in the case to connect the language used with the specific injuries to the sloop: *Commonwealth v. Smith*, 2 Allen, 517.

#### VIII. Sufficiency of Evidence.

A conviction for malicious mischief in breaking and defacing a fence is not sustained by testimony showing that one of the defendants was seen kicking the fence and the other pulling the wire therefrom. The evidence must show that one or both either broke or defaced the fence: *Kluthe v. People*, 29 Ill. App. 448.

Although the ownership of the property injured or destroyed must be proved as charged, yet if the injured property is attached to the realty, ownership will be inferred from proof of possession or occupancy: *Holder v. State*, 127 Ga. 51, 56 S. E. 71. A grant of church premises to the elders of a church and their successors and proof of the proper election of the complainants, as such successors, is sufficient proof of ownership for the purposes of the trial: *State v. Brant*, 14 Iowa, 180.

It is sufficient to charge the jury that it must be "satisfied" as to the ownership of the property in question: *State v. Sears*, 61 N. C. 146; *State v. Knox*, 61 N. C. 312.

If the evidence does not show, even circumstantially, that the defendant did the act maliciously with intent to injure the owner of the animal injured, nor that there was in fact any actual damage done by maiming, wounding or disfiguring it, the evidence will not support a conviction: *Dover v. State*, 32 Tex. 84. If the evidence shows that a defendant set his dogs on plaintiff's hogs with intent to injure them and also injure their owner, it will support a conviction of malicious mischief: *Shirley v. State* (Tex. Cr. App.), 22 S. W. 42.

#### IX. Presumptions.

On a trial for malicious mischief, malice cannot be inferred from the relation existing between the defendant and the family in which he lived, and the owner of the property injured: *State v. McDermott*, 36 Iowa, 107. But if a person inflicts an injury on an animal of another that amounts to a maiming, willfully, wantonly and without reasonable excuse shown therefor, the law will imply malice toward the owner: *State v. Williamson*, 68 Iowa, 351, 27 N. W. 259; *People v. Olsen*, 6 Utah, 284, 22 Pac. 163. Nor need it be shown that the defendant knew who the owner of the animal was, if he acted with malice toward whomsoever proved to be such owner. In such case malice is inferred: *State v. Phipps*, 95 Iowa, 491, 64 N. W. 411. It is not necessary to prove malice on the part of the accused. If the act is willfully done the law will presume that he either maliciously, or recklessly and wantonly intended the consequences of his own act: *Wallace v. State*, 30 Tex. 758; *Lane v. State*, 16 Tex. App. 172. But an intent to injure the owner is the gist of the offense, and it has been held, though doubtless erroneously, that to warrant a conviction, this intent must be alleged and well proved. It cannot be inferred from the mere act of injury wantonly inflicted: *Newton v.*



State, 3 Tex. App. 245. On a prosecution for maliciously killing a horse, sufficient evidence of the killing, unless rebutted by some fact connected with the commission of the act, casts upon defendant the burden of proof to rebut the presumption of malice: *Fein v. Territory*, 1 Wyo. 376.

On the trial of an indictment for malicious mischief by the tearing down and removal of a certain house, it is sufficient to prove that the land on which the house stood did not belong to the defendant, but to the person alleged in the indictment to be the owner, and that the defendant entered upon the land and committed the offense charged, for if the defense relied upon is that the land belonged to a different person by whose authority the house was removed, that is a matter which must be established by the defendant: *Ritter v. State*, 33 Tex. 608.

Malice may be inferred from evidence that lead pipes have been severed and carried away from a house by a person not the owner, and that the plastering, molding, and paper have broken, and that wash-basins and doors have been broken, wrenched and torn away, though a witness testifies that he has no reason to believe that the defendant bore malice toward the owner: *People v. Burkhart*, 72 Mich. 172, 40 N. W. 240.

It is not incumbent upon the prosecution, after proving malicious mischief and injury to a building, to show that there was no consent by the owner, as that is a matter peculiarly within the knowledge of the accused, and the burden is on him to show such consent: *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

## X. Indictment.

a. **Essentials of, Generally.**—An indictment charging malicious mischief must follow the words of the statute strictly, and an indictment charging the commission of that offense in a certain year without naming either the day or the month when the offense was committed is fatally defective: *Bailey v. State*, 65 Ga. 410. An indictment charging that defendant did unlawfully, etc., destroy and injure, and cause to be destroyed and injured, a certain mare is sufficient: *State v. Slocum*, 8 Blackf. 315. So an information that the defendant did maliciously and mischievously injure a certain wagon of a certain value, the property of another, to his damage to a certain amount, is sufficient: *State v. Williams*, 21 Ind. 206. It is immaterial whether the indictment charges damages to the property or damages to the owner thereof: *Kinsman v. State*, 77 Ind. 132. An indictment for malicious mischief in shooting and killing by the defendant of the animals of a named person without his consent and willfully is good: *Commonwealth v. Smith*, 6 Bush, 263.

Generally, under such statutes, no negative averment is necessary: *State v. Batson*, 31 Mo. 343.

An indictment charging that the defendant did maliciously pursue a cow, the property of a certain person, with intent unlawfully and wickedly to kill said cow, and did kill her, merely charges an

injury against personal property, and contains no sufficient averments to make the act amount to malicious mischief: *State v. Allen*, 72 N. C. 114.

The indictment is sufficient if it alleges that the accused did wantonly and willfully injure the property, without charging that it was unlawfully done: *State v. Martin*, 107 N. C. 904, 12 S. E. 194. If the indictment alleges that the defendant, maliciously killed a dog with intent to injure the owner thereof, it is sufficient: *State v. Pine*, 30 Tex. 399. But an information charging malicious mischief in tearing down the fence of two persons must allege want of consent of each of the owners: *Govitt v. State*, 25 Tex. App. 419, 8 S. W. 478. But the indictment need not allege that the injury was done with force and arms: *Taylor v. State*, 6 Humph. 285.

**b. Allegation of Malice.**—It is generally necessary in an indictment for malicious mischief to charge that the act was done maliciously, and with malice toward the owner of the property killed or injured: *United States v. Gideon*, 1 Minn. 292; *State v. Jackson*, 12 Ired. 329. A contrary holding may, however, be found in the same state: *State v. Scott*, 2 Dev. & B. 35. But as the essential ingredient of the offense is the intent to injure the owner of the property, such intent as well as malice toward him should be alleged: *State v. Rector*, 34 Tex. 565. At least the indictment must charge that the act was done mischievously and maliciously: *Thompson v. State*, 51 Miss. 353; *Boyd v. State*, 2 Humph. 39; *State v. Delue*, 1 Chand. 166, 2 Pinn. 204.

**c. Means of Injury and Extent Thereof.**—Under many of the statutes a complaint charging malicious mischief, in that the defendant did willfully injure certain property, a certain public building, etc., though substantially in the language of the statute, is insufficient in failing to show particularly the manner and amount of the injury: *State v. Costello*, 62 Conn. 128, 25 Atl. 477. Under statutes relating to malicious mischief, the amount of damage inflicted, and not the value of the property injured, constitutes the basis upon which the penalty for the offense is estimated, and therefore, in information for such injuries, the damages caused by the injury complained of should be distinctly averred, though the value of the property is stated: *Harness v. State*, 27 Ind. 425. Many of the cases decide, however, that the indictment or information is not sufficient if it does not show that the property was injured and the amount of damages resulting from the injury: *State v. Aydelott*, 7 Blackf. 157; *State v. McKee*, 109 Ind. 497, 10 N. E. 405; *Thomas v. State*, 42 Tex. 235; *Nicholson v. State*, 3 Tex. App. 31; *Uecker v. State*, 4 Tex. App. 234.

The indictment must allege the amount of damage and injury done to the owner by the mischievous act, as such amount is necessary in determining the punishment: *State v. Heath*, 41 Tex. 426.

Whether the indictment must allege the amount of the injury inflicted upon the property or owner must necessarily depend upon the wording of the statute, and under some of the statutes such allegation

is not necessary: *Harris v. State*, 73 Ga. 41; *Commonwealth v. Cox*, 7 Allen, 577; *State v. Batson*, 31 Mo. 343.

d. **Value of Property Injured.**—Under some statutes an indictment for malicious mischief should allege the value of the property injured: *State v. Garner*, 8 Port. 447; *McKinney v. People*, 32 Mich. 284; *United States v. Gideon*, 1 Minn. 292; *Nicholson v. State*, 3 Tex. App. 31. Under other statutes the value of the property injured need not be alleged: *Caldwell v. State*, 49 Ala. 34; *Birdg v. State*, 31 Ind. 88; *Sample v. State*, 104 Ind. 289, 4 N. E. 40; *State v. Pearce, Peck* (Tenn.), 66. In any case, if the language of the statute is followed, the indictment is generally sufficient: *State v. Pearce, Peck* (Tenn.), 66.

e. **Ownership.**—In an indictment for malicious mischief in injuring property, its ownership must be alleged: *Staadon v. People*, 82 Ill. 432, 25 Am. Rep. 333; *State v. Jackson*, 7 Ind. 270; *State v. Haney*, 32 Kan. 428, 4 Pac. 831; *Ex parte Eads*, 17 Neb. 145, 22 N. W. 352; *State v. Deal*, 92 N. C. 802; *Davis v. Commonwealth*, 30 Pa. 421. On an indictment for malicious mischief it is material to lay the name of the owner, and a mistake in his name is fatal: *State v. Smith*, 21 Tex. 748; *Haworth v. State, Peck* (Tenn.), 89. Or if the indictment fails to allege that the defendant had no interest in the premises to which the injury has been done, it is fatally defective: *State v. Crenshaw*, 41 Mo. App. 24; *State v. Stanley*, 63 Mo. App. 654. Under certain statutes it is not necessary to set forth the ownership of the property injured, and which is the subject of the malicious mischief: *State v. Brocker*, 32 Tex. 611. And an indictment for wantonly and maliciously defacing a building which was occupied by a certain person at the time of the offense has been decided to be sufficient, without alleging who was the owner thereof: *State v. Mathes*, 3 Lea, 36.

Under a statute making it malicious mischief to injure or deface a public building, it need only be alleged that the building injured was a public building: *Read v. State*, 1 Ind. 511; *Brown v. State*, 16 Tex. App. 245; *Pratt v. State*, 19 Tex. App. 276. An indictment for malicious mischief to a church building need only allege that the injury was done to a church building, without stating the ownership thereof: *Smith v. State*, 63 Ga. 168; *State v. Brant*, 14 Iowa, 180. But the information should allege that the rightful possession of the property was in some other person than the defendant: *Woodward v. State*, 33 Tex. Cr. 554, 28 S. W. 204.

## CENTRAL TRUST COMPANY v. STEPANEK.

[138 Iowa, 131, 115 N. W. 891.]

**CHATTEL MORTGAGES**—Assignments of.—Though no statute requires the recording of an assignment of a chattel mortgage, failure to make such record will subordinate the assignee to the rights of a bona fide purchaser of a second mortgage upon the same property from the original mortgagee, who, after such assignment, fraudulently cancels the mortgage of record and obtains another for the same debt and puts it in circulation. (p. 176.)

**CHATTEL MORTGAGES**—Assignments—Purchasers.—A subsequent assignee of a chattel mortgage, as well as a subsequent mortgagee, is a purchaser within the meaning of a statute providing that "no unrecorded mortgage of personal property where the possession is retained by the mortgagor is valid against existing creditors or subsequent purchasers." (p. 178.)

H. B. Hurd, Shaw, Sims & Keuhnle and Hager & Powell, for the appellant.

Conner & Lally, for the appellee.

**132** WEAVER, J. On January 8, 1904, J. W. Stepanek executed and delivered to H. S. Green a chattel mortgage on one hundred head of three year old steers to secure the payment of his promissory note for four thousand dollars, due April 8, 1904. Soon after the first-named date Green transferred the note to the Central Trust Company of Illinois as collateral security for the payment of his own debt to said company. The mortgage was duly recorded, but no record of its assignment to the appellant was ever made. After said assignment had been made to the appellant, Green pretending still to be the owner of the note and mortgage, Stepanek paid him thereon the sum of two hundred dollars, and made and delivered to him another promissory note for three thousand eight hundred dollars in renewal of the note first mentioned, and secured the same by another mortgage upon the same property. Green then went to the office of the recorder of the county and canceled upon the record the first mortgage, and thereafter, and before the last-mentioned note became due, transferred it to the Merchants' National Bank of Omaha, which claims to have received it in due course and for a valuable consideration. On April 9, 1904, plaintiff began this action in equity, averring the making of the note and mortgage by Stepanek to Green and the assignment of the said security by Green to itself, and further alleging that Stepanek had wrongfully sold two carloads of the mortgaged <sup>133</sup> steers and received therefor two thousand dollars in cash, which money he refused to turn over to plaintiff:



that Stepanek was insolvent; and that the Des Moines National Bank was asserting some claim to the cattle or to some lien thereon, and prayed for an appointment of a receiver for the mortgaged property and for the money received by Stepanek as aforesaid and for a foreclosure of said mortgage. A receiver was in fact appointed, and much of the record pertains to the orders made by the trial court with reference to said receiver and his subsequent discharge on motion of the defendants; but as we think that phase of the case is not of controlling importance we shall not here enter into the details. On October 21, 1904, the Merchants' National Bank of Omaha intervened, setting up its claim under the mortgage last executed. The trial court found for the intervener, and established its mortgage as a first lien on the property, and the plaintiff appeals.

1. The principal question urged upon our attention has reference to the effect, if any, upon the rights of the parties of plaintiff's failure to record the assignment of the mortgage under which it claims a first lien on the cattle in controversy. It will be noted from the foregoing statement that the mortgage first in time was duly recorded and afterward assigned to plaintiff. Later, the assignment not being recorded, Green, the mortgagee named in the instrument, and the only person whom the record indicated as having the right so to do, canceled it, and, taking another mortgage for the same debt on the same property, assigned it to the intervener, who took it without notice of the earlier lien. Appellant argues there is no statute requiring the recording of such assignments, and that failure to make such record will not affect the rights of the assignee or priority of his lien, even where the original mortgagee, taking advantage of such failure, cancels the lien of record, and obtains another mortgage for the same debt, and puts the security <sup>134</sup> thus fraudulently obtained in circulation. Much support for this position may be found in the cases, but the question is no longer an open one in this state. It is true we have no statute which in express terms requires the recording of assignments of mortgages either of real or personal property, but it has very frequently been held that as to the former an unrecorded assignment will be avoided in favor of subsequent purchasers and existing creditors without notice: *McClure v. Burris*, 16 Iowa, 591; *Bank of State of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Quincy v. Ginsbach*, 92 Iowa, 144, 60 N. W. 511; *Jenks v. Shaw*, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900; *Parmenter v. Oakley*,

69 Iowa, 388, 28 N. W. 653; *Bowling v. Cook*, 39 Iowa, 200; *Daws v. Craig*, 62 Iowa, 515, 17 N. W. 778.\* Since the trial of the present case in the court below we have also held the same rule applicable to mortgages of personal property (*Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170); the theory being that the spirit of the statute, if not the strict letter, requires the record of all such instruments in order to bind existing creditors, subsequent purchasers and lienholders. While the first of the cases above cited (*Bank v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390) was by a divided court, the rule there announced has since been steadily and repeatedly adhered to without dissent. The reasons advanced in support of our rule are no more persuasive where the mortgage is of real estate than where it refers to personalty. In the *Anderson* case, the majority, speaking by Wright, J., says:

"But, on the other hand, how easy it is for the assignee of the notes or debts to protect himself. He can, by having the mortgage assigned on the margin of the record, protect himself against all possible fraud on part of the mortgagee, and leave the evidence of his rights in such a condition as that it must inevitably be seen by anyone looking for encumbrances. Or, if not thus, he may take his assignment in the ordinary form and have it duly acknowledged and recorded, and thus give notice of his interest in the security to third persons. . . . Some of the states, for instance, after providing a general law upon the subjects of mortgages and conveyances, expressly require assignments of mortgages<sup>135</sup> to be recorded. Our law, by using general terms, well defined and understood, obviates the necessity of more specific legislation. And in view of this legislation, why should the assignee of a mortgagee be exempt from the duty of placing upon record that which evidences his title to the right or interest thus purchased? He need not do it for the perfection of his right as against the assignor or vendor, but for his own protection against third persons the necessity arises. . . . A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of a debt, however honest of purpose, is liable as against third persons to untold abuse. They ought, therefore, to be made a matter of record. The spirit, if not the very letter, of our recording law, requires it. Such a requirement can work no possible hardship, while the contrary can only be attended with evil, and that continually."

In the *McClure* case (16 Iowa, 591), the court applies the well-settled rule "that when one of two innocent parties must

suffer by the wrongful act of a third person, he must suffer who placed or left it in the power of such third person to do the wrong." In *Daws v. Craig*, 62 Iowa, 515, 17 N. W. 778, we said: "The negligence and failure of the plaintiff to have the assignment of the mortgage recorded has been the primary cause of this controversy, and we think the burden to have the defendant's mortgage set aside should have been assumed by her." It would be difficult to formulate any plausible ground for saying that these reasons, the soundness of which we have so often approved as applied to assignments of mortgages upon real estate, are not equally persuasive as applied to mortgages upon personal property. The statute provides that no unrecorded sale or mortgage of personal property where the possession is retained by the vendor or mortgagor is valid against existing creditors or subsequent purchasers: Code, sec. 2906.

It is a well-settled proposition that a subsequent mortgagee is a purchaser within the meaning of this statute: *Manny v. Woods*, 33 Iowa, 265; *Union Bank v. Creamery Packing Co.*, 105 Iowa, 136, 74 N. W. 921; *Raymond v. Whitehouse*, 119 Iowa, <sup>136</sup> 132, 93 N. W. 292; *In re Gill's Estate*, 79 Iowa, 296, 44 N. W. 553, 9 L. R. A. 126. If a mortgagee be a purchaser within the meaning of the statute, there is no reason for denying that character to the assignee of the mortgage: *Larned v. Donovan*, 84 Hun, 533, 32 N. Y. Supp. 731; *Burns v. Berry*, 42 Mich. 176, 3 N. W. 924. The doctrine of our late case (*Farmer v. Bank of State of Indiana*, 130 Iowa, 469, 107 N. W. 170), above cited, finds direct support also in *Page v. Benson*, 22 Ill. 484. In that case a chattel mortgage securing the payment of a certain judgment was assigned to the plaintiff, who did not place the assignment of record. Taking advantage of this omission, the mortgagee satisfied the judgment and the mortgage, and executed another mortgage on the same property. The property having been seized under the second mortgage, the assignee of the first mortgage sought to have the satisfaction of the judgment set aside and the priority of his mortgage established. In affirming a decree denying the relief asked the court says: "A secret assignment of the judgment cannot be allowed to entrap innocent parties. All who are not chargeable with notice of the assignment of the judgment were justified in assuming that the judgment creditors were still the equitable owners of the judgment and first mortgage, and, when they entered the satisfaction of the judgment or caused the execution to be returned satisfied, everybody ignorant of the assignment had a



right to buy the property, or treat the property as released from the first mortgage, which was given to secure that judgment. Otherwise the grossest frauds might be practiced upon the innocent not chargeable with laches."

The appellant's contention is based solely upon precedents which have not had the approval of this court, and are not, we think, in harmony with the trend of the later authorities. We are satisfied that the rule we have heretofore adopted is supported by the better reason and the greater equity, and we are content to reaffirm the position taken in the *Farmer case* (130 Iowa, 469, 107 N. W. 170). The controversy is one of those <sup>137</sup> in which unfortunately one of two innocent parties must suffer a substantial loss, and, as we have already seen, the law leaves the burden upon the one whose omission made the perpetration of the fraud possible. The finding of the trial court that the mortgage owned by the appellee is entitled to preference must therefore be upheld. Appellant devotes some effort to the argument that the note held by the appellee bank to secure the mortgage last given is not negotiable in form. If we were to concede the soundness of the position stated, we are still unable to see how the fact, if established, would affect the result under the issues tried. If the appellee, instead of advancing the money and taking the note and mortgage, had purchased the steers outright, without notice of conflicting claims, and no paper, negotiable or otherwise, had been executed or delivered, its defense to the foreclosure of appellant's mortgage would be complete under the rules we have hereinbefore approved, and no reason is suggested why it should be held less effective because of the non-negotiable character of the evidence of the indebtedness which it seeks to enforce.

2. The result of the conclusion reached in the first paragraph renders unnecessary further consideration of the points made in the argument for the appellant. There has been submitted with this case a motion by the appellee to dismiss the appeal and a motion to strike the appellant's abstract and to affirm the judgment below, based on several grounds therein stated. The various assignments involve no questions which are not already well settled, and we shall not take the time to enter upon their discussion further than to say we think none of the objections are well taken, and the motions are each overruled.

We find no sufficient reason for disturbing the judgment of the district court. The costs for one-third of the printing



of the record and arguments in this court will be taxed to the appellee, and all other costs to the appellant. Affirmed.

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*If an Assignee of a Mortgage does not Record the Assignment*, he may thereafter be estopped to assert the mortgage as against persons having no notice of the assignment: Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655. And a release by the mortgagee after assigning the note secured by the mortgage is valid in favor of one who has no notice of the assignment, although both the note and the mortgage are in the hands of the assignee: Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368. If a mortgagee assigns the mortgage, and nevertheless subsequently proceeds to foreclose it, and at the foreclosure sale the property is purchased by one having no notice of such assignment, it not being filed for record, he acquires a title to the property as against the assignee: Huitink v. Thompson, 95 Minn. 392, 111 Am. St. Rep. 476. And if the assignee of a mortgage fails to record the assignment, knowing that the mortgaged land was held by a real estate dealer with consequent likelihood of sale, he thereby negligently places it in the power of the mortgagee to deceive or mislead a purchaser, who, by law and custom, would have the right to rely on the record. Withholding the assignment from record is a persistent declaration to all persons dealing merely with the title to the realty that the mortgagee owns the debt: Marling v. Nommensen, 127 Wis. 363, 115 Am. St. Rep. 1017.

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## McMANUS v. CHICAGO GREAT WESTERN RAILWAY COMPANY.

[138 Iowa, 150, 115 N. W. 919.]

**RAILROADS—Authority of Agent—Burden of Proof.**—There is no presumption that the local agent of a railroad company at one station has any authority to enter into a contract for a shipment from another station, and if it is claimed that such authority exists, the burden of proof is upon the plaintiff to affirmatively show the authority claimed. (p. 182.)

**RAILROADS—Limitation of Liability—Connecting Lines—Burden of Proof.**—If a railroad company, by written agreement, limits its liability for the transportation of property to the terminus of its own line, it is not chargeable with damages occurring on a connecting line, nor is the burden of proof upon it to show freedom from such liability. (p. 183.)

**RAILROADS—Injury to Stock in Transit—Burden of Proof.**—The burden of showing freedom from liability for damage to live-stock while in transit is not cast upon the railroad company where the shipper is furnished free transportation for the purpose of enabling him to accompany his shipment, and he does in fact accompany the stock. (p. 183.)

**RAILROADS—Injury to Livestock in Transit.**—If a railroad company limits its liability for the transportation of livestock to the terminus of its own line, it cannot be held liable in damages because one of a carload of cattle got down while in transit on its line, unless it is shown that the company was the cause of the condition of the animal at the time and of an injury thereto. (p. 183.)

**RAILROADS—Overcharges for Freight.**—To recover for overcharges for freight at the destination of the goods there must be a showing of the weight of the shipment carried by each car, when the charge is based on car capacity. (p. 184.)

J. A. Briggs and Saunders & Stewart, for the appellant.

C. F. Kimball, for the appellee.

<sup>151</sup> SHERWIN, J. The plaintiff is the assignee of L. L., E. G., and E. T. Baker, and as such sues to recover for damages to livestock shipped by said Bakers from McClelland, Iowa, to High River, Alberta, Canada. He also sues to recover an alleged overcharge of freight on said shipment which was paid to the agent of the Canadian Pacific at High River. The plaintiff alleged that he, as agent for the Bakers, entered into an oral agreement with the defendant through its agent at Council Bluffs, one Shipley, for the transportation of three cars of emigrant outfit and stock between the points stated, and that by the terms of said agreement the freight charge thereon was to be twenty cents per hundredweight from McClelland to Minnesota Transfer, the northern terminus of the defendants' road, and that from Minnesota Transfer to High River, Alberta, the rate agreed upon was forty-five dollars per car. It was further alleged, and the evidence supported the allegation, that the charge over the defendant's road was based on a minimum car capacity of twenty thousand pounds, and that the rate from Minnesota Transfer to High River was based on a maximum car capacity of twenty-four thousand pounds. The defendant pleaded a written contract entered into by the assignors of <sup>152</sup> the plaintiff, whereby the defendant undertook to transport the property from McClelland to Minnesota Transfer, and wherein its liability was limited to its own line.

The trial court, over the objection of the defendant, permitted the plaintiff to show that he had had a conversation with the agent Shipley in Council Bluffs, Iowa, wherein the rates were discussed, and the amounts stated herein were by the agent said to be the rate for which the property would be shipped to its destination. There was error in receiving such testimony. There is no pretense in argument, nor is there anything in the record tending to show, that Shipley had any authority to enter into a contract for the company in reference to a shipment from a station other than Council Bluffs. The appellee does contend that a shipment of one car was made to High River some six or eight months before the shipment in question, and that he made the contract with Shipley

for such shipment, and entered into an agreement with him for the freight charge therefor and for other details of the trip. It appeared, also, that the car went through according to the contract with Shipley and for the charge agreed upon. The plaintiff now claims that the facts relating to the first shipment were sufficient to warrant the finding that Shipley had authority to make a contract for the company for a shipment from McClelland, and also authority to contract for the company for a shipment beyond the terminus of the company's line. So far as the latter question is concerned, it may be conceded that such a transaction would give some warrant for the finding that he had authority to contract for a shipment beyond the terminus of the defendant's road; but it does not furnish any foundation for the claim that he had authority to make a contract for a shipment from another station, because there is nothing in the record tending to show that the first shipment was made from McClelland or any station other than Council Bluffs. The law raises no presumption <sup>153</sup> that the local agent of a railroad company at one station has any authority to enter into a contract for a shipment from another station, and, where it is claimed that such authority existed, the burden of proof is upon the plaintiff to affirmatively show the authority claimed: *Voorhees v. Chicago etc. Ry. Co.*, 71 Iowa, 735, 60 Am. Rep. 823, 30 N. W. 29; *Burgher v. Chicago etc. Ry. Co.*, 105 Iowa, 335, 75 N. Y. 192.

The testimony relating to the oral agreement plead having been improperly received for the reason stated, there was nothing upon which a verdict for the plaintiff could be based growing out of such alleged oral contract; and, it being unquestioned that the Bakers did, in fact, enter into written contracts for the transportation of such cars with the defendant's agent at McClelland, it must necessarily follow that the appellant was not chargeable with any damages to the stock or property of the Bakers which was caused after the property had been delivered to the shippers at the Minnesota Transfer. The trial court instructed the jury that the plaintiff could only recover for damages arising while the property was in the defendant's possession, but, in the same connection, the jury was told that the burden of proof was upon the defendant to show that it was not liable therefor. The instruction was undoubtedly based upon chapter 74, Acts of the 30th General Assembly, 1904, which provided, in substance, that, where a railway company made a contract to carry property to a point beyond the terminus of its own railway and provided therein that there should be no liability for

damage to such property beyond its own terminus, it should be held for such damage unless it prove that it was not liable therefor. While the instruction might have been pertinent had the oral contract governed, it clearly was not the rule by which the jury was to be guided, and it was prejudicial error to give the same. It is a well-settled rule that a carrier may ordinarily limit its liability for the transportation <sup>154</sup> of property to the terminus of its own line: *Hartley v. St. Louis etc. Ry. Co.*, 115 Iowa, 612, 89 N. W. 83.

There is also another reason why the instruction was erroneous. The shippers were furnished free transportation by the defendant company for the purpose of enabling them to accompany their shipments, and where the shipper does, in fact, accompany the stock, the burden of showing freedom from liability is not cast upon the defendant: *Grieve v. Illinois etc. Ry. Co.*, 104 Iowa, 659, 74 N. W. 192; *Elliott on Railroads*, sec. 1549, and cases cited.

The plaintiff claimed over four hundred dollars damage to his stock, and the verdict returned by the jury shows that the greater part of such claim was allowed. The plaintiff's own testimony conclusively showed that practically all of the damage was done after the stock left the defendant's road, and that the defendant was in no manner liable therefor. The question of the defendant's liability for damage to stock, except one item of the claim to which we shall presently refer, should not have been submitted to the jury under the record in this case. The testimony showed that one heifer of the value of thirty-five dollars was down when the defendant's train reached the stockyard at Minnesota Transfer. It was also shown that there was a delay of some ten or twelve hours on the road from McClelland to that point, and that it was caused by an obstructed track near Bristow, Iowa, but the record is absolutely without evidence tending to show that the railroad company was the cause of the heifer's condition at the time in question, and one of the shippers himself testified that it was very common for stock to get down in the car during a shipment. There is nothing in the record indicating that the heifer was thrown down by improper management of the train or the car, or that her condition was in any way caused by the defendant. For this reason, we think it was error to submit that item of the claim to the jury.

<sup>155</sup> When the cars in question reached High River and before they were unloaded, the plaintiff's assignors were required to pay something like two hundred and fifty dollars more than the amount claimed to have been agreed upon with



Shipley, and this amount the plaintiff sought to recover in this action, and he was awarded some part of the amount at least. Just how much it is impossible to tell from the verdict because it was for a lump sum. But, however this may be, there was no justification in the evidence for the recovery of any sum. Even if it be conceded that the plaintiff was entitled to recover under the oral contract alleged, there is absolutely nothing in the record tending to show the weight of the loads in any of the cars, and no jury could say, nor can we say from the record, that the charge may not have been entirely correct based upon the load each car in fact carried. If the cars contained more than twenty thousand pounds, they would be liable to an additional charge from McClelland to Minnesota Transfer, and if they carried more than twenty-four thousand pounds from Minnesota Transfer to High River, they would be subject to a still different rate, so that, to enable a jury or a court to find that there had in fact been an overcharge, it would be necessary to prove the load each car carried. This was not done, and there is nothing in the record from which it can be determined.

Other errors are assigned and argued, but the same questions are not likely to again arise if there should be a retrial of the case, and we need give them no further consideration.

For the errors pointed out, the judgment must be, and it is, reversed.

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*The Burden of Proof as Between Connecting Carriers* to show who is at fault for a loss or injury to freight is considered in the note to *Beede v. Wisconsin Central Ry. Co.*, 101 Am. St. Rep. 392. For subsequent decisions on this question, see *Charles v. Atlantic Coast Line R. R. Co.*, 78 S. C. 36, 125 Am. St. Rep. 762, and cases cited in the cross-reference note thereto. The liability of an initial carrier for the torts or negligence of connecting carriers is the subject of a note to *Pennsylvania Co. v. Loftus*, 106 Am. St. Rep. 604.

*In the Transportation of Livestock*, the liability of a common carrier attaches, including liability for injuries occasioned by the acts of the carrier's employes: *Cleve v. Chicago etc. Ry. Co.*, 77 Neb. 166, 124 Am. St. Rep. 837. The delivery of livestock to a carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which exempts it from liability: *Chicago etc. R. Co. v. Slatery*, 76 Neb. 721, 124 Am. St. Rep. 825, and see cases cited in the cross-reference note thereto.

PECK v. CHICAGO GREAT WESTERN RAILWAY COMPANY.

[138 Iowa, 187, 115 N. W. 1113.]

**RAILROADS—Care in Shipment of Livestock**—A contract for the shipment of livestock, providing that the shipper or his agent in charge shall water, feed and care for the stock while in transit, imposes upon him the duty to see that the stock is furnished with such food and water as are properly required for consumption; but it does not impose upon him the duty of sprinkling and cooling the stock during hot weather. This duty devolves upon the railroad company alone. (p. 186.)

**RAILROADS—Care of Livestock**—In shipping swine crowded together, showering them with water in warm weather is essential to protect them from excessive heat, and as the facilities for doing so are entirely within the control of the railway company, it must be done by its employes alone, and the shipper cannot properly participate in the work. How frequently this should be done necessarily depends on the condition of the weather and the animals, and all that can be exacted from the shipper accompanying his stock is that, in the exercise of that care he has undertaken to bestow, he shall keep the railroad employes advised of the condition of the stock, that they may apply water as its necessities require. (p. 186.)

**RAILROADS—Care of Livestock—Contract Against Negligence**—A carrier of swine cannot by contract relieve itself from liability for its own negligence in failing to shower them during hot weather, and the most that can be required of the shipper is to notify the railroad employes of the need of such showering, and having called their attention to the condition of the swine and of the necessity of plenty of water to keep them cool, he has the right to rely upon the discharge by them of their plain duty of showering as their condition required. (p. 188.)

**RAILROADS—Care of Livestock—Liability of Connecting Carrier**—If no injury occurs to livestock while in transportation on the line of a connecting carrier, joined in a suit for the negligent care of the stock, a verdict should be directed in its favor. (p. 189.)

A. G. Biggs, T. P. McNamara and Hagemann & Farwell, for the appellant.

Sager & Sweet, for the appellee.

Hagemann & Farwell, for the Waterloo, Cedar Falls & Northern Railway Company.

188 LADD, C. J. The one hundred and fifty-five hogs were loaded in two cars at Bremer at about 10 o'clock A. M. on June 4, 1905, and in ten or fifteen minutes thereafter were "picked up" and hauled by the Waterloo, Cedar Falls & Northern Railway Company to Waverly, arriving there in about fifty minutes. The conductor promised plaintiff to haul the cars to the chute so that plaintiff could water the animals, but the train on the Chicago Great Western Railway

came in as this was about to be done. The conductor of that train refused to wait long enough to allow the hogs to be watered, and pulled out for Chicago shortly afterward, taking the cars. These reached their destination at 3:10 o'clock on the following morning with thirty of the hogs dead. The evidence was such as to indicate that none of them were injured prior to reaching Waverly, and that their loss was occasioned by the failure to reduce their temperature by showering with water sufficiently between that point and Chicago. The plaintiff accompanied the cars, and in the freight contract was a provision that "said <sup>189</sup> animals are to be loaded, unloaded, watered, fed and cared for by the shipper or his agent in charge, and the shipper assumes all risk of losses or damage to the animals while the same are in the yards waiting shipment, or while unloading from cars for any purpose, and during such periods the carrier shall be liable only for such loss or damage to said animals as is caused by its gross negligence."

Showering is usually done by holding a pipe from an elevated tank with one end flattened, so that the water is thrown through the openings in the cars as they slowly pass, thereby sprinkling and cooling the animals within. Appellant has argued the case on the theory that the duty of watering the hogs by showering is imposed on the shipper by the clause quoted. This is not so. Fairly construed, it means no more than that the shipper shall see that the stock is furnished with such food and water as are required for consumption, and, when required for their proper care, the necessary facilities for doing so being provided, and has no connection with the general treatment of stock of this kind essential to safe transportation. The evidence shows that in shipping swine crowded together as is necessary showering them with water in warm weather is essential to protect them from excessive heat; that the facilities for so doing are entirely within the control of the railway company, and it is done by its employes only; and that a shipper properly could not participate in the work. How frequently this should be done necessarily depends on the condition of the weather and of the hogs, and all that can be exacted from the shipper accompanying his stock is that, in the exercise of that care he has undertaken to bestow, he shall keep the employes advised of the condition of the stock that they may apply water as the necessities of the swine require.

A like provision in a shipping contract was so construed by the supreme court of Illinois in *Illinois Central R. Co. v.*

Adams, 42 Ill. 474, 92 Am. Dec. 85, where the court, after observing that the phrase "feeding and watering" <sup>190</sup> as used in the contract has reference alone, as we understand the contract, to the ordinary sustenance such animals require in the course of transportation, said: "The proof is clear that it is the custom of the railroad agents to make this application of water, and it is most reasonable and just that it should be their duty, for their employers own the trains, the tanks, and water within them, and have entire and exclusive control of all the movements and stoppage of the trains with which no shipper can in the slightest degree interfere. Were it not so, who can estimate the derangement to which trains would be subjected, did every shipper control its movements—did he have the power to stop it for any purpose, or to appropriate water at an inconvenient or improper station when there might be but a scanty supply not in excess of the necessities of the boilers? Good policy and a due regard to the operations of the trains require that this duty of watering live hogs in the manner described in the evidence should devolve upon those who manage the trains, and not upon the shippers of such stock. The contract referred to in the declaration had no reference to this matter, but to their ordinary feeding and watering, which duty properly belonged to the owner": See, also, *Wallace v. Lake Shore & M. S. R. Co.*, 133 Mich. 633, 95 N. W. 750.

Under the contract the hogs were to be cared for by the shipper, but this did not relieve the company from furnishing the necessary facilities, nor from its general duty to take all such precautions for safe transportation as reasonable prudence at least dictated. It could not by contract relieve itself from liability for its own negligence: *Hudson v. Northern Pac. Ry.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608. Thereunder that degree of care which a person of ordinary caution usually would bestow in a like situation is exacted from the shipper; and, in view of the state of the weather, plaintiff might well be held to the duty of observing the condition of his animals and of advising the <sup>191</sup> trainmen of such condition, unless aware that they were already informed thereof, and it was the duty of the trainmen upon being so advised, or having knowledge thereof, regardless of how obtained, to give the hogs the attention necessary for their preservation. The defendant's employes knew the state of the weather quite as well as plaintiff, and that the hogs in the ten or twelve earloads in the train were suffering from heat. The evidence that plaintiff directed their attention to the



condition of his hogs at Waverly is undisputed, and he notified the only person in charge of the train at the time, the engineer at Oelwein, and it is also undisputed that defendant's employes were fully aware of the state of the weather and the heated condition of the hogs in the several cars throughout the trip. Any further information or demands on the part of plaintiff could not have added to their knowledge of the need of showering or emphasized their duty in the matter. He was not required to harass and annoy them, but, having called their attention to the condition of his hogs, and the necessity of plenty of water to keep them cool, he had the right to rely upon the discharge by them of their plain duty of showering as their condition required. This the jury might have found they did not do. Whether they were adequately treated at Redlyn, fourteen miles east of Waverly, or showered at all at Oelwein, was in dispute, and other places with watering facilities, as Dubuque, were passed, though the employes knew of the heated condition of the hogs. It was the first excessively warm day of the season, and the jury might well have found that the care ordinarily bestowed on such animals in the heated season during transportation was not given them by the trainmen, and that therein the company was negligent.

2. The contention that the evidence shows conclusively that plaintiff was guilty of contributory negligence is not supported by the record. He bedded the cars with straw at Bremer, but did not wet it, <sup>192</sup> owing to the lack of water in the company's well at that place. He probably could have obtained water from neighboring wells by permission of the owners; but in not doing so, in view of the time of day, and the fact that the hogs were not heated in loading, and his reasonable expectation that facilities for showering them would be available en route, he cannot be said to have been negligent in waiting. Upon reaching Waverly, he allowed the Chicago Great Western Railway Company to take the cars without the hogs being watered, though by waiting for another train this might have been done before proceeding farther. But, according to his testimony, he did not know how soon the next train would arrive, and ought not to be held to have been at fault in allowing the employes who knew the condition of the hogs immediately to move them on. Nor was he guilty of not exercising ordinary care in not notifying the employes on the way what was necessary to do in order to protect the hogs against excessive heat. The evidence shows that they were familiar with the treatment essential for

protection of such stock, and were aware of the condition of the weather and of the hogs. Nothing he could have done would have added to the information these employés then had, or have facilitated the performance of their duties. The question of whether he was guilty of contributory negligence was rightly submitted to the jury.

3. The evidence shows affirmatively that the hogs were not injured by any negligence on the part of the Waterloo, Cedar Falls & Northern Railway Company, and for this reason the court rightly directed a verdict for that company. The case is within the exception of chapter 74 of the Acts of the 30th General Assembly. Affirmed.

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*The Duty and Liability of a Carrier to Livestock* which it accepts for transportation are considered in the note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548. As to the duty of the carrier to shower hogs because of excessive heat, see *Illinois Central R. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; and as to the duty of the carrier to unload stock for rest, food and water, see *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825; *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883.

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## ATLAS ASSURANCE COMPANY v. ATLAS INSURANCE COMPANY.

[138 Iowa, 228, 112 N. W. 232, 114 N. W. 609.]

**TRADEMARKS**—Protection.—The owners of trademarks and trade names have the right to protect them against piracy, whether such owners are residents or aliens. (p. 191.)

**TRADEMARKS**—Protection.—An insurance company is entitled to protection in the use of the figure of "Atlas" as a trademark. (p. 192.)

**TRADEMARKS**—Protection—Similarity.—If the resemblance in a trademark or name is such as to mislead purchasers or those doing business with the person or corporation using the name who are acting with ordinary caution, this is sufficient to entitle the one first adopting such trademark or name to protection. (p. 192.)

**TRADEMARKS**—Protection—Injunction.—The wrongful use of a trademark, trade name, or device may be enjoined without proof that anyone has been actually deceived. (p. 192.)

**TRADEMARKS**—Equity Jurisdiction—Protection.—A trade name as well as a trademark, symbol, or device is entitled to protection by courts of equity, and it makes no difference in the application of the rule whether the person using the name or trademark acts in good faith or otherwise. (p. 193.)

**TRADEMARKS**—Injunction.—The fact that a corporation adopting a certain trade name or device has permitted another corporation conducting a like business, but not in privity with it, to use a similar name or device in its business does not preclude the former from enjoining the latter from using such name. (p. 193.)

**TRADEMARKS, Legitimate Use of.**—The use of a trademark by another in such manner as to clearly and unmistakably show that one company is entirely separate and distinct from the other, and which can in no way mislead the public, is not objectionable and will not be enjoined. (p. 194.)

Berryhill & Henry, for the appellant.

A. H. McVey, for the appellee.

229 SHERWIN, J. The plaintiff was organized as an insurance company in 1808, under the laws of Great Britain, and under name of the "Atlas Assurance Company." In 230 1842, the word "Limited" was added, so that the name of the plaintiff since that time has been the "Atlas Assurance Company, Limited." It was authorized to do fire insurance business in the state of Iowa in 1892, and has continued to receive each year from the state a permit to do business herein, and has paid the state the taxes required by law for such purpose. In addition to the name "Atlas," it uses upon its policies of insurance, letter-heads, advertising matter, etc., the well-known device of Atlas supporting the world upon his shoulders, which device the plaintiff has used constantly since its organization in 1808. In 1892, a mutual insurance company was organized in Des Moines under the name "Iowa Business Men's Mutual Fire Insurance Company." In January, 1897, this name was changed to the "Atlas Mutual Fire Insurance Company." In March, 1905, a company was organized in Des Moines to do a fire insurance business and incorporated under the laws of this state under the name of the "Atlas Insurance Company." It is a stock company, with a capital stock of one hundred thousand dollars, and in August, 1905, it reinsured all outstanding risks of the Atlas Mutual Fire Insurance Company, and it has continued from the date of its organization to the present time, and is now using the device of Atlas supporting the world upon his shoulders; the device being identical in all respects with the same device used by the plaintiff. The defendant has also used the name "Atlas" in its business and on its policies, letter-heads, cards, etc., and is now so using it under the name Atlas Insurance Company. It uses letter-heads as follows: "Atlas Insurance Co." in bold-faced type at the head of the sheet, and below that for a date line the words "Des Moines, Iowa," without any other designation than the name "Atlas Insurance Co." to indicate that it is an Iowa insurance company. On such letter-heads the device Atlas is also used. It issues cards as follows: "Atlas Insurance Company, Des Moines, Iowa." The policies issued by it,

however, so far as the record shows, <sup>231</sup> bear upon their face these words, in addition to the name of the company, "of Des Moines, Iowa." This suit was brought by the plaintiff to enjoin the defendant from using the word "Atlas," and from using the device of Atlas, as hereinbefore stated. After hearing the testimony in the case, the trial court entered a decree finding the issues in favor of the plaintiff, and enjoining the defendant from using either the word or the device "in its present form."

The appellant contends that, because the plaintiff is a foreign corporation doing business in this state only by comity, it cannot maintain an action of this kind against an Iowa corporation; but there is nothing in this contention. As a general rule, the courts of the United States and those of the several states recognize the right of the owners of trademarks or of trade names to protect such trademarks and trade names against piracy, no matter where such owners reside: *State v. Gibbs*, 56 Mo. 133; *Peck Bros. & Co. v. Peck Bros. Co.*, 113 Fed. 300, 51 C. C. A. 251, 62 L. R. A. 81; *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784. In the latter case Mr. Justice Story said: "It is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. There is no pretense to say that, if a similar false imitation and use of the labels of a citizen put upon his own manufactured articles had been designedly and fraudulently perpetrated and acted upon, it would not have been an invasion of his rights, for which our law would have granted ample redress. There is no difference between the case of a citizen and that of an alien friend, where his rights are openly violated": See, also, *Brown on Trademarks*, 143; *Hopkins on Trademarks*, sec. 13; *Baker v. Baker*, 115 Fed. 297, 53 C. C. A. 157.

The appellant further says that the plaintiff never had, and cannot have, any rights in the use of the figure of <sup>232</sup> Atlas as a trademark, symbol, or device, because of the character of its business. It says that an examination of the adjudicated cases will show that, wherever a trademark or trade-name has been protected by a court of equity, it will be found to have been used in connection with some manufactured article. But no matter what the adjudicated cases may show in this respect, it probably arises from the fact that a precisely similar case has not heretofore been passed upon. To hold that a trade name or a trademark shall receive the pro-



tection of the court only when used in connection with the manufacture of some article of commerce would be adopting an extremely narrow view of the matter, and leave large financial interests engaged in other lines of business wholly without the protection of the court, so far as a trademark or trade name is concerned, and open to general piracy. We are not willing to sanction any such rule, and see no reason why the rule should be so limited.

The appellant further contends that there is such a difference in the names of these two companies that the plaintiff is not entitled to the relief sought. What degree of resemblance between the names or devices is sufficient to warrant the interference of a court in cases of this kind is not capable of exact definition. It is, and must be, from the very nature of the case, mainly a question of fact, to be determined by the circumstances appearing in each particular case. In general, it may be said that, if the resemblance is such as to mislead purchasers or those doing business with the person or corporation using the name, who are acting with ordinary caution, this is sufficient: *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *California Fig Syrup Co. v. Improved Fig Syrup Co. (C. C.)*, 51 Fed. 296; *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658. In *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040, it was said: "The true <sup>233</sup> test, we think, is whether the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer making his purchase under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates." From an examination of the printed matter issued by the defendant corporation, we are thoroughly satisfied that there is such a resemblance between the plaintiff's name and the defendant's name that a person desiring to purchase insurance might easily be misled as to the company he was in fact dealing with.

The wrongful use of a trade name or device may be enjoined, without proof that anyone has been actually deceived: *R. P. C. C. Co. v. R. P. C. C. Co.*, 108 Iowa, 105, 78 N. W. 803; *Paul on Trademarks*, sec. 215; *Von Mumm v. Frash (C. C.)*, 56 Fed. 830; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188. And it has been held that the confusion of names in business is sufficient ground for the issuance of an injunction: *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200;

Higgins v. Higgins, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490, 27 L. R. A. 42; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511. In the latter case, it was said: "A cause of action for the wrongful use of a trade name by another arises where there is a confusion of goods put upon the market by the respective parties, where there have been actual mistakes or sales of one product for another, or where the similarity is such that one product may readily be mistaken for the other." The use of the principal word, "Atlas," in the plaintiff's name, is sufficient ground for the issuance of injunction restraining its use by the defendant. In Saxlehner v. Eisner, 179 U. S. 19, 21 Sup. Ct. Rep. 7, 45 L. ed. 60, it was said: "It is not necessary to constitute an infringement that every word of the trademark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." <sup>234</sup> That a trade name, as well as a trademark, symbol, or device, is entitled to protection by courts of equity, is the general rule: Shaver v. Shaver, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; Hopkins on Trademarks, secs. 1, 9, 69; 28 Ency. of Law, 2d ed., 428. And it makes no difference in the application of the rule whether the party using the name or trademark acts in good faith or otherwise: Shaver v. Shaver, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; 28 Ency. of Law, 416; Higgins v. Higgins, 144 N. Y. 462, 25 N. E. 46, 8 L. R. A. 640; Nesne v. Sundet, 93 Minn. 299, 106 Am. St. Rep. 439, 101 N. W. 490; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; R. P. C. C. v. R. P. C. C., 108 Iowa, 105, 78 N. W. 803. It will be observed that the facts in this case bring it within the rule relating to unfair competition, and it is said that the question of fraud is more important in such cases; but it is not necessary even in cases of unfair competition to show by direct evidence the existence of an intention to defraud. Where there is no such proof, fraud may be inferred in many cases from the fact of imitation alone: Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; Simmons Med. Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

The appellant argues further that whatever right the plaintiff might have had to the use of either the word "Atlas" or the figure of Atlas in its advertising matter was abandoned by allowing the use of such name and device by the Atlas Mutual Insurance Company and by other insurance companies doing business elsewhere in the United States; but the record before us shows that the appellant is a corporation wholly dis-

inct from the Atlas Mutual Fire Insurance Company. The appellant is a corporation doing business on the stock plan, while the Atlas Mutual Fire Insurance Company was a mutual company, and its name clearly indicated as much. There is no privity between the two companies, and the appellant certainly is not in a position to now claim that the permissive use of the word "Atlas" by the mutual company protects it in its use thereof. The only relation between the two companies arose out of the fact that the <sup>235</sup> appellant reinsured the risks of the mutual company. The fact that other companies may have used the word in other places is no protection: *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511. In the latter case, it was said: "Use of the word in other states or in other parts of this state by persons who did not compete with plaintiff is not controlling on the issue of unfair competition."

The appellee complains of the limitation in the decree to the use of the word in its present form. We think the prayer of the petition should be granted without limitation, and as thus modified the judgment of the district court is affirmed.

#### SUPPLEMENTAL OPINION.

Per CURIAM. The trial court entered a decree enjoining the defendant from "using the word or device 'Atlas' in its present form," and the plaintiff objected to the form of the decree. In the original opinion filed herein we held, briefly, that the prayer of the petition should have been granted without limitation. The opinion, however, is based on the ground that the appellant cannot use the word or device in a way that is calculated to deceive those who seek insurance, and the entire argument of the opinion is along that line. We did not intend to hold that the word or device cannot be used when it appears that the use made of it can in no way deceive or mislead. The use thereof in such manner as to clearly and unmistakably show that the defendant is an insurance company entirely separate and distinct from the plaintiff cannot possibly prejudice the latter in any way, and there can be no legal objection to such use.

The judgment of the trial court is therefore affirmed, without modification.

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*The Law of Trademarks* is discussed in respect to what words or phrases may constitute a trademark in the note to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83. The use of descriptive words in a trade name will be enjoined by an older concern adopting very similar words as a trade name, even though the defendant is not guilty of intentional fraud if the striking similarity in the names results in

embarrassment and injury to the plaintiff: *Koebel v. Chicago Landlords' Protective Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154; *Van Stan's Stratena Co., Ltd., v. Van Stan*, 209 Pa. 564, 103 Am. St. Rep. 1018. The use of a name may be enjoined, if misleading and calculated to do injury, irrespective of the good faith or intent to mislead the public in adopting the name: *Nesne v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439. The finding of the master that the words "Crown Malt" bear such a close resemblance to the plaintiff's trade name and trademark "Creamalt," as to be likely to produce frauds by dealers and mislead the public, is a finding of fact which must stand unless plainly wrong: *George G. Fox Co. v. Glynn*, 191 Mass. 344, 114 Am. St. Rep. 619.

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## KELLY v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

[138 Iowa, 273, 114 N. W. 536.]

**EVIDENCE—Judicial Record.**—If, in an action for wrongful death by decedent's administrator, the defendant pleads and puts in evidence her alleged settlement of the claim and its approval by the court, together with so much of the record of the probate court as has any tendency to support the defense, the record of a subsequent order of the court disapproving such settlement is admissible when the defendant claims that the approval of the settlement was a prior adjudication of the rights involved in the action. (p. 197.)

**ACTIONS TO Recover for Negligent Death—Damages—Instructions.**—If, in an action to recover for negligent death, the court charges that the damages recoverable are those occasioned to the estate of the decedent by his premature death, taking into consideration his age, health, occupation, earning capacity, earnings and other matters in evidence tending to show the extent of such loss, a refusal to charge that in estimating damages, the jury should not allow anything for his pain and suffering, or as exemplary damages, is not erroneous. (p. 198.)

**TRIAL—Instructions.**—The only office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact case-made by either party to the controversy. (p. 198.)

**SETTLEMENTS for Death Caused by Wrongful Act** which bear the taint of fraud or undue influence in their procurement will be set aside. (p. 200.)

**RAILROADS—Death by Wrongful Act—Avoiding Settlement.** A settlement and release from liability obtained by a railway company or its agents for a death caused by wrongful act, from one who, by reason of inexperience or weakness of body or mind, or of lack of independent counsel and advice, is not in condition to deal on equal terms with the party seeking the release, will be scrutinized with jealous care, and any contract or agreement thus unfairly obtained will be set aside. (p. 201.)

**RES JUDICATA—Approval of Settlement for Negligent Death.** If a settlement and release by an administratrix for the negligent death of her intestate is fraudulently obtained, its approval by the



court is not an adjudication between her and the person causing the death, and does not prevent her, in an action for such death, from pleading and relying on the fraud of the defendant in procuring such settlement and release. (p. 202.)

C. Wright, J. L. Parrish and Grimm, Trewin & Moffit, for the appellant.

Barnes & Chamberlain and Jamison & Smith, for the appellee.

**274** **WEAVER, J.** John W. Kelly, a brakeman in the employ of the defendant company, was killed while in the line of his duty in such service by the explosion of a locomotive boiler. He left no will and no children, and his estate descended in equal shares to his wife and mother. The widow, having been appointed administratrix of his estate, brings this action, alleging that her husband's death was chargeable to the negligence of the defendant, and demanding a recovery of damages in the sum of ten thousand dollars. She further alleges that within a very short time after her husband's death, and while she was still suffering great mental and nervous depression and weakness by reason of her sudden and great affliction, **275** and in consequent unfit condition to transact business, she was approached by defendant's claim agent, one Albright, who represented that he would pay her three thousand dollars in settlement of her own claim for the death of her husband, and, in addition thereto, would settle with the mother of the deceased, leaving the plaintiff to have and hold as her own said sum of three thousand dollars, and that she, believing and relying upon said representations and promises, accepted the offer. She further says that, upon expressing her willingness to settle upon the terms proposed, the claim agent, taking advantage of her weakness and unfitness for business, presented a receipt or voucher, which she signed, believing it to be a receipt in accordance with the proposed terms of settlement, but, as she now learns, it purports to be a receipt in full by her as administratrix of her husband's estate, and that defendant and its agents have neglected and failed to settle with the mother of the deceased, or to pay her anything upon her claim for the death of her son. She therefore avers that said settlement and receipt were obtained by fraud, and are of no validity. The defendant admits the death of the said John W. Kelly by accident while in its service, and alleges full settlement on account thereof with plaintiff as administratrix of his estate, the approval of such settlement by the district court where the administration was

pending, and the acceptance by plaintiff of the sum of three thousand dollars in full of all claims on account of the death of the intestate. It denies being in any manner negligent with respect to said accident, and denies all allegations of fraud and imposition in the procurement of the alleged settlement. The jury having returned a verdict in plaintiff's favor for three thousand dollars, judgment was entered thereon, and defendant appeals.

1. As already stated, the defendant in its answer sets up the alleged written stipulation of settlement with the plaintiff and her receipt of three thousand dollars in discharge of all claims against the defendant. On the trial, plaintiff having given testimony <sup>276</sup> on her own behalf tending to show that the settlement and receipt were obtained by fraud and deception, defendant's counsel in cross-examination called her attention to the voucher or receipt which she had signed, to the order of the court approving the settlement, and to a report to the court purporting to have been filed by her containing matter apparently recognizing the validity of said settlement. Thereafter the plaintiff introduced in evidence over the defendant's objection the record of an order by the district court disapproving said report, and approving a substituted report, in which she alleged that said former report and the application for approval of the alleged settlement had been made by the agents and attorneys for the railway company, who procured her signature thereto without her understanding the true nature and effect thereof. Error is assigned upon the admission of these papers and records in evidence. The objection is grounded upon the general rule, which excludes self-serving declarations of a party, and that records of judicial proceedings are not admissible as against one who was not a party thereto. The soundness of these general propositions cannot be disputed, but their applicability to the present case is not apparent. The defendant having pleaded and put in evidence the alleged settlement and its approval by the court, together with so much of the probate record as had any tendency to support its defense, we think that, upon very familiar principles, it was the right of the plaintiff to offer the remainder of the same record. Moreover, defendant was claiming that the approval of the settlement had the effect of a prior adjudication of rights involved in this action, and in our judgment the entire record affecting the claim in suit was material evidence for the consideration of the jury.

2. Upon the measure of plaintiff's damages, if found entitled to recover, the trial court charged the jury substantially

in the language approved by this court in *Lowe v. Railroad Co.*, 89 Iowa, 433, 420, 56 N. W. 519. <sup>277</sup> Counsel for appellant concede the correctness of the instructions; but assign error on the court's refusal of the request for an additional instruction framed in part after the manner approved in *Spaulding v. Railroad Co.*, 98 Iowa, 205, 219, 67 N. W. 247, to the effect that in estimating the damages to the decedent's estate the jury should allow nothing for his pain and suffering or by way of exemplary damages, but should take into consideration his age at the time of his death, his ability, if any, to earn money, his expenditures, his accumulation of property and other circumstances affording any aid in establishing the present value of his life to his estate. The instruction asked could properly have been given, but we are not prepared to hold that its refusal under the circumstances of the case constitutes prejudicial error. The court did very fairly and fully give to the jury the general rule that the loss or damage which plaintiff was entitled to recover, if the issues were found in her favor, was the loss or damage occasioned to the estate of the decedent by his premature death, taking into consideration his age, health, occupation, earnings, his ability to earn and other matters in evidence tending to show the extent of such loss, and that, in arriving at such result, consideration should be given to the fact that the sum allowed was to be paid at once, and not at the end of the deceased's expectancy of life. The requested instruction added essentially nothing to this rule, except to direct the attention of the jury to certain features of the evidence bearing upon the question of damages. It is not often practicable, and still less often advisable, for the trial court in framing its instructions to make specific mention of the items of evidence bearing upon any given issue. The office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact case-made by either party to the controversy. Nor can the court be expected to give express or special warning against every possible mistake <sup>278</sup> or misapprehension into which the jury may fall in the discharge of its functions. Something must be left to the intelligent apprehension and application by the jurors themselves of the general rules stated in the court's instructions. It may, and does occasionally, happen that some unfairness in argument of counsel or some other circumstance out of the ordinary arising in the course of the trial suggests to the court the propriety of guarding against prejudice therefrom

to either party by an instruction covering the specific matter thus imported into the case. When and to what extent instruction of this nature shall be given rests very largely in the sound and impartial discretion of the court. The charge given in the present case announces the correct rule in terms which in essence and effect cover the thought of the requested instruction in all its essential features; and we see nothing in the record to indicate possible prejudice to appellant in the refusal of the more specific and detailed direction.

3. While not yielding the other points mentioned, counsel for appellant very properly say that "the principal question in this case is whether the plaintiff and defendant had made a valid settlement of the case or action in controversy." To that question we now turn our attention. There was evidence from which the jury could find the truth of the following state of facts: Within a very few days after the accident Albright, the railway company's claim agent, called on the widow for the purpose of procuring a settlement of the company's alleged liability for the death of her husband. In furtherance of that purpose, he dissuaded her from seeking the advice of counsel, and told her that, if she did so, she would be robbed, and directed or took her to the office of the attorneys for the railway company at Cedar Rapids, where an application was prepared for her appointment as administratrix and such appointment secured. At the outset Albright offered plaintiff two thousand six hundred dollars, which offer, after several interviews, he raised to three thousand dollars. Meanwhile plaintiff had been <sup>270</sup> informed that, under the statute, she would succeed to but one-half of her husband's estate, and that his mother would be entitled to the other half. On being again approached for a settlement, she told Albright that she would not take three thousand dollars if she had to divide with her mother in law, and he assured her that the sum offered was for herself alone, and that he would see the mother and settle with her personally. Believing this promise and representation, plaintiff accepted the offer. During the period covered by these negotiations plaintiff was suffering much in mind from her affliction, and was more or less broken physically. In signing a receipt for the money paid her she did not know or understand that she was executing it as administratrix, but supposed it to be a release or discharge of her individual claim. Her eyes being swollen, and being sick and nervous, plaintiff could not read the paper, but was assured by Albright that it accorded in all respects with their agreement. The receipt having been obtained, a report was



made to the district court which was then in session, and an order of approval secured, this service being performed by the attorneys for the company. Another report prepared by the same attorneys, and, recognizing the validity of the settlement with the company, was filed at a later date in the probate proceedings, and was subsequently disapproved by the court and withdrawn by the plaintiff. It was not until after the filing of this last-mentioned report that plaintiff discovered the scope and effect of the settlement which had been made, and of the proceedings which had been had with reference thereto, when she at once repudiated the transaction. Many of the matters which we have here stated are without substantial dispute, while others are vigorously denied.

Upon the method employed by Albright to secure the alleged settlement, his own testimony as a witness affords the best possible characterization. He says:

"I knew that Mr. Kelley had been killed in the explosion of the engine, the blowing up of which I had investigated, <sup>280</sup> and in my judgment it was a claim that ought to be adjusted. In a general way, I had investigated and knew of the condition and circumstances by which he had lost his life before I advised Mrs. Kelley to go to the company's attorneys. And it looked to me that it was a case where it was the proper thing for me to do as adjuster to adjust the claim. When Mrs. Kelley came to me, and wanted his watch and wages and such things, I suggested to her that she would have to have an administratrix, and that I would take her up and introduce her to the company's attorneys, and they could attend to the business as well as any other attorneys. She did not ask me to recommend her to any attorneys. I did that of my own motion. Yes; I had an object in recommending the company's attorneys. I thought that she would be in good hands. I was interested as to her going to see lawyers, and was interested in keeping her out of the hands of lawyers. And it was my intention not to allow her to consult any lawyers, except the company's, if I could avoid it, until after I had brought about this settlement."

With this illuminating admission in evidence, it is not at all strange that the jury should believe the story of the plaintiff concerning the imposition alleged to have been practiced upon her by the appellant's agent, and we have no inclination to disturb their finding in that respect. While it is and should always be the policy of the courts to encourage the amicable settlement of all controversies, it is even more a matter of good policy and good morals to stamp the law's

disapproval upon settlements which bear the taint of fraud and undue advantage: *Coles v. Railroad Co.*, 124 Iowa, 48, 99 N. W. 108; *Rauen v. Insurance Co.*, 129 Iowa, 725, 106 N. W. 198; *Bussian v. Railway Co.*, 56 Wis. 325, 14 N. W. 452; *Bliss v. Railroad Co.*, 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65; *Railroad Co. v. Lewis*, 109 Ill. 120; *Mullen v. Railroad Co.*, 127 Mass. 86, 34 Am. Rep. 349; *Eagle Packet Co. v. De Friez*, 94 Ill. 598, 34 Am. Rep. 245; *Peterson v. Railroad Co.*, 38 Minn. 511, 39 N. W. 485; *Stone v. Railroad Co.*, 66 Mich. 76, 33 N. W. 24; *McLean v. Insurance Co.*, 100 Ind. 127, 50 Am. Rep. 779; *Lusted v. Railroad Co.*, 71 Wis. 391, 36 N. W. 857; *Schultz v. Railroad Co.*, 44 Wis. 638; *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82; *Railroad Co. v. Doyle*, 18 Kan. 58; *Sheanon v. Insurance Co.*, 83 Wis. 507, 53 N. W. 878; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432, 26 Atl. 857; *Troxell v. Silverthorn*, 45 N. J. Eq. 330, 19 Atl. 622; *Lord v. Association*, 89 Wis. 19, 46 Am. St. Rep. 815, 61 N. W. 293, 26 L. R. A. 741; *Railroad Co. v. Fowler*, 201 Ill. 152, 94 Am. St. Rep. 158, 66 N. E. 394; *Girard v. Car Wheel Co.*, 123 Mo. 358, 45 Am. St. Rep. 556, 27 S. W. 648, 25 L. R. A. 514; *Railroad Co. v. Harris* (Tex. Civ. App.), 65 S. W. 885; *Railroad Co. v. Brown* (Tex. Civ. App.), 69 S. W. 651; *Light Co. v. Rombold*, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; *Railroad v. Green* (C. C.), 114 Fed. 676; *Davenport v. Lumber Co.*, 112 La. 943, 36 South. 812; *Clayton v. Traction Co.*, 204 Pa. 536, 54 Atl. 332; *Railroad Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598; *Railroad Co. v. Phillips*, 66 Fed. 35, 13 C. C. A. 315; *Butler v. Railroad Co.*, 88 Ga. 594, 15 S. E. 668; *Albrecht v. Railroad Co.*, 94 Wis. 397, 69 N. W. 63; *Railroad Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. Rep. 843, 39 L. ed. 1003; *Vautrain v. Railroad Co.*, 8 Mo. App. 538; *Railroad Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195; *Coal Co. v. Buzis*, 213 Ill. 341, 72 N. E. 1060.

Many of the foregoing cases are quite parallel in facts with the case at bar, and all of them emphasize and enforce the proposition that a compromise or release of a right of action obtained by misrepresentation, undue influence, or fraud will be held for naught, and a settlement obtained from one who, by reason of inexperience or weakness of body or mind, or of lack of independent counsel and advice, is not in condition to deal on equal terms with the party seeking the release, will be scrutinized with jealous care, and any contract or agreement thus unfairly obtained will be unhesitatingly avoided. The conduct of the claim agent in the present case by persuading plaintiff of his desire to serve her interests, in

exciting in her mind distrust of independent legal advice,<sup>282</sup> and actively maneuvering to keep her from consulting other counsel, in introducing her to the counsel of the railway company, and in kindly taking charge of the matter of her appointment as administratrix, and in other methods impressing her with his spirit of philanthropic disinterestedness, was well calculated to disarm the suspicions of an inexperienced woman still suffering from the shock of her recent bereavement, and bring her to a frame of mind in which he could obtain from her a settlement favorable to his employer. If, under such circumstances, he made use of the advantage thus shrewdly obtained to deceive the plaintiff as to the true nature of the settlement she was making and of the paper she was being asked to execute—and of this there was ample evidence to carry the question to the jury—a defense based upon such settlement cannot avail to defeat her recovery in this action.

4. It is argued, however, that the approval by the court of the alleged settlement constitutes an adjudication between plaintiff and defendant, and therefore the question of fraud cannot be considered in this proceeding. In our judgment the proposition is untenable. There was no action pending to which these persons were parties. No issue of law or fact had been joined between them upon which the court undertook to pass. The order of approval was in no sense of the word a judgment for a recovery of damages. At common law an administrator had an undoubted right to compromise claims in favor of the estate upon which he was administering. Our statute does not take away that right, but the administrator is an officer or trustee under the direction of the court and his acts are ordinarily subject to its approval. The chief office of the approval of a compromise or settlement is the protection of the administrator against personal liability to the estate on account thereof. Referring to a statute providing for an order of the probate court for the compromise of claims, the New York court has said: "The object of the statute was <sup>283</sup> not to confer upon administrators powers which otherwise they would not possess, but to afford them additional protection when acting in good faith in the exercise of their common-law power. Although they could compromise a claim or compound a debt without the aid of the statute, still they might, perhaps, be held responsible for any serious error in judgment in so doing. The act in question enables them to obtain the sanction of the surrogate in addition to their own, and this affords them additional protection if their

conduct be fair and honest": *Chouteau v. Suydan*, 21 N. Y. 180. See, also, *Wyman's Appeal*, 13 N. H. 18. Such approval cannot operate as a condonation of any fraud on part of a debtor in negotiating the compromise: *Leigh v. Holloway*, 8 Ves. Jr. 213. We are cited to no authority giving color of support to the appellant's theory of prior adjudication, and after diligent search, we have found none to that effect.

There is no reversible error in the record, and the judgment of the district court is affirmed.

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*The Effect of Releases or Compromises made in ignorance of one's rights is considered in the note to Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 507. It is generally held that a release obtained by a railroad company from a person injured by its negligence, the release being obtained by deception in the manner common to such transactions, is without validity: *Indiana etc. Ry. Co. v. Fowler*, 201 Ill. 152, 94 Am. St. Rep. 158. See, also, *Missouri etc. Ry. Co. v. Smith*, 98 Tex. 47, 107 Am. St. Rep. 607; *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456; *Kane v. Chester Traction Co.*, 186 Pa. 145, 65 Am. St. Rep. 846.

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### McELDON v. DREW.

[138 Iowa, 390, 116 N. W. 147.]

**INFANTS—Negligence—Sale of Dangerous Substances.**—If one sells a dangerous article to a child whom he knows to be, by reason of his youth and inexperience, unfit to be trusted with it, and who probably might innocently and ignorantly play with it to his own injury, and injury does in fact result, he is negligent, and liable in damages therefor. (p. 205.)

**INFANTS—Negligence—Care Required of.**—The care required of an infant is that degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity and understanding of the child. (p. 207.)

**INFANTS—Negligence.**—Children under seven years of age are incapable of contributory negligence as a matter of law, and children between seven and fourteen are presumed incapable of contributory negligence, although the contrary may be shown. (p. 207.)

**INFANTS—Contributory Negligence.**—A child twelve years of age cannot ordinarily be guilty of contributory negligence. (p. 208.)

**INFANTS—Contributory Negligence.**—If a person sells gunpowder to an infant, twelve years of age, the question as to whether the manner in which he exploded the powder to his injury was the proximate cause thereof is a question for the jury. (p. 208.)



L. Heins and C. G. Watkins, for the appellants.

Redmond & Stewart, for the appellees.

<sup>391</sup> DEEMER, J. Defendants were conducting a store in the city of Cedar Rapids, in the year 1906, whereat they sold gunpowder and other explosives. At the time in question plaintiff was five days over twelve years of age. He was small of stature and inexperienced in the use of explosives. He was still wearing short trousers, and had never seen anyone use gunpowder, save on the Fourth of July, 1905, and on the day of the accident in question. He had never used firearms of any sort, and a jury may have found that he did not have the ordinary experience of boys of his <sup>392</sup> age. On the twenty-seventh day of June, 1906, plaintiff saw some older and larger boys exploding powder in a tin can, and after watching them for a time, inquired as to where they had obtained the powder, and was informed that they had procured it from the defendants. Thereupon plaintiff went to defendants' store, and asked for ten cents' worth of gunpowder, requesting that it be put up in two packages. His order was filled, and plaintiff returned to where the other boys were and attempted to imitate their performances. While so engaged, there was a premature explosion, causing the loss of one of plaintiff's eyes and other injuries, of which he complains. The record presents but two questions, and these are: (1) Was there enough evidence to take the case to a jury upon the question of defendants' negligence? and (2) was the question of plaintiff's contributory negligence for a jury or for the court, under the testimony adduced?

1. There is no statute of this state forbidding or regulating the sale of gunpowder; and if there be any negligence upon the part of the defendants, it might be founded upon some common-law obligation not to sell to persons of immature age or development. The common law imposes upon every one the duty of so using and disposing of his property as not to injure the person or property of another, and if one sells a dangerous article to a child whom he knows to be, by reason of his youth and inexperience, unfit to be trusted with it, and who probably might innocently and ignorantly play with it to his own injury, and injury does in fact result, he is liable in damages therefor. The leading case on this subject is *Dixon v. Bell*, 1 Stark. 287, 5 Maule & S. 198, where defendant sent a young maid servant for a loaded gun, whom he knew to be too young and an unfit person to be intrusted with the care and custody of it, and who carelessly and im-

properly shot the gun at and into the face of plaintiff's minor son. It was held that the question of defendant's negligence was for a jury, and an instruction to the effect that, if the ~~jury~~<sup>jury</sup> were of opinion that the instrument in such a state ought not to have been intrusted to such a person, plaintiff would be entitled to a verdict was approved. The same rule was adopted in *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, and *Binford v. Johnson*, 82 Ind. 426, 42 Am. Rep. 508. In the *Dixon* case (1 Stark. 287, 5 Maule & S. 198) the servant was a mulatto girl, thirteen or fourteen years of age. The question of defendant's negligence was manifestly one of fact for the jury.

2. Bearing upon the issue of plaintiff's contributory negligence is the following from the testimony of the plaintiff:

"I took the powder home, and met two boys, and we went down to the brewery, and we met another boy, Fred Trego. He got me the can and nail, and we put a hole in it, and then we put a firecracker fuse in it, then powder, and then paper, and then some sand to keep it in there. As I went to strike a match, the spark flew on the fuse there, and just as I stooped over it, it flew up and hit me in the eye.

"Q. What did you go down there to get powder for? A. I seen some bigger boys do it, and I went and did it, too.

"Q. How many times did you see the bigger boys shoot it off? A. They were shooting it off the year before up near our house, and the same day before I got the powder, why there was Theodore Nesper shooting it off, on Seventh street and D avenue aside of the brewery. They were shooting it in a can. It was in the afternoon. I don't know how many times they shot it off. I just went past there, and I seen them. I asked them where they got it, and he said at Drew's and I said before that, 'They don't sell it any place else, do they?' Theodore Nesper and a little boy by the name of Winke was there shooting this can of gunpowder. I saw them shoot it twice while I was there. The year before, the shooting was up on A avenue and Eighth street near our house. Walter Barlow was shooting it. He had a can.

"Q. How did they shoot it? Just tell the jury. A. The same way, put it. They had a hole in the top of the can, and took a firecracker fuse, and put it in there, and then put powder in, then put paper so it wouldn't go out, and then put sand in it so as to keep it there, then put a little around the top—a little <sup>394</sup> powder around the top. And they light the fuse with a match. They used fuse out of one of these little firecrackers.

"Q. Did you ever see anyone shoot these cans other times than that? A. No, sir. That is the only time I ever saw them shoot. The year before they shot it four or five times. When I got the powder, I went up near the slough, near the brewery. The can that they used there the year before was a regular corn can, a tomato can, a tin can. They put a hole in it with a nail, just big enough for the fuse to go in, or the firecracker to go in, and they put in powder, and then paper to keep it in there, and then sand on top of the paper. They put powder in cans, and then put paper, and put sand, and turned it over. Then a little powder on top where the fuse is, then light the fuse.

"Q. When they lit the fuse, what did they do then? A. The can would go away up in the air.

"Q. But what did they do when they lit the fuse? A. Just stand over to the side. I saw them do that four or five times. They would go back some ten feet. They would light the fuse, and then step back some ten feet, and the can would go up in the air. The day before I bought the powder, Theodore Nesper and Will Winke were shooting it in the same way. When I got the powder, I didn't go home with it. I was going down Seventh street, and met the boys. I was looking for a can to put it in, and they got me a can. Van Norman and Sam Moore went along with us. When we got the can, we went down by the slough. We shot the can off three times, and then went over to the Illinois Central track, and we shot it off over there two or three times. We put in fuse, and put in some powder, and then paper, and then sand. And some powder around the top, and lit it. We turned it over before we lit it.

"Q. When you lit it, did you jump back? A. Yes, sir. About the same distance as the boy did a year before, some ten or twelve feet. The can would go up in the air. We did that the same way twice down to the brewery, then we went up to the Illinois Central track, and did it the same way. The last time the can struck me in the face. The last time we loaded it the same way we always did.

"Q. How far did you run away from it before it exploded? A. I lit it, struck a match, and a spark flew on it, and just as I went over to light it and it flew up and hit me in the face.

"Q. When you struck your match, and the head of it flew on it? <sup>395</sup> A. Yes, sir.

"Q. Then it exploded, before you got down to light? A. Yes, sir.

"Q. What were you striking the match on? A. On the side of my pants.

"Q. And you were close to the can? A. Yes, sir.

"Q. And the lighting of the match threw a spark on the powder and exploded it before you really had it lit, is that it? A. Yes, sir. I was right over the can when it flew up. I was just about to light it.

"Q. Had you ever bought powder before this time? A. No, sir. I never had any powder before this. I never seen anybody use any powder other than I told about the boys shooting up the can. I have no firearms. I never use any firearms."

In this connection it must be remembered that plaintiff was but five days over twelve years of age. The general rule, with reference to the care required of an infant, is that degree which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity, and understanding of the child: *Fishburn v. Burlington & N. W. R. R. Co.*, 127 Iowa, 483, 103 N. W. 481.

Assimilating the rule which applies in criminal cases to civil ones, it has been held that children under seven years of age are incapable of contributory negligence as a matter of law, and that children between seven and fourteen are presumed incapable of contributory negligence, although the contrary may be shown. We seem to be committed to this rule, at least to a limited extent: See *Doggett v. Chicago B. & Q. R. R.*, 134 Iowa, 690, 112 N. W. 171, 13 L. R. A., N. S., 364. Although we have also affirmed the doctrine that even children are bound to exercise that degree of care which children of the same age ordinarily exercise under similar circumstances, if the doctrine of presumption applies, then the case was clearly one for a jury; the presumption standing as sufficient until met by testimony from the defendant. If the other rule obtains, we still think the question was one of fact for a jury, rather than of law for the court. The testimony tended to show that plaintiff was simply imitating the older boys with whom he was at play; that he did not realize or comprehend the dangers incident <sup>306</sup> to the explosion of the powder or to the method whereby it was being accomplished. The discharge was due to a spark from the lighted match, or to one flying from the match as it was being scratched for the purpose of ignition. This danger does not seem to have been apprehended by plaintiff, and in any view of the case we think it was for the jury to say whether or not plaintiff was in the



exercise of that degree of care which children of his age ordinarily exercised under like circumstances, considering his age, experience, capacity, and understanding: *Bromberg v. Evans Laundry Co.*, 134 Iowa, 38, 111 N. W. 417. It must be a strong case to justify a court in holding, as a matter of law, that a child twelve years of age is guilty of contributory negligence.

3. One other proposition is mooted by appellees, and that is that plaintiff's act in setting off the powder in the manner he did was an independent, intervening cause for which defendant is not responsible. There is nothing in this proposition. Of course, if the case is submitted to a jury, it must find that defendant's wrong was the proximate cause of the injury. There is ample evidence to take the case to a jury upon that proposition.

The trial court was in error in directing a verdict, and the judgment must be, and it is, reversed.

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*The Liability of a Vender of Dangerous articles to one injured by them* is considered in the notes to *Keulling v. Lean Mfg. Co.*, 111 Am. St. Rep. 701; *Woodward v. Miller*, 100 Am. St. Rep. 192. The unlawful sale of croton-oil to a minor, who administers it as a joke to another minor to his injury, creates no cause of action in favor of the father of the latter, for the injury is not the natural or proximate consequence of the sale: *McKibben v. Bax & Co.*, 79 Neb. 577, 126 Am. St. Rep. 677. One who represents that a certain stove polish sold by him may be used with safety upon a hot stove is liable, either to the purchaser or to a member of his family, injured by an explosion of the polish: *Cunningham v. Pease House Furnishing Co.*, 74 N. H. 435, 124 Am. St. Rep. 979.

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## WOODS v. INCORPORATED TOWN OF LISBON.

[138 Iowa, 402, 116 N. W. 143.]

**PHYSICIANS — Privileged Communications.**—A physician, never consulted by the patient or her husband nor by her attending physician, but who is informed by him of the nature of an operation to be performed on her, and who is present thereat at the request of a third party, is competent to testify to his observations of the operation as performed, but in which he did not participate. (p. 210.)

**MUNICIPAL CORPORATIONS—Defective Sidewalks—Evidence of Notice of Defect.**—In an action to recover for injury alleged to have resulted from a defective sidewalk, evidence that the street commissioner and a member of the city council had actual notice of the condition of the walk prior to the accident is admissible. (p. 211.)

**PLEADING—New Cause of Action—Notice.**—A substituted complaint alleging the generally dangerous condition of a sidewalk complained of, whereas the original complaint had complained of specific defects only, does not plead a new cause of action of which notice must be given. (p. 211.)

M. J. Randall and Jamison & Smyth, for the appellant.

E. A. Johnson and C. W. Kepler and Son, for the appellee.

**402** SHERWIN, J. This is a suit to recover damages alleged to have been caused by a defective sidewalk. It was alleged that the injuries received produced a miscarriage and otherwise permanently injured the plaintiff; that on account of **403** said injuries she was compelled to go to a hospital for treatment where she remained for more than one hundred days, all of the time under treatment for the injuries received.

The evidence showed that the plaintiff was pregnant at the time she received the injury complained of, and that almost immediately after she fell there was severe pain in her womb and abdomen. Dr. York was called soon after the accident and treated her for her injuries. The plaintiff testified that on Friday, the second day after the injury was received, she suffered labor pains which continued until the following Sunday, when she had a miscarriage. She further testified that Dr. York removed the embryo from the womb with instruments, and that within two or three days thereafter a lump appeared on her right side over the right ovary, and that it grew larger until she was removed to the hospital on the Sunday following. The plaintiff testified further as to the treatment given her at the hospital, and that her right ovary and right fallopian tube were removed soon after she went there. The hospital was in Cedar Rapids, and the operations were performed by the Drs. Crawford of that city with the assistance of Dr. York and in the presence of still others. It was the contention of the defendant that the plaintiff's fall had not produced a miscarriage, and that the operations were made necessary by a diseased condition that existed at the time of the accident. Neither Dr. York nor the Drs. Crawford were called by the plaintiff to show her condition before she was taken to the hospital or at that time, nor did either of them testify as to the character of the operations performed for the plaintiff. Dr. H. W. Bender, a physician of Cedar Rapids, witnessed one of the operations and was called by the defendant to testify relative thereto. On his preliminary examination it appeared that he had never

met Dr. York before the day of the operation, and that on that day he met him on the street while on his way to the hospital. Dr. Bender had been employed by the defendant <sup>404</sup> to be present at the operation if possible, and he in fact went to the hospital when Dr. York did. Before reaching the hospital Dr. York told Dr. Bender what the operation was to be, but neither at that time nor at any other time was there any consultation between them as to the case or as to the nature of the operation about to be performed. The testimony showed absolutely that the relation of physician and patient did not exist, that Dr. Bender in no way participated in the work, and that he was merely an observer thereof.

The trial court held him an incompetent witness under section 4608 of the Code. The ruling was erroneous and prejudicial to the defendant. The section provides that "no practicing . . . physician, surgeon . . . who obtains such information by reason of his employment, . . . shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." The statute has been construed to include knowledge or information acquired by the physician by observation or examination: *Finnegan v. Sioux City*, 112 Iowa, 232, 83 N. W. 907. And if the relationship of physician and patient had existed at the time in question, the ruling would have been correct. But, as we have heretofore said, there was no such relationship, and without it the testimony offered was clearly competent. There was no confidential relation, and hence no privilege existed: *Battis v. Chicago etc. Ry. Co.*, 124 Iowa, 623, 100 N. W. 543; *State v. Swafford*, 98 Iowa, 362, 67 N. W. 284; *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Sutcliffe v. Iowa State Traveling Men's Assn.*, 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; 1 *Elliott on Evidence*, sec. 634, and cases cited. In *Sutcliffe v. Iowa State Traveling Men's Assn.*, 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90, it was said that the mere presence of the physician did not render the communication confidential when not such in fact.

The appellee urges that Dr. Bender was not in the operating room with the consent of the plaintiff or her husband, <sup>405</sup> and that because thereof he can give no testimony as to what he observed. We know of no authority going to this extent; but, on the contrary, such a holding would be directly adverse to the rule of the cases and to the language and intent of the

statute itself. In *State v. Height*, 117 Iowa, 650, 94 Am. St. Rep. 323, 91 N. W. 935, 59 L. R. A. 437, we held that the testimony of a physician who had made an examination of a man against his will was competent because the confidential relation protected by the statute did not exist.

Evidence was received over the defendant's objections that the street commissioner and one member of the city council had actual notice of the condition of the walk prior to the accident. The evidence was competent: *Owen v. City of Fort Dodge*, 98 Iowa, 281, 67 N. W. 281; *Carter v. Town of Monticello*, 68 Iowa, 178, 26 N. W. 129.

The plaintiff filed a substituted petition in which she alleged the generally dangerous condition of the walk in question, whereas in her original petition she had complained of specific defects. The substituted petition did not in our judgment plead a new cause of action for which no notice had been given. The action was commenced within three months after the accident happened, and the condition of the walk as alleged in the substituted petition was but an amplification of the charge, which is permissible: *Sachra v. Town of Manila*, 120 Iowa, 562, 95 N. W. 198; *Cahill v. Illinois Cent. R. Co.*, 137 Iowa, 577, 115 N. W. 216; *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa, 550, 105 N. W. 1024. The court properly refused to direct a verdict for the plaintiff. The evidence on the question of notice of the condition of the walk was sufficient to take the case to the jury.

Some forty more errors are assigned, but, as it is impossible to notice them all in detail, and as the others are not likely to arise on a retrial of the case, we need not give them further consideration. For the error pointed out, the judgment must be reversed.

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*The Mere Presence of a Physician* does not render inadmissible the admissions of a wounded man concerning his suicide, when not made to the physician nor connected with his professional duties: *Sutcliffe v. Iowa State Traveling Men's Assn.*, 119 Iowa, 220, 97 Am. St. Rep. 298. And an objection to the testimony of physicians that it discloses a privileged communication cannot be sustained when it relates to an examination made of a party who did not make any communication to them nor submit to their examination with the idea that they were acting as his physicians: *State v. Height*, 117 Iowa, 650, 94 Am. St. Rep. 323. But assistant physicians or surgeons in a hospital to which a person is taken for treatment are incompetent to testify, over objection, as to anything connected with the treatment or condition of such person while there: *Smart v. Kansas City*, 208 Mo. 162, 123 Am. St. Rep. 415.



## NEWMAN v. FRENCH.

[138 Iowa, 482, 116 N. W. 468.]

**SPECIFIC PERFORMANCE—Contracts for Future Support.—**

An executory oral contract to convey land in consideration of support or care to be furnished to one person by another during the lifetime of the latter, cannot be specifically enforced until it has been fully executed. (p. 214.)

**EQUITY JURISDICTION—Relief Granted.**—In equity the court should grant such relief as the plaintiff shows himself entitled to under the evidence, and should adjust the decree to the evidence, irrespective of failure to make specific objection to the sufficiency of the allegations and prayer to entitle the plaintiff to the kind of form of relief which is asked. (p. 215.)

**CONTRACTS to Convey for Future Support—Equitable Relief.**

One who has agreed to convey property to another in consideration of the latter furnishing him a home during his life may be enjoined from conveying the property, and interfering with the possession of the other contracting party so long as the latter continues to perform, or is ready to perform, such contract on his part. (p. 215.)

**CONTRACTS to Convey for Future Support—Equitable Relief.**

A grantee with notice that his grantor has agreed to convey the property to another on his agreement to furnish him with a home for life, may be decreed in equity to hold the property subject to the rights of the promisee to have the property conveyed to him when his obligations under the contract have been fully performed. (p. 215.)

Rickel, Crocker & Tourtelott and Heald & Linville, for the appellants.

Voris & Haas, for the appellee.

483 **McCLAIN, J.** We find it to be satisfactorily established by the evidence that defendant, who is the father of plaintiff, and who was over eighty years of age at the time the transactions hereinafter referred to took place, and who, having formerly been a resident of Linn county, had returned after a considerable period of absence to the home of the plaintiff near Central City soon after the death of plaintiff's husband, proposed to plaintiff that she give up her home and go to live in town where the defendant, who is blind, might more conveniently and comfortably live with her. Defendant proposed to buy such a house as would suit the plaintiff at an expense of not exceeding two thousand dollars, and plaintiff selected such a house, for which the defendant paid, taking the title in his own name. It was arranged in accordance with plaintiff's wishes that her daughter, Mrs. Lola Mann, should make her home with the plaintiff and the defendant, and for some months the three lived in the house thus procured, the defendant furnishing the provisions for the family, while the plaintiff did the cooking and looked after the house. Defendant, however, became dissatisfied with the arrangement, and went to live with a

granddaughter and her husband, and deeded the house which he had bought for plaintiff to the husband of this granddaughter, the intervener, Charles H. Waterhouse, and the other intervener, Sarah Larson, defendant's half sister, who was also at that time living with Waterhouse and his wife. Defendant also served notice on plaintiff to quit the premises. Plaintiff's claim of present right and equitable title to the house purchased for her by the defendant is that in consideration of an agreement to give up her former home and go to live in town and make a home for the defendant, and take care of him, he agreed that the house purchased under this arrangement should be hers, and that she has fully performed the agreement on her part, being prevented from continuing to <sup>484</sup> furnish defendant with a home in the house thus purchased by defendant's voluntary act in leaving such home to reside elsewhere. As against the interveners claiming title under conveyance from defendant, the plaintiff claims that such conveyance was made in violation of the trust under which defendant held title to the property for her and while she was in possession thereof, and therefore the interveners are purchasers with notice, and subject to plaintiff's equitable title.

The vital controversy in the case is as to the nature and effect of the contract, if any, made between defendant and plaintiff, in pursuance of which the house was purchased by defendant, and plaintiff removed thereto, and provided a home for defendant so long as he chose to remain. It would be impracticable to set out all of the testimony of many witnesses relating to this arrangement, consisting, as it does, of testimony as to conversations between plaintiff and defendant prior to the purchase of the house and declarations of defendant as to his purpose and intention in doing so. We are satisfied, however, that the agreement was in substance that, if defendant would buy a house for plaintiff in Central City, she would remove to it and furnish him a home, and that after his death the property should be hers. If the understanding between the parties had been that plaintiff should at once, on the purchase of the house, become the absolute and unqualified owner thereof, plaintiff would not have consented, as she did, that the title should be taken in the name of the defendant. We think that her right to have the property as her own was conditioned upon her providing a home for defendant in which he could live until his death, and the difficulty which we have in reviewing the decree of the lower court is as to the nature of plaintiff's present right

and the extent of the relief to which she is entitled under conditions as they existed at the time of the trial. The lower court decreed plaintiff to be the sole and absolute owner of <sup>485</sup> the premises in controversy, charged only with her liability to care for, nurse, and support the defendant during his lifetime if he should so desire and return to said home, and that at the death of defendant, whether he has prior thereto been or is then living with the plaintiff, and has been and is receiving care, nursing and support from her and her family or not, the premises shall then become the absolute property in fee simple of the plaintiff, and that at such time the decree shall pass to her, or her heirs at law or devisees if she is then deceased, the legal title absolutely in fee simple, the same and as fully as if she had received an unconditional warranty deed therefor from the defendant, and that the decree shall then stand as and in lieu of said warranty deed, and the deed to the interveners be annulled, set aside and declared of no effect, and the record thereof canceled, and that the interveners be required to quitclaim to the plaintiff. Defendant is also enjoined and restricted from in any manner conveying or encumbering or in attempting to convey or encumber the premises or any part thereof, and he is decreed to hold the legal title in trust for plaintiff during his lifetime, and not otherwise.

The effect of this decree is to enforce specific performance of an oral contract to convey in consideration of future personal services to be rendered by plaintiff to the defendant. An executory agreement to convey in consideration of support or care to be furnished to one party by the other during the lifetime of the latter cannot be specifically enforced in a court of equity by the latter, and therefore lacks such mutuality of obligation that, until it has been fully executed by the former, no equitable relief to the former by way of specific performance of the agreement to convey can be given: *Flower v. Cruikshank*, 77 Iowa, 110, 41 N. W. 587; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Richmond v. Dubuque & S. C. R. R. Co.*, 33 Iowa, 422; *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469. The cases relied upon by counsel for appellee are those in which the contract has <sup>486</sup> been fully performed and executed by the party contracting to furnish support or render services, and we have no question as to the right of specific performance of a parol contract to convey under such circumstances. But here the obligations of plaintiff have not been fully performed. We do not find it necessary now to determine

whether defendant had any sufficient reason for leaving the home which plaintiff was providing for him. Defendant is not insisting upon rescission of the contract on the ground of failure of plaintiff to carry it out, but he is insisting that no such contract was ever made, and that he had a perfect right to convey the property to interveners without reference to any such contract. It will be time enough to determine the sufficiency of performance by plaintiff, or readiness and ability on her part to perform, and any other question involving her right to a decree of specific performance, when under the terms of the contract she claims to have fully performed its conditions so as to be entitled to the property.

It is argued for appellee that the question which we have discussed as to right of specific performance was not raised in the trial court, and that defendant's sole contention there was that no such contract as relied upon by plaintiff was ever made. But in an equity case the court should only grant such relief as the plaintiff shows himself under the evidence to be entitled to, and the court should adjust the decree to the evidence, irrespective of failure to make specific objection to the sufficiency of the allegations and prayer to entitle the plaintiff to the kind or form of relief which is asked. It remains open to a court of equity to decree that which is equitable under the evidence irrespective of objections made to the pleadings, provided, of course, the allegations of plaintiff show him to be entitled to some equitable relief: *Seymour v. Shea*, 62 Iowa, 708, 16 N. W. 196. The decree confirming title in the plaintiff by way of specific performance subject to fulfillment of her obligations under the contract in the future was erroneous, but we think <sup>487</sup> that, as against the attempt of the defendant to convey the title to the interveners free from any claims on behalf of the plaintiff, the latter is entitled to some equitable relief, and a decree should be entered restraining defendant from conveying or attempting to convey the premises, and from interfering with plaintiff's possession and enjoyment thereof, so long as plaintiff continues to perform or to be ready and able to perform the contract on her part, and it should provide that the title taken by the interveners under defendant's conveyance to them is subject to the right of plaintiff to have the fee simple title to the property conveyed to her when her obligations under the contract have been fully performed, and it is found that otherwise she is entitled to a decree on her contract. As justifying such a decree as is now ordered, see *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123.



The decree as rendered was essentially erroneous, and it is reversed.

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*Specific Performance of an Agreement to devise land in return for personal services* may be decreed in a proper case: *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609, and cases cited in the cross-reference note thereto; *Offutt v. Offutt*, 106 Md. 236, 124 Am. St. Rep. 491. As said in *Laird v. Vila*, 93 Minn. 45, 106 Am. St. Rep. 420, a person may by contract obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. If a person agrees to leave another property by will in consideration of personal services to be performed by the latter, the contract is not revocable as being testamentary in character, after the services have been performed: *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802. The rule that there must exist, as a prerequisite to specific performance, both mutuality of obligation and remedy, has been very much narrowed in modern equity practice: *Frank v. Stratford-Hancock*, 13 Wyo. 37, 110 Am. St. Rep. 963.

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## CAIN v. VOGT.

[138 Iowa, 631, 116 N. W. 786.]

**PAYMENTS, Application of.**—If a creditor holds claims secured by chattel mortgage of his debtor and his wife upon property which belongs to the husband alone and for his debts alone, and also unsecured claims against such husband alone, he may apply payments made from money obtained by the mortgagor's sale of a part of the mortgaged property upon the unsecured debts, in the absence of any direction as to their application. (p. 218.)

**PAYMENTS, Application of.**—The fact that the wife of a debtor is a surety upon a mortgage debt, and not upon another unsecured debt, does not deprive the creditor of his right to apply payments received to the latter, in the absence of any direction to credit them upon the former. (p. 219.)

**PAYMENTS, Application of.**—If but one of several debts are secured and payments are made of which neither the creditor nor the debtor makes application, the court will apply them to the unsecured claim. (p. 219.)

**PAYMENTS, Application of.**—Rules which bind the mortgagor, who sells upon foreclosure to apply the proceeds to the satisfaction of the mortgage debt have little application, where the payment is made from money obtained by a voluntary sale of the property by the mortgagor. (p. 220.)

**ACTIONS, Abatement of.**—If a chattel mortgagee seeking to foreclose his mortgage is in possession thereof during all the time payments are made thereon, and alleges his ownership and brings the mortgage and notes into court, and the mortgagor pleads and relies upon payments made to such mortgagee, and treats him as the owner of the mortgage long after the date of its alleged assignment to another, he cannot rely upon a general allegation that the mortgagee is not shown to be the real party in interest, and that the action must therefore be abated. (p. 221.)

L. Heins, for the appellants.

F. L. Anderson, for the appellee.

**632** WEAVER, J. The controversy in this case involves a question of application of payments. The evidence tends fairly to establish the following facts: On January 8, 1897, the defendants, or one of them, being indebted to the plaintiff in the sum of \$505, made and delivered to him their two promissory notes aggregating that sum, together with the chattel mortgage in suit, which recites that it is given to secure the payment of the mortgage debt by the said Louis Vogt. In February or March, 1897, Vogt having been sued for the rent of a farm occupied by him, and his property being seized under a landlord's attachment, plaintiff at his request made settlement of the landlord's claim by advancing the sum of \$342, on payment of which the rent notes were delivered to him. Thereafter, and during the period beginning August 20, 1897, and ending September 19, 1902, a series of payments ranging from \$20 to \$140 each, and aggregating \$846.66 was made to the plaintiff. Of these the first four payments made August 20, 1897, \$140, September 8, 1897, \$115, September 14, 1897, \$50, and December 7, 1897, \$75.80, aggregating \$380.80, he applied to the satisfaction of the rent notes above mentioned. Thereafter he indorsed upon the notes in suit payments as follows: March 27, 1899, \$71.50, July 22, 1899, \$80, May 9, 1901, \$100, March 24, 1902, \$100, and September 19, 1902, \$20. The defendants also claim to have made a single payment of about \$400, but the evidence shows quite satisfactorily **633** that this is a mistake, and that the sum which they speak of is the aggregate of several smaller payments, which are duly accounted for. They also claim a credit of \$69.30 under date of December 6, 1897. For this they show no receipt or voucher, except a weigher's ticket of the date mentioned, indicating a delivery of hogs of that value by the plaintiff to some person not named. The ticket is not signed or indorsed by any person. If it represents hogs sold by the defendant for the account or credit of plaintiff, it is quite probable that the same is included in the receipt for \$75.80, which bears date the following day. We may therefore assume that the payments above mentioned as indorsed upon the notes are all to which the defendants or either of them are entitled to credit. Indeed, there seems to be no serious contention between counsel as to the number or amount of the payments made, but appellants' principal reliance is on the proposition that they

should have been applied first to the satisfaction of the mortgage debt.

It is also alleged by the defendants in their answer that, in making these payments, they directed that the same be applied to the notes secured by the mortgage, but the allegation is not sufficiently sustained by the testimony. Neither defendant so swears. The husband does state in general terms, or by way of conclusion, that the payments were made on the notes, to be applied on the notes and mortgages, but there is no evidence that either of the defendants ever directed such application to be made. The fact that some of the receipts given by the plaintiff expressly acknowledge payments "on notes" is not inconsistent with their application upon the rent notes. It was shown, however, that the payments were nearly or quite all made from the proceeds of sales of property included within the mortgage, and it is argued for the appellant with much persistence that, because of this fact, appellee was in duty bound to apply the moneys so received to the satisfaction of the mortgage. In support of this claim it is said that the mortgage debt is the joint <sup>634</sup> debt of both defendants, and is secured by a mortgage upon their joint property, and therefore appellee could not equitably apply the proceeds of the sale of such property to the payment of the other debt, which was that of the defendant Louis Vogt alone.

Before discussing the legal proposition it is necessary to correct, in some respects, the appellants' assumption of facts. While it is true that the mortgage debt is joint in so far as both defendants signed the instruments, yet when construed together, as they should be, they disclose the truth to be that the debt thus secured was, as between themselves, that of Louis Vogt. As we have already noted, the mortgage by its express terms is given to secure the payment of the debt by the "said Louis Vogt," and it is Louis Vogt who covenants to pay the attorney's fee on foreclosure, and to pay the deficiency, if any remaining, after the foreclosure sale. Moreover, there is no showing of any kind that the wife, Augusta Vogt, owned any interest whatever in the mortgaged property. On the contrary, the tenor of the mortgage as a whole indicates that the debt thus secured was that of the husband alone, and that the property mortgaged belonged to him individually. The wife's signature was doubtless obtained with the primary purpose of avoiding any question of exemption in her favor, and possibly with the further view that her liability upon the note would add something to the

value of the security. In the light of these facts a defense, based upon the joint character of the mortgage debt, and joint ownership of the mortgaged property, fails for want of evidence to support it.

Nor does the fact that the wife was a surety upon the mortgage debt, and not upon the unsecured debt, deprive the plaintiff of his right to apply the payments received to the latter, in the absence of any direction to credit them upon the former. Indeed where but one of the debts is secured, and payments are made of which neither the creditor, <sup>635</sup> nor the debtor makes application, the court under the rule prevailing in this state will apply it to the reduction of the unsecured claim: *Bishop v. Hart*, 114 Iowa, 96, 86 N. W. 218; *Illsly v. Grayson*, 105 Iowa, 685, 75 N. W. 518; *Whiting v. Eichelberger*, 16 Iowa, 422; *Fargo v. Buell*, 21 Iowa, 292; *Hanson v. Manly*, 72 Iowa, 48, 33 N. W. 457; *Hall v. Johnson*, 6 Tex. Civ. App. 110, 24 S. W. 861; *Brewer v. Knapp*, 18 Mass. 332; *Harding v. Tift*, 75 N. Y. 461; *Hare v. Stegall*, 60 Ill. 380; *Wilhelm v. Schmidt*, 84 Ill. 183. There are authorities for the contrary rule, but they have not been followed in this state.

It remains to be considered whether the fact that the payments were made from money obtained by the mortgagor's voluntary sale of part of the mortgaged property calls for the application of any different rule. We have found no precedent for this situation in our own decisions. Of course, if the creditor forecloses his mortgage, the proceeds of the sale will be applied upon the debt thereby secured, because the very purpose of the foreclosure is to convert the security into money for the payment of that specific debt. But if the mortgagor voluntarily sells the property, and turns the money thus realized over to the creditor without direction for its application, the right of the latter to apply it to the unsecured debt is, in our judgment, a logical deduction from the proposition of law to which we have already given our adhesion. The books are not wanting in authority bearing upon the point here presented. It has been held that the mortgagee of a crop may apply payments, made from the sale of the crop, to the satisfaction of unsecured advances: *Mercer v. Tift*, 79 Ga. 174, 4 S. E. 114. See, also, *Ross v. Perrault*, 13 Grant Ch. 206; *Richardson v. Coddington*, 49 Mich. 1, 12 N. W. 886. The sureties on a bond, given to secure repayment of advances made, and for the purchase of goods, cannot require that money received from the sale of the goods shall be first applied to repay the advances, unless an



agreement <sup>636</sup> therefor is shown: *Turner v. Yates*, 57 U. S. 14, 14 L. ed. 824.

Rules which bind the mortgagee who sells upon foreclosure, or takes possession of and sells and converts the security, have little application to a case where the payment is made from money obtained by a voluntary sale by the mortgagor. In the latter case the lien of the mortgage does not follow or attach to the money, and the mortgagee has no recourse upon any other person to whom such moneys may be paid. In the hands of the mortgagor they have no different character than moneys derived from a wholly different source; and when paid over to the mortgagee in the absence of agreement or direction as to their application, the latter has the right to credit them upon the unsecured debt without regard to the source from which they were obtained by the debtor.

There is another significant fact in the case. The notes in suit were given January 8, 1897, and made to become due one and two years after date, while the debt represented by the rent notes, taken up by plaintiff in February and March, 1897, was past due. The four payments, the application of which is in controversy, were all made in 1897, and before either of the notes in suit had matured. Under such circumstances there is a strong presumption that payments, made without express direction for some other application, were intended to apply on the matured debt. If neither party had designated the debt to which the payment should be applied, the law would make the application in accordance with such presumption: *Richardson v. Coddington*, 49 Mich. 1, 12 N. W. 886. Indeed, in the absence of an express agreement or an application by the debtor, the trend of authorities is to the effect that, as between two debts, one due, and one not due, the creditor has no choice, and the application must be upon the latter: *Bacon v. Brown*, 4 Ky. 334, 4 Am. Dec. 640; *Parks v. Ingram*, 22 N. H. 283. 55 Am. Dec. 153; *Bobe's Heirs* <sup>637</sup> *v. Stickney*, 36 Ala. 482; *Richardson v. Coddington*, 49 Mich. 1, 12 N. W. 886. It should be said before leaving this branch of the case that the rules of law to which we have referred, while generally recognized and approved, are not without their exceptions, and that a court of equity will always feel at liberty to so control their application as to prevent manifest injustice to either party. But there is nothing in this case calling for a consideration of the exceptions. The finding of the district court in this respect has our approval.

Finally, it is claimed that plaintiff is not the real party in interest, and therefore the action must be abated. In the course of the trial the fact was developed that in November, 1897, the plaintiff assigned the mortgage and notes in suit to S. M. Cain. Except as the same may have been involved by the general denial in the defendant's answer, no point was made upon the ownership of the notes in the court below; but appellants insist that it was in issue, and advantage may be taken of it in this court. We cannot so hold. The note and mortgage were in plaintiff's possession. He brought them into court. His petition alleges ownership in himself; and while the answer denies in general terms so much of the petition as is not expressly admitted, it proceeds to treat the plaintiff as the owner, and pleads and relies upon payments made to him long after the date of the assignment. The testimony shows without dispute that during all of these years, while these payments were being made, the plaintiff was in possession and control of the notes, and defendants were recognizing him as the owner, and we think that the objection that plaintiff is not shown to be the real party in interest cannot be upheld: *Farmers' Bank v. Arthur*, 75 Iowa, 129, 39 N. W. 228.

The decree of the district court is affirmed.

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*The Law of Application of Payments* is the subject of a note to *McWhorter v. Bluthenthal*, 96 Am. St. Rep. 44. The general rule is that when a creditor has two claims, one past due and the other not, a payment made by the debtor without direction or agreement as to its application must be applied to the debt past due: *McWhorter v. Bluthenthal*, 136 Ala. 568, 96 Am. St. Rep. 43. Payments and credits on an account, in the absence of any agreement or direction for their application elsewhere, should be applied to the satisfaction of those items or claims which are earliest in point of time: *Ida County Sav. Bank v. Seidensticker*, 128 Iowa, 54, 111 Am. St. Rep. 189.

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## COGGESHALL v. CITY OF DES MOINES.

[138 Iowa, 730, 117 N. W. 309.]

**ELECTIONS—Increase of Indebtedness—Right of Women to Vote.**—A statute authorizing cities having a certain population to erect a city hall and containing a section authorizing a special tax to pay therefor, and another section authorizing the issuance of bonds in anticipation of the special tax authorized by the first section, and containing another section providing that no building shall be erected unless a majority of the legal voters voting thereon shall vote in favor of the foregoing propositions, does not make such sections independent of each other, but they are interdependent and

were enacted with a view to the accomplishment of a single object, and should be construed together, and the question submitted at an election under such statute is that of issuing bonds and increasing taxation; hence under a statute providing that the right of any citizen to vote on the issuance of bonds, borrowing money, or increasing the tax levy shall not be denied on account of sex, women are entitled to vote. (p. 223.)

**STATUTES, Construction of.**—The sole object of the courts in construing statutes is to ascertain the intent with which they are enacted, and to arrive at this the several sections of an act are to be considered as parts of a connected whole and harmonized, if possible, so as to give aid in giving effect to the intention of the law-makers. (p. 226.)

**ELECTIONS.—Right to Vote at Elections** is not a natural or inherent right, but exists only as conferred by the constitution or some statute. (p. 227.)

**ELECTIONS.—Right to Vote.**—If the state constitution has declared, by prescribing definite qualifications, the persons who shall represent the interests of all at the polls, it is not competent for the legislature to add to, or subtract from, the qualifications as determined by the fundamental law at any election therein contemplated. (p. 227.)

**ELECTIONS.—Right to Vote—Constitutional Law.**—Under a constitutional provision that "every male citizen . . . of the age of twenty-one years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law," the word "elections" has reference to a choice of officers alone, whether they are state, county, or municipal, but it does not necessarily refer to other elections which may be authorized by statute. (p. 229.)

**CONSTITUTIONAL LAW.—Right to Vote—Women as Voters.** A constitutional provision that "every male citizen of the United States of the age of twenty-one years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law," has reference to elections for a choice of officers alone, and a statute authorizing women to vote on the issuance of bonds, borrowing money, or increasing the tax levy, in cities containing a certain population, is not in conflict with such constitutional provision. (p. 230.)

**CONSTITUTIONAL LAW.—Class Legislation—Women as Voters.**—A statute authorizing women to vote at elections on questions of municipal indebtedness in cities containing a certain population, without requiring registration as a prerequisite to the right to vote, is not unconstitutional as class legislation. (p. 230.)

**ELECTIONS.—Denial of Right of Women to Vote.**—If a statute authorizes women to vote at elections on questions involving the issuance of bonds, borrowing money and increasing the taxation in cities containing a certain population, and the refusal of permission to allow certain women to vote at such an election is not based upon their disqualification as individuals, but as members of a class, and when the body of voters of such class thus denied the privilege of voting is numerous enough to have changed the result of the election, it is invalid, though the votes of those actually rejected would not have changed the result. (p. 232.)

G. H. Ballantyne and W. H. Baily, for the appellants.

W. H. Bremner and W. L. Read, for the appellees.

Bowen v. Brockett, for the interveners.

<sup>731</sup> LADD, C. J. The council of the city of Des Moines, in pursuance of the authority conferred by chapter 34 of the Acts of the 32d General Assembly, caused to be submitted at an election called for that purpose the question: "Shall the city of Des Moines erect a city hall at a cost not exceeding three hundred and fifty thousand dollars?" No provision whatever was made by the officers of the city for the casting or receiving the ballots of women, and when two of the plaintiffs and another appeared at the proper polls they were refused ballots and denied the right to vote. The <sup>732</sup> result of the election was a majority of seven hundred and twenty-nine votes in the affirmative. The council thereupon procured plans and specifications for a building, purchased a site, directed the board of public works to contract with a firm of architects to superintend the construction, levied taxes, and intended to issue and sell bonds to raise funds to pay the contract price. The demand of plaintiffs that further action by the council be enjoined is based on the alleged denial of the right of women to vote at the election. This is met by the defendants, contending: (1) That the question submitted was not one upon which the statute authorizes women to vote; (2) that the statute authorizing women to vote on certain specified subjects is inimical to section 1 of article 2 and section 6 of article 1 of the constitution; (3) that the statute, or a part of it, has been repealed by subsequent legislation; and (4) that, even if some women were refused the right to vote, the election was not invalidated thereby.

The privilege of voting is limited to males in this state, save on certain questions clearly pointed out in section 1131 of the Code, which reads: "At all elections where women may vote, no registration of women shall be required; separate ballots shall be furnished for the question on which they are entitled to vote; a separate ballot box shall be provided in which all ballots cast by them shall be deposited, and a separate canvass thereof made by the judges of the election, and the returns thereof shall show such vote. The right of any citizen to vote at any city, town or school election, on the question of issuing any bonds for municipal or school purposes, and for the purpose of borrowing money, or on the question of increasing the tax levy, shall not be denied or abridged on account of sex." This was a city election, and, as we think, the vote was both on the question of issuing bonds and on the question of increasing the tax levy. The vote of the people never operates as a levy nor the execution of bonds. It merely empowers the proper officers to do



<sup>733</sup> these things, and this may be accomplished by a direct expression on the issuance of bonds or increase of taxation, or indirectly by instructing the officers to make improvements or erect buildings which necessarily have this effect. Statutes in this state are to be liberally construed, to the end that the object had in their enactment be effectuated, and from a reading of this section the intention to allow women to participate in local elections directly involving the expenditure of large sums in improvements is manifest. It is immaterial whether the question specify the precise amount of bonds to be issued or tax levied, or authorize the construction of an improvement involving the raising of money in one or both of these methods with which to pay the cost. The consequence of the election is the same in either event. What practical difference is there between voting a tax to be levied at so many mills a year until three hundred and fifty thousand dollars is raised, or the issuance of that amount in bonds, the proceeds to be paid for the cost of a building and voting for the erection of a building at that cost, thereby authorizing the expenditure of that amount to be raised by the city in one or both these methods? In either event the question of the issuance of bonds or increase of taxation is directly involved, and on that the voice of the women can no longer be silenced in this state, save by the repeal of this statute. If, then, the question submitted to the voters involved the issuance of bonds or increase of taxation, women having other qualifications requisite should have been provided with ballots at the special election. Chapter 34 of the Acts of the 32d General Assembly, except the last section, which relates to the procedure of submitting the question, is as follows:

“Section 1. Cities having a population of fifty (50) thousand or over shall have the power to erect a city hall and to purchase the ground therefor.

“Sec. 2. For the purpose of paying for the construction of such building and the purchase price of such ground, such cities shall have the power to levy upon all the property <sup>734</sup> within the corporate limits of such cities and towns subject to taxation for said purposes, in addition to all other taxes now provided by law, a special tax not exceeding in any one year two mills on the dollar for a period of years not exceeding twenty.

“Sec. 3. Any city desiring to construct such a building or to purchase ground therefor may issue bonds in anticipation of the special tax authorized in the preceding section. Such bonds shall be known as city hall bonds and shall be

issued and sold in accordance with the provisions of chapter 12 of title 5 of the Code of Iowa, and acts amendatory thereto. In issuing such bonds, the city council may cause portions of said bonds to be one due at different, definite periods, but none of such bonds so issued shall be due and payable in less than five (5) or more than twenty (20) years from date.

"Sec. 4. No building shall be erected under the provisions of this act unless a majority of the legal voters voting thereon vote in favor of the same at a general city election or at a special election."

The design of the legislature was to enable a city of the population stated to acquire a building commensurate with its needs in which to transact the business incident to so large a corporation. The several sections are to be construed as having been enacted to accomplish this object. To this end the council is given plenary power in the selection and purchase of a suitable site and may levy taxes or issue bonds for its payment; but, before any building may be erected thereon, the approval of a majority of the "voters, voting thereon" is essential. It matters not whether we denominate this a limitation on the first section or the source of authority to build; the power cannot be exercised without the approval of the voters. Nor do we think that prior to such approval the council have any authority to levy taxes or issue bonds to meet the cost of the erection of the hall. These are authorized only "for the purpose of paying for the construction of such building." Surely the council may not lawfully raise funds to pay for something for which it is forbidden to expend the money. If, as appellees contend, section 735 4 of the act merely prevents the council from proceeding with the erection without the sanction of the voters, but does not interfere with raising of funds, then the council might anticipate the uncertain outcome of an election, or even the uncertainty of it being called, and load the people with the burden of debt without prospect of the expenditure of the money raised in the construction of the building. Funds might be accumulated in unlimited amounts from the levying of taxes, or sale of bonds in anticipation that at some time indefinitely in the future the council might conclude to call an election and the voters authorize the construction of a hall. Manifestly such was not the design of the legislature, for this would authorize the council to fix upon the cost of the structure, whereas, by the language of the question to be submitted, that is to be determined by the voters.

Of course, the sole object of the courts in construing acts of the legislature is to ascertain the intent with which enacted. To arrive at this the several sections of an act are to be considered as parts of a connected whole and harmonized if possible so as to aid in giving effect to the intention of the law-makers: *District Tp. of Dubuque v. City of Dubuque*, 7 Iowa, 262; *Minneapolis & St. Louis R. Co. v. Cedar Rapids etc. Ry. Co.*, 114 Iowa, 502, 87 N. W. 410; *Goerdts v. Trumm*, 118 Iowa, 207, 91 N. W. 1067; *State v. Forkner*, 94 Iowa, 733, 62 N. W. 683.

These different sections are interdependent, and were enacted with a view to the accomplishment of a single object, and none of the accepted canons of construction lend support to the contention of appellees that each of the first three should be held to confer separate powers each independent of the other; only the first being limited by the fourth. We are of the opinion that they should be construed together, and that an affirmative vote by a majority of those voting is essential as a condition precedent to the levying of the special tax or issuance of bonds for the payment of the building. Possibly, as suggested, a city hall might be erected from the general funds of the city, a point we do not decide, because <sup>736</sup> not material. It is enough that the question submitted involved the granting of power to the council of the city of Des Moines to make a special tax levy or to issue bonds, and that is the only matter ever determined by the voters of an election called to pass on such a question. As said before, the majority vote does not operate as a levy or the execution of the bonds; it merely confers upon the proper officers the authority to do so, and it is immaterial, so far as this case is concerned, whether such authority was mandatory or discretionary. The question submitted involved that of issuing bonds and increasing taxation, and therefore, under the plain provisions of section 1131, qualified females were entitled to vote thereon.

The case of *Youngerman v. Murphy*, 107 Iowa, 686, 76 N. W. 648, seems to have been relied on by appellees, but it is not in point. There the city was expressly authorized to levy and collect taxes with which to create a sinking fund, and to deposit the same in the banks at interest with a view of subsequently purchasing waterworks or of erecting the same. The contract of purchase or for the creation of the works alone was to be submitted to the electors for approval, and the court held that, as the tax was for a specific purpose, it might be levied as the statute directed prior to such approval. Here

there is no provision for raising a sinking fund or the deposit of that raised in banks, nor authority to levy a tax or issue bonds prior to an affirmative vote of the people.

2. Appellees contend that the legislature was without power to confer upon women the privilege of voting on any subject, and rely on section 1 of article 2 of the constitution as prescribing the qualification of voters at all elections. That section provides that: "Every male citizen of the United States of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now <sup>737</sup> or may hereafter be authorized by law." The right to vote is not a natural or inherent right, but exists only as conferred by the constitution of the state or some statute: *Gougar v. Timber Lake*, 148 Ind. 38, 62 Am. St. Rep. 487, 46 N. E. 339, 37 L. R. A. 644. Ours is a representative government, wherein only a limited number express the will of all the people, and the constitution having declared, by prescribing definite qualifications, the persons who shall represent the interests of all at the polls, it is not competent for the legislature to add to or subtract from the qualifications as determined by the fundamental law at any election therein contemplated: *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *Feibleman v. State*, 98 Ind. 516; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *McCafferty v. Guyer*, 59 Pa. 109; *Davies v. McKeeby*, 5 Nev. 369; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465. See *Morrison v. Springer*, 15 Iowa, 304; *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177. "Whenever the constitution has prescribed the qualifications of electors, they cannot be changed or added to by the legislature or otherwise than by an amendment to the constitution": *Cooley's Constitutional Limitations*, sec. 599. The right of suffrage is a political right of the highest dignity, abiding at the fountain of governmental power, and is for the consideration of the people in their capacity as creators of the constitution, save as that instrument may authorize a regulation of its mode of exercise: *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326; *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; *Coffin v. Board of Election Commrs.*, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662. The doctrine that, as the constitution of the state is a limitation of power, the legislature may enact laws not prohibited, has no application, for, the section quoted having designated the precise qualifications of electors, it thereby determines who shall exercise the



privilege of voting, and necessarily prohibits others or disqualifying those so endowed with that privilege. The decisions are so uniform on these propositions <sup>738</sup> that only a few have been cited. In a number of cases similar constitutional qualifications have been held not to be essential in elections not contemplated in the constitution itself: See *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674, 34 L. R. A. 55; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24; *Wheeler v. Brady*, 15 Kan. 26; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. But these decisions are not controlling, for that the qualifications prescribed in this state are not only for "all elections which are now," but for all which "may hereafter be authorized by law." Clearly this has reference to such elections as the general assembly, in the exigencies of the future, may deem advisable, and, whether such elections are local or general, sex is made an essential qualification of the elector. The language is so plain that discussion cannot elucidate. As bearing thereon, see *Alison v. Blake*, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *In re Gage*, 141 N. Y. 112, 35 N. E. 1094, 25 L. R. A. 781. See *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177.

True, as contended by appellants, the only elections referred to in the constitution are those of the state, district, county and township; but this does not preclude other elections from being authorized by law. For this reason decisions relied on by appellants are not in point. Thus in *State v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124, the qualifications prescribed were for "all elections under this constitution," and as the instrument contained no reference to elections in municipal corporations, though the former constitution had done so, it was held that the legislature might fix the qualifications of electors at municipal elections. See, also, *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768. In some of the cases, provisions for the establishment of a school system are given great weight, but in none has an act of the legislature modifying the qualifications <sup>739</sup> of an elector at an election of an officer been upheld where those found in the constitution are made applicable to all elections of officers authorized by law. No option is left to the courts, save to enforce the mandate of the constitution according to its plain language and intent. It may be that a municipality is the creature of the legislature (*Dubuque v. Illinois C. Ry. Co.*, 39 Iowa, 56); but not of unlimited control, save in so far

as it performs functions as the agent of the state: *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222, 89 N. W. 204, 57 L. R. A. 244. It is a subdivision of the state and recognized in the constitution in the limitation of indebtedness which may be incurred thereby and the prohibition of special laws for the incorporation of cities and towns: Const., sec. 30, art. 3, sec. 3, art. 11. Conceding the legislature plenary powers in the matter of organizing municipal corporations, yet, if it provides for the election of officers therein, there is no escape from accepting the electorate as defined by the constitution.

3. But, as contended by appellant, the word "elections," as used in the constitution, has been construed to have reference to the choice of officers alone: *Seaman v. Baughman*, 82 Iowa, 216, 47 N. W. 1091, 11 L. R. A. 354. And this definition is in harmony with the authorities generally. Thus, in *Callam v. City of Saginaw*, 50 Mich. 7, 14 N. W. 677, an act authorizing the defendant city to construct the county courthouse on condition that a majority of the taxpayers so voted was approved, though such qualification was not specified in the constitution. In *Mayor etc. of Town of Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947, property qualification of electors voting to dissolve the town and annex to Deaver was held valid, though such qualification was not one of those prescribed in the constitution; the court saying: "In our opinion the word 'elections' thus used (in the constitution) does not have its general or comprehensive signification, including all acts of voting choice or selection, without limitation, but is used in a more restricted sense as elections of <sup>740</sup> public officers": See, also, *Thornton v. Territory of Washington*, 3 Wash. T. 482, 17 Pac. 896; *Woodley v. Town Council of Cllo*, 44 S. C. 374, 22 S. E. 410; *Menton v. Cook*, 147 Mich. 540, 111 N. W. 94. Until comparatively recent times, the word "election," when applied to political subjects, did not denote the choice of a principle, or the decision of a question of government, or the advice to governing bodies by the electors, and only when declared by the instrument itself to be sufficiently comprehensive to cover these matters has it been construed to have this extended meaning: See *Commonwealth v. Steele*, 97 Ky. 27, 29 S. W. 855. A vote on a question like that submitted is advisory only. Even though a majority of the voters voting answer it in the affirmative, the council is not bound to act thereon, though it be a condition precedent to their power to act. It is but the participation by persons authorized in a subdivision of the state

in the exercise of legislative power, and, though involving choice and discrimination, cannot, in any proper sense, be regarded as voting at an election such as contemplated by the constitution in defining the qualifications of those entitled to the ballot: *Eckerson v. City of Des Moines*, 137 Iowa, 425, 115 N. W. 477.

4. It will be observed that section 1131, already set out, requires separate ballots, ballot boxes, canvass, and returns, and provides that "no registration of women shall be required." No point is made with respect to the separation because of sex, as this could not be said to involve any discrimination; but it is urged the exemption from registration, when male voters are required to register, is violative of the provision of the constitution that "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens." That the statute grants an immunity which is not accorded the male voters is apparent, and our only inquiry is whether this is done on the same terms; that is, <sup>741</sup> whether the classification is reasonable. Without reviewing the authorities as to what is essential to the validity of legislative classification, it may be said in a general way that such classification must be based upon apparent natural reasons as opposed to those which are purely arbitrary, such as are suggested by necessity, by difference in the situation and circumstances of the subjects indicating the necessity or propriety of different classification for different legislation concerning them. All are to be treated alike who, under the same conditions, are brought within the influence of the law, and also the law in its classification must bring within its influence all under the same conditions: *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 527, 82 N. W. 959, 56 L. R. A. 570; *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521; *Shaw v. City Council of Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, 10 L. R. A., N. S., 825; *McGuire v. Chicago etc. Ry. Co.*, 131 Iowa, 340, 108 N. W. 902. That an arbitrary classification of voters will not be tolerated may be conceded, and it is doubtful whether any substantial discrimination between electors with full suffrage may be upheld: See *Attorney General v. Detroit*, 78 Mich. 545, 18 Am. St. Rep. 458, 44 N. W. 388, 7 L. R. A. 99; *Lyman v. Martin*, 2 Utah, 136; *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326. The matter of sex, but for the constitution and laws, might not alone furnish a basis of discrimination, for such differ-

ence alone can have little or no bearing on the necessity for requirements in proving the right to vote. But the fact that female suffrage is limited, and women are allowed to vote only on questions involving the issuance of bonds, borrowing money, and increase of taxation when submitted to the people, and never at "elections" as that term is used in the constitution, while the male voters may cast their ballots on all questions and at elections, furnishes a sufficient distinction to justify a classification such as made. Indeed, the constitution itself, by allowing males alone to vote at the election of officers, has created the classification appellees contend is inconsistent with its provisions. The legislature might well have concluded that, owing to the limited <sup>742</sup> exercise of suffrage, the nature of the questions voted on, as well as the infrequency of the submission thereof to the voters, women ought not to be required to go to the trouble nor the municipality to the expense of registration, and we are of opinion that the constitution by its discrimination between the sexes in favor of men furnished a reasonable basis for this discrimination in favor of women in this legislation. It follows that plaintiffs were entitled to vote on the question submitted at a special election June 20, 1907, and were illegally deprived of that privilege.

5. Had the election officers gone no farther than refuse the votes of the women which were actually tendered, the result could not be disturbed, for in that event enough were not rejected to have changed the result. But the refusal was not based upon disqualification peculiar to the individuals, but as members of a class. The evidence shows conclusively that the denial was directed to all women as such, and for this reason the election cannot be sustained as valid. The city clerk, whose duty it was to provide separate ballots and ballot boxes for each voting precinct, though demanded by the representatives of the Political Equality Club of one hundred and fifty women, refused, and none were furnished or to be found at the voting booths. To Grace H. Ballantyne, as attorney for this club, the city solicitor said that in his opinion women were not entitled to vote, and that no provision would be made for them. Such evidence was admissible in connection with proof that the city officers acted on such advice as tending to show the denial of the privilege of voting to women generally. All this was reported to the members of this club and to representatives of the Federation of Women's Clubs, composed of about twelve hundred members. The city clerk and the judges of election of at least three precincts acted



on the advice of the city solicitor, and the daily press of the city discussed in a manner to give widest publicity the fact that women would not be permitted to vote <sup>743</sup> on the question submitted. From the omission of the officer, whose duty it was to see to it that facilities for voting were furnished, to provide separate ballots and ballot boxes for the female voters on the advice of the city solicitor, together with proof that the judges at their voting precinct and voting booths were not supplied therewith and declined to receive votes on the advice of the solicitor, it is to be inferred that the ballots of the women of the city generally would have been refused had they tendered them. The result was that a large class of voters, many times the majority mentioned, was denied the right of suffrage. The distinction must be kept in mind between depriving an individual of the ballot because of some disqualification peculiar to himself and the denial thereof to an entire class of voters. In the former, when not fraudulently done, but through error in judgment, there is no remedy: Cooley's Constitutional Limitations, sec. 781; *State v. Hanson*, 87 Wis. 177, 41 Am. St. Rep. 38, 58 N. W. 237. But it is not so where a body of voters is denied the privilege as a class when numerous enough to have changed the result. The denial is then in the nature of oppression and operates to defeat the very purpose of the election; that is, of ascertaining the choice or sentiment of the electorate. Thus, excluding enough votes, on account of color, to change the result had they voted one way, has been held to render an election void: *Howell v. Pate*, 119 Ga. 537, 46 S. E. 667. Says Mr. McCrary, in his work on Elections, section 235:

"It sometimes happens that the officers of election, though acting in good faith, commit errors which will vitiate the election. Thus, if they have adopted an erroneous rule in regard to the qualification of electors, by which legal votes were excluded, or illegal votes admitted, in numbers sufficient to change or render doubtful the result, the election is void, unless there is proof upon which the poll can be purged of illegal votes and the true result shown. And in such case if the erroneous rule affects a class of voters, and it has become generally known to the persons excluded <sup>744</sup> by it, they may submit to it, without waiving any rights, although they do not present themselves at the polls and offer their ballots. They have the right to take notice of the decision of the board in other cases precisely like their own. To require each voter belonging to a class of excluded voters to go through the form of presenting his ballot, and having a separate ruling in each

case, would be an idle and useless formality. We are to look at the substance, and not the formality.

The same thought is expressed in section 276 of this work. A like rule seems to obtain when no opportunity is afforded those entitled to cast ballots in sufficient number to affect the result either owing to the polls not being opened in some precincts of the district, an insufficient number of ballots being supplied, or the rejection as invalid the vote of entire precincts of a district or county: *People v. Salomon*, 46 Ill. 415; *Maloney v. Collier*, 112 Tenn. 78, 83 S. W. 667; *Hocker v. Pendleton*, 100 Ky. 726, 39 S. W. 250; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *Marshall v. Kerns*, 2 Swan (Tenn.), 68; *Barry v. Lauck*, 5 Cold. (Tenn.) 588; *Burrough v. Hackney*, 31 L. T., N. S., 69.

According to the last state census, there were nineteen thousand one hundred and seventy-nine native born women above twenty-one years of age residing in Des Moines, or seven hundred and forty-one more than there were men of like age, and no time need be wasted in deducing from this proof that more qualified female voters than were necessary to overcome the majority resided in the city June 20, 1907, the day of the election. In view of the fair inference that probably more than half of those entitled to vote were denied the privilege, no consideration need be given the suggestion that but slight injury resulted from the deprivation of this important right. The suggestion that so much of section 1131 as allows women to vote without registration has been repealed is disposed of by what has been said. We reach the conclusion that the election was invalid, and that defendants <sup>745</sup> should have been permanently enjoined from proceeding thereunder. Reversed.

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*The Power of the Legislature to Regulate Elections* is undoubted, provided the elective franchise is regulated and not denied. The legislature has no power expressly to deny or take away the right, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. Its power is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. All reasonable latitude should be given the legislature in the exercise of this power of regulation, but statutes must be reasonable, uniform and impartial. They must be calculated to facilitate and secure, rather than to subvert or impede, the right to vote: See notes to *Chamberlain v. Wood*, 91 Am. St. Rep. 685; *Livesley v. Litchfield*, 47 Or. 248, 114 Am. St. Rep. 920. When the constitution of a state has prescribed qualifications for voters and defined the qualifications of an officer, it is not competent for the legislature to add to or in any way alter such qualifications, unless the power to do so is conferred by the constitution itself: *Johnson v. Grand Forks County*, 16 N. D. 363, 125 Am. St. Rep. 662.

**CASES**  
IN THE  
**COURT OF APPEALS**  
OF  
**KENTUCKY.**

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**KENTUCKY AND INDIANA BRIDGE AND RAILROAD  
COMPANY v. BUCKLER.**

[125 Ky. 24, 100 S. W. 328.]

**STREET RAILWAY — Carrying Passenger Beyond Destination—Subsequent Injury.**—When a street railway company carries a passenger past the point where he has requested to be set down, and the conductor then refuses to take him back to the desired point, but directs him how to reach the same on foot, and the passenger, following such directions, in the darkness falls through a trestle, the railway company is answerable for his injuries. (p. 241.)

Humphrey & Humphrey, for the appellant.

Bugerin & Dinwiddie and Samuel Averitt, for the appellee.

**27 NUNN, J.** This suit was instituted by appellee against appellant for damages on account of personal injuries received through the alleged negligence of the appellant's servants. The case was tried, and a verdict returned in favor of appellee for five thousand one hundred dollars. This appeal is prosecuted by appellant to reverse the judgment rendered upon this verdict.

The appellee's testimony shows the following state of facts: That late in the afternoon on the day he received his injuries at night he went to a steamboat that was tied in the canal at the foot of Twenty-sixth street, and obtained employment. Then he started to his sister's, in the upper end of the city, to get his clothes to take on the trip. A young man by the name of Kelly, with whom he became acquainted on the boat, went up with him. On their return they took passage on one of appellant's cars at First and Water streets. On paying their fare they informed the conductor that they wanted to get off at Twenty-sixth street; that they wanted to get to

the boat, stating where it was situated. The car failed to stop at Twenty-sixth street. They called the conductor's attention to the fact that he was passing without stopping. He stated that they could get off at the next stop. The car was not stopped until they arrived at Thirtieth street. When they arrived there they found it dark, and were unable to see how to go to reach their place of destination. They protested against getting off at that place, and requested that the car be run back to Twenty-sixth street, or that <sup>28</sup> they be permitted to remain on the car until it returned to Twenty-sixth street, which was refused by the conductor. The conductor then told them to walk back up the track, nearly to a dim light that he pointed out to them, and then turn to the left and go toward the river, which would take them to their boat. They both testified that they had never been in that part of the city below Twenty-sixth street before; that they did not know which way to go independent of the direction given them by the conductor, and, in compliance with his instruction, they walked up the track to the place designated, where appellee turned to the left, and stepped from a trestle, falling about twelve feet, striking his breast on a stump, breaking four or five ribs, severely and permanently injuring himself. They also stated that it was so dark that they could not see and did not know they were on a trestle at the time appellee fell. The conductor, in his testimony, contradicted all of the testimony given by appellee and the witness Kelly, except that part that when they paid their fare they said to him that they wanted to get off at Twenty-sixth street to go to a steamboat tied up at the foot of that street. The motor-man corroborated the conductor with reference to the car stopping at Twenty-sixth street, but he did not hear anything said between the conductor and appellee, he being at the front end of the car. Appellee introduced testimony, in rebuttal, tending to show that the witness, who professed to be the conductor, was not the conductor on the car on which appellee and the witness Kelly were on the night of the injury. Appellant makes no contention as to the extent of appellee's injury, nor to the amount of the verdict; but claims that the carrying of him beyond his destination was not the proximate cause of his subsequent injuries <sup>29</sup> while attempting to get back to his place of destination; that appellant is not responsible for the injuries received by appellee as the result of misdirections of its conductor; that, if the conductor gave appellee directions how to reach his place of destination, it was not within the scope of his employment, and not bind-



ing upon appellant, and, further, that the injuries received by appellee were the result of his own contributory negligence.

Appellee and his companion were left at the place stated, virtually out of the city, with obstructions on either side of the track which made it dangerous for them to attempt to leave, not knowing which way to go to reach their place of destination other than to follow the directions of the conductor. Their boat was to leave in a short time. The question is: Under these circumstances, what action would an ordinarily prudent man have taken? Was he required to stand there until daylight? Was it more prudent, not knowing the surroundings, to start out at random in the darkness? Or was it more prudent for him to rely upon the instructions and assurances of safety offered him by the conductor, and go in the direction pointed out by him, and turn at the point indicated. The decided weight of authority is to the effect that when one is carried beyond his station, or stopped short of it, and is directed by the conductor to alight from the train, the passenger, being ignorant of the surroundings and dangers that might befall him while attempting to get to his station with or without the directions of the person in charge of the car, receives an injury while exercising ordinary care for his own safety, the company is responsible to him in damages. In such a case the company has not performed its contract, and, in effect, he is still a passenger until he reaches <sup>30</sup> the station; and the injury received is the proximate result of the wrong done him.

In the case of *New York etc. Ry. Co. v. Doane*, 115 Ind. 435, 7 Am. St. Rep. 451, 17 N. E. 913, 1 L. R. A. 157, the railroad company carried Mrs. Doane eighty or ninety rods beyond her station, where she was requested to and did alight from the car, and, in attempting to get back to the station, she fell into a cattlepit, breaking her arm. In that case the court said: "It also failed to perform a plain and very urgent duty when it neglected to either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station-house after it had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger in proper condition at the station to which he has paid his fare. Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private inclosures, and into an open and remote field, through which she might have returned to the station by an unmarked and

circuitous route. It was, under the circumstances, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she would have attempted to follow the railway track back to the station-house. Until she reached that point, she was still constructively a passenger on the railway train, and had a right to rely upon the information or directions which she may have received from the conductor."

In the case of *Adams v. Missouri Pac. Ry. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, the passenger was caused to alight from the train about a <sup>31</sup> quarter of a mile before it reached the station. He found the path leading to the platform blocked by a coal car, and, finding no other way out, climbed over it and jumped down on the other side, sustaining the injuries for which he sued. In defense it was urged that the injuries were not the proximate result of the defendant's negligence. Of this the court said: "The defendant's conductor, in requiring the plaintiff to get off of its train at a distance from the station to which he had paid his fare, was guilty of a breach of his duty. The plaintiff, in obeying his orders and getting off the train at the place where he was directed to do so, was obeying the orders of defendant. When he landed safely on defendant's roadbed beside the caboose, he was still a passenger of the defendant, to whom it owed not only the duty of transporting him on its train to its station at Harrisonville, a duty which it had refused, was then refusing and continued to refuse to perform up to and including the moment in which the plaintiff was injured, but to whom the defendant also owed the further duty of providing for him a convenient and safe way by which he might leave defendant's train, its right of way and premises, and go about his own business. The duties that impelled the plaintiff to take passage on defendant's train were demanding his presence at the point of his destination. Thus far he had done all he could to meet the requirements of his sense of those duties, but now he was about to fail, and must fail to meet the requirements of those personal duties unless he takes up the discharge of defendant's duty thus unexpectedly, and against his will, thrust upon him, of finding a way and transporting himself to the station. To do this on foot and by the way that seemed to him most practicable was the only course <sup>32</sup> left open to him. To this course he was constrained by defendant's neglect of duty. That duty attending him, however, and every step taken by him in the effort to reach the station, was the direct effect of defendant's neg-

lect toward him. That the plaintiff, when he was wrongfully set afoot at a distance from, would seek to reach, the station with ordinary care and caution by the most practicable route, was to be expected, and ought to have been foreseen, by defendant's servants. If there was danger in that way, such danger ought to have been foreseen, and that he was liable to encounter it. If in such encounter he was injured, such injury was the proximate, because the natural, although not the necessary or inevitable, result of the defendants' negligence, and for it the defendant ought to be held responsible."

In the case of *Winkler v. St. Louis etc. Ry. Co.*, 21 Mo. App. 99, the appellant was taken beyond his station in the night-time. When his station was called, he arose and was directed to go out of the rear end of the car, which he did when the car stopped. His testimony was that the night was very dark, and continued, in substance, as follows: "After we alighted on the ground the conductor said, 'Stand still till we pull out, and then you will be all right'; and immediately pulled the train out. We looked around and could not see the depot and were bewildered, and did not know where we were. We deliberated as to what we would do. It was about 2 or 3 o'clock in the morning; think this point was below the station about three hundred yards, but it seemed that night about a quarter of a mile. After a short deliberation, and noting the surroundings, we started back. We were following the railroad track. We could not see any other road to follow by reason <sup>33</sup> of the darkness. I was walking on the track and could not distinguish the ties and space between them. It was very dark. I suddenly fell, one foot going through the timbers of the trestle." The evidence of Winkler was corroborated by a traveling companion. That case and the one at bar are almost alike. The claim was made by the appellant in that case that the injury received by Winkler was not the proximate result of the appellant's wrong in carrying him past his station and putting him off at another point. The court in that case also said: "If a passenger, instead of being discharged at the place called for in the contract of carriage, is discharged in the night-time at another place, so that in getting to his place of destination it becomes necessary to walk along a path containing a dangerous obstruction, it is not too much to say that the danger of his being injured by such obstruction is a danger which the carrier ought to foresee, and that it is not an unnatural, improbable, or remote consequence of the act of discharging the passenger in such a place."

See, also, the cases of *Patten v. Chicago etc. R. R. Co.*, 32 Wis. 524, *Burnham v. Wabash etc. R. R. Co.*, 91 Mich. 523, 52 N. W. 14, and *Kentucky Cent. R. R. v. Biddle*, 17 Ky. Law Rep. 1363, 34 S. W. 904. The last case was where two young ladies were carried beyond their station. They walked back to it, and sued the company for damages, and the court said: "On the other hand, the walk of the appellees was clearly in consequence of the negligence of the conductor. They might have sought and obtained shelter among the strangers by whom they were surrounded, but were not bound to under the circumstances surrounding them. The injuries resulting from their walk are the proximate results of the failure of the train to stop <sup>34</sup> at Garnett." The cases cited by appellant's counsel in the main do not apply to the facts of this case.

In the case of *Lewis v. Flint etc. Ry. Co.*, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744, the plaintiff was carried some distance beyond his station. This fact he knew when he left the train. He asked the conductor about the matter, and was informed that he had been carried beyond his station about two car-lengths. He said, if that was the case, it did not matter, and got off the train. Soon afterward he discovered that the conductor was mistaken, or at least had misinformed him, as to the distance they had passed the station, and in trying to reach the highway, for which he was bound in the first instance, he stepped into a ditch and was injured. The syllabus of the case states: "Plaintiff knew the neighborhood, and knew where the road crossed the track there were cattle-guards and culverts on both sides of it." In the case at bar appellee did not know there was a trestle up the track from which he might fall. In the case referred to plaintiff voluntarily left the train, merely asking the conductor's opinion as to how far beyond the station he had run. In the case at bar appellee objected to being required to leave the car, and did so under protest. The conductor knew the trestle was up the track, but did not inform appellee of it, and appellee did not know it.

In the case of *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26, 2 Am. St. Rep. 144, 13 N. E. 122, 14 N. E. 352, the plaintiff intestate through his own mistake boarded the wrong train. The mistake was discovered after the train had passed over a bridge or trestle. The train was stopped for him, and he got off for the purpose of going back to the station and boarding the train he <sup>35</sup> intended to leave on. As he did so, he inquired of the conductor as to the best way to get back to the station. The conductor gave it as his opinion that the



best way for him to get back was to proceed along the railroad track, which he did, and while he was upon the trestle another train came along and killed him. As stated, he had boarded the train through his own mistake, to which the defendant had in no way contributed. He left the train voluntarily, as being the best thing possible for him to do under the circumstances. The court held that the act of the conductor in advising him as to the best way to get back to the station was not within the scope of the conductor's authority. The case is not like the one at bar. The defendant was not responsible for his mistake in getting on the train. It owed him no duty to back the train to the station. If it had owed him any such duty, he waived it by voluntarily getting off the train. When he had gotten off the train in safety, the company was no longer responsible to him for any injury he might receive; but the court in that case said: "If the conductor had refused to carry the deceased to a regular station, or had compelled him to leave the train, an essentially different question would have faced us; but the passenger here leaves the train without complaint. It is not the theory of the complaint that the conductor put the deceased off the train at an improper place. The case is not, therefore, controlled by the authorities upon that general subject." Plainly admitting that had the conductor put him off at an improper place, the rule would have been different.

The case of *Haley v. St. Louis Transit Co.*, 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295, was against a street railway. The plaintiff was carried one square beyond her destination in a city, and in walking back <sup>36</sup> on the icy pavement she fell and received the injury for which she sued. A different rule is applicable to a case of that kind. The plaintiff was deposited at a safe place in daylight in the streets of a city, and, while she might have had a cause of action for being carried beyond the place at which she was to alight, she could not recover damages for personal injuries plainly brought about by an intervening cause. It was not shown that there was no ice at the place where she desired to alight, and the presumption is that there was ice on the pavements all over the city; and she was as likely to fall at the place she desired to alight as any other.

In the case of *Benson v. Central Pac. Ry. Co.*, 98 Cal. 45, 32 Pac. 809, the appellant, a little girl, was walking back with her father along the railroad track, after having been carried beyond her destination, when they were caught by another train. They had, however, left the track when the child broke

away from her father and ran back in front of the train. This case is not like the case at bar on account of the manifest difference of the facts. The court distinguishes the facts of that case from the case of *New York etc. Ry. Co. v. Doane*, 115 Ind. 435, 7 Am. St. Rep. 451, 17 N. E. 913, 1 L. R. A. 157.

Under the facts proven by appellee, it was the duty of appellant to see that the appellee got safely to Twenty-sixth street. Appellant might have accomplished this end in several ways. It might have stopped its car at Twenty-sixth street and allowed appellee to alight; it might have backed its car from Thirtieth to Twenty-sixth street, as he demanded; it might have allowed appellee to remain on the car until the return trip—each of which it refused to do. If appellant chose rather than to do either one of these things, to take some other means of getting <sup>37</sup> appellee to his destination, if it chose to take chances, directing him how to go back unaided from the place where it wrongfully deposited him, then it cannot be heard to say that the injuries which the appellee received were not directly the result of these wrongful acts and not the proximate result of the same.

The court submitted to the jury, by proper instructions, the question whether the appellee, under the circumstances, acted as a reasonably prudent man would; and the jury, by its verdict, decided that he did. The question of contributory negligence was also submitted under proper instructions to the jury and the jury found against appellant. The instructions as a whole were as favorable to appellant as it could have asked.

For these reasons the judgment of the lower court is affirmed.

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*For Authorities Bearing upon the Decision in the principal case, see St. Louis etc. Co. v. Braggs, 69 Ark. 402, 86 Am. St. Rep. 206; New York etc. Ry. Co. v. Doane, 115 Ind. 435, 7 Am. St. Rep. 451; Cincinnati etc. R. R. Co. v. Carper, 112 Ind. 26, 2 Am. St. Rep. 144.*

## RAGLAND v. ANDERSON.

[125 Ky. 141, 100 S. W. 865.]

**CONSTITUTIONAL LAW—Representative Districts.**—Whether a Statute Redistricting the state into representative districts makes a division so unequal as to violate a constitutional provision that such division must be in proportion to the population is not so essentially a political question as to be beyond the jurisdiction of the courts. (p. 246.)

**CONSTITUTIONAL LAW—Representative Districts—Inequality.**—A statute redividing the state into representative districts and placing three counties with a population of fifty-three thousand and an area of twelve hundred square miles into one district with one representative, while placing one county with a population of seven thousand and an area of two hundred square miles in another district with one representative, violates a provision of the constitution requiring such districts to be as nearly equal in population as may be without dividing counties. (p. 249.)

**CONSTITUTIONAL LAW—Joining Two Counties to Form Representative District.**—The provision of the Kentucky constitution that not more than two counties shall be joined together to form a representative district does not forbid such joining when necessary to effectuate equality of representation. (p. 253.)

Lewis McQuown, Barnett & Smith, M. L. Heavrin and James S. Morris, for the appellants.

W. A. Halbert, Worthington & Cochran, W. H. Holt and George Du Relle, for the appellees.

<sup>145</sup> **BARKER, J.** These cases involve the constitutionality of an act of the General Assembly of the commonwealth of Kentucky, entitled "An act dividing the state of Kentucky into one hundred representative districts," approved March 23, 1906 (Acts 1906, p. 472, c. 139). They were heard together, and, as they involve the same question, will be treated as one case in this opinion.

In the first case, S. A. Anderson filed a petition in <sup>146</sup> equity in the Butler circuit court, alleging that he was a citizen, taxpayer, and voter of that county; that he possessed all of the qualifications to be a representative of the legislature of Kentucky, and was an announced candidate for the Republican nomination for the office of representative from the district composed of Butler and Edmonson counties; that by an act of the General Assembly of May 3, 1893, Butler and Edmonson counties constituted the twenty-fifth legislative district, which was entitled to have one representative in the legislature; that by the act of March 23, 1906,

Ohio county was joined with Butler and Edmonson counties, and designated as the twenty-sixth district; that the defendants (appellants) were the Republican chairmen of the three counties, and under their party law constituted the committee of the district thus created, and that this committee have ordered a primary election to be held in the three counties to name a Republican candidate for the office of representative; that the plaintiff (appellee) is a resident of Butler county, and entitled to be elected by the voters of Butler and Edmonson counties; that the defendants are proposing to and will hold a primary election for representative for the district composed of Ohio, Butler, and Edmonson counties; and that the plaintiff will be compelled to submit his claims to the voters of the three counties, instead of to the voters of Butler and Edmonson counties, unless the defendants are enjoined from so doing. In the second case, the appellee Keown filed a petition in the Ohio circuit court, averring that he was a citizen, taxpayer, and voter of that county, and possessed all of the qualifications of a representative of the legislature of Kentucky, and he seeks an injunction against the clerk of Ohio county restraining <sup>147</sup> him from refusing to place his name upon the official ballots of that county, and also to restrain him from placing the names of candidates from either of the other counties—Butler or Edmonson—on the official ballots of Ohio county.

In both petitions it is alleged that the act of March 23, 1906, is unconstitutional and void, because it violates section 33 of the constitution of Kentucky, in that the representative districts constituted by it are grossly unequal both in population and area. In speaking of the inequality of the act under discussion it is alleged as follows:

“It not only in many instances joins more than two counties together to form a representative district—in some cases three, as in the so-called twenty-sixth, seventy-third, and ninety-fifth districts; in some, four, as in the so-called seventieth and seventy-first districts—but many of the districts are grossly and outrageously unequal in population, and so much so as not to approximate equality, but shows plainly that the alleged law does not follow even the principle of equality, but violates it so grossly as to show that the principle and constitutional rule of equality was not applied at all, but entirely ignored. Thus, according to the census of 1900, Kentucky had a population of 2,147,174, making the average for a representative district 21,471. Under said invalid act 24



of the one hundred districts named in it have a population and area as follows:

District.	County.	Population,	Area.
99	Spencer	7,407	204
25	Wolfe	8,764	239
29	Hancock	8,914	195
41	Bullitt	9,602	301
57	Anderson	10,051	224
148 30	Meade	10,553	304
32	Larue	10,764	299
78	Boone	11,170	242
21	Simpson	11,624	190
63	Jessamine	11,925	160
67	Garrard	12,042	234
85	Bracken	12,137	193
—	—	—	—
12	Counties	124,933	2,785

“These counties are hardly entitled to six but are given twelve representatives.

“Average, one county to district; population, 10,411; area, 232.

District.	County.	Population.	Area.
100	Elliott and Carter	30,615	770
88	Fleming and Bath	31,808	589
3	Graves	32,204	550
89	Lewis and Greenup	33,300	794
71	Jackson, Owsley, Perry, and Letcher	34,883	1,240
97	Floyd, Knott, and Magoffin	36,262	1,028
10	Christian	37,962	694
98	Boyd and Lawrence	38,446	608
95	Pike, Johnson, and Martin	42,196	1,250
69	Whitley and Knox	42,387	930
70	Laurel, Rockcastle, Clay, and Leslie	53,125	1,610
26	Ohio, Butler, and Edmonson	53,263	1,241
—	—	—	—
12	29 counties	466,451	11,304
Average	2.41	38,871	942

149 "These counties are entitled to twenty-two, but are given twelve representatives.

"These groups have a population and area as follows:

	Population	Area.
The first group.....	124,933	2,785
The second group.....	466,451	11,304
Difference .....	341,518	8,519

"Spencer county, with a population of 7,407, and an area of 204 square miles, is given one representative, while Ohio, Butler, and Edmonson, with a combined population of 53,263, and an area of 1,241 square miles, is given only one representative.

District.	County.	Population.	Area.
99	Spencer	7,407	204
26	Ohio, Butler and Edmonson	53,263	1,241
		45,856	1,037

"The twenty-sixth district is more than seven times as large in population as the ninety-ninth, the difference being more than enough to constitute two average districts. By this arrangement one citizen of Spencer county has nearly as much voice in the legislature as eight citizens of Ohio, Butler, and Edmonson.

"The said one hundred districts attempted to be created by the said unconstitutional act are not by a great deal as nearly equal as may be without dividing any county, except where a county may include more than one district; and the state can be divided into one hundred representative districts, which would be approximately equal in population, without dividing any 150 county, except where a county may include more than one district."

Without analyzing the allegations of the petitions with overnice particularity, it is deemed sufficient to say that, in our opinion, they contain such a statement of facts with reference to the inequality of the representative districts of the state that the demurrers, which confess these allegations, raise sufficiently for adjudication the validity of the act which is assailed. The allegations upon which is predicated the infirmity of the act are substantially the same in both petitions. General demurrers were filed to each of them, and overruled by the trial courts. The defendants declined to answer, and thereupon judgments were entered holding the

act of the General Assembly under discussion invalid, and perpetuating the temporary injunctions which had been granted at the commencement of the actions. From these judgments the defendants have appealed.

Section 33 of the constitution is as follows: "The first General Assembly after the adoption of this constitution shall divide the state into thirty-eight senatorial districts, and one hundred representative districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which district shall constitute the senatorial and representative districts for ten years. Not more than two counties shall be joined together to form a representative district; provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the state according to this rule, and for the purposes <sup>151</sup> expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous."

The first proposition with which we are confronted is raised by the insistence of appellants, that the question involved here is political, and not judicial, and that the courts have not jurisdiction to review the acts of the General Assembly in the matter. To this we cannot agree. It is for the courts to measure the acts of the General Assembly by the standard of the constitution, and if they are clearly and unequivocally in contravention of its terms, it becomes the duty of the judiciary to so declare. Of course, if the question as to whether or not the legislation is inimical to the constitution be doubtful, it will always be decided in favor of the constitutionality of the law. But where the matter is plain that the constitution has been violated, then the courts cannot escape the duty of so declaring whenever the matter is brought to their attention. And no matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government, their duty under their oath of office is imperative.

In the case of *Carter County v. Brooks*, 118 Ky. 85, 25 Ky. Law Rep. 2284, 80 S. W. 443, there was involved the constitutionality of an act of the General Assembly creating the county of Beckham, and the question arose as to whether

or not the new county contained the constitutional requirements to authorize its establishment. In that case, as in this, it was insisted that the question involved was a political one; <sup>152</sup> that a court of equity had no power to issue an injunction for the enforcement of political rights, and was without jurisdiction to review the acts of the legislature, it being said that the recitation of the new act as to the facts necessary to the establishment of the new county was conclusive on the courts. In answer to these propositions it was responded in the opinion: "It is the province of the courts to protect private rights under the constitution. Constitutional guaranties would amount to nothing if there was no way to protect them. The court will not adjudge bad a legislative act on doubtful evidence; but where it is plain that the constitution has been violated, it is the duty of the court to say what the law is, and protect private rights. Otherwise, the constitution may be disregarded, and power may be exercised by the legislature in a case where, under the constitution, it is without power to act at all, and those whose rights are thus destroyed will be left without remedy. This question was fully considered in *Cheaney v. Hooser*, 48 Ky. 330, decided in the year 1848, the court holding that the discretion of deciding on all legislative measures is in the legislature itself, except where the constitution limits the power of the legislature, but that a statute is void if in violation of the constitutional limitation on the power of the legislature; and in that case parol evidence was received to show that private property was taken for public purposes under an act of the legislature without just compensation. This case was followed in *Covington v. Southgate*, 54 Ky. 491, *Elkton v. Gill*, 94 Ky. 138, 14 Ky. Law Rep. 755, 21 S. W. 579, and a number of other cases. There can be no sound reason why the same rule should not apply in the cases of violation of any other constitutional restriction on the <sup>153</sup> power of the legislature to the prejudice of private rights." The general effect of the opinion in this case is that the court went behind the recitation of facts contained in the act establishing the county, and found it untrue; upheld the power to protect by injunction the rights of the citizens of the old counties who, by the terms of the act, would be put in the new county, and decided that the constitutional provisions with reference to the establishment of a new county were mandatory, and the act of the legislature unconstitutional.

The case of *Neal v. Young*, 25 Ky. Law Rep. 183, 75 S. W. 1082, arose on a motion to dissolve an injunction granted



by the court below. Although made before Judge Paynter, as a judge of the court of appeals, it was brought before the whole court and treated as a case pending for decision; and it was there held that the courts had jurisdiction to protect political rights by injunction. The question arising on the record was whether or not the state central committee of the Democratic party could arbitrarily call off a primary election theretofore ordered. In the opinion, Judge Paynter said: "It was urged in argument that the question here involved is purely a political one, and that the courts should not take jurisdiction of it. My answer is that the court of appeals has a contrary opinion, and in *Fagan v. Gerwe*, *Brown v. Republican County Committee*, and *Young v. Beckham*, has held that it had jurisdiction to enforce individual and legal rights." To the same effect are *Purnell v. Mann*, 105 Ky. 87, 20 Ky. Law Rep. 146, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264; *Massengale v. Lester*, 104 Ky. 191, 20 Ky. Law Rep. 481, 46 S. W. 694; *Yates v. Collins*, 118 Ky. 684, 26 Ky. Law Rep. 558, 82 S. W. 154 382, 973; *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36 L. ed. 869.

That the act under discussion is grossly violative of section 33 of the constitution, in that the injunction as to equality between the districts was not even pretended to be obeyed by the legislature, is not and cannot be denied. The material allegations of the petitions are admitted by the demurrers; and we have, therefore, before us a redistricting act in which twelve Democratic counties, the population of the largest of which is 12,137, and the smallest, 7,407, are each given a representative. The population of Kentucky, according to the census of 1900, was 2,147,174. This divided by one hundred—the number of representative districts—produces as the average unit for representation the sum of 21,471. Tested by this ratio, some of the counties, which are each given a representative, have a population of less than one-half the unit of representation, and the rest have little more than one-half. On the other hand, there are twelve Republican districts composed in large part of two and three counties each, the smallest of which districts has a population of 30,615, and the largest, 53,263, which are only given one representative each. The first twelve districts, composed of one county each, have an aggregate population of 124,933; while the aggregate population of the second twelve districts is 466,451. The first twelve districts were entitled to only six representatives, tested by the average ratio, but were given twelve. The second twelve districts were entitled to twenty-two repre-

sentatives but were only given twelve. To take the extremes, Spencer county (which belongs to the first set) has a population of only 7,407, and is given one representative; whereas Ohio, Butler and Edmonson (which compose the twenty-sixth district under the act in <sup>155</sup> question) have a total population of 53,263, and these together have only one representative. In other words, a voter in Spencer county exercises in the legislature of the state more than seven times the influence a voter in Ohio, Butler and Edmonson counties. This inequality is so glaring that it precludes the possibility that there was any attempt on the part of the legislature to apportion the state into one hundred representative districts, as nearly equal in population or area as might be. It needs no argument or elaboration to show that the arrangement of the districts for representation is clearly violative of the constitutional inhibition against inequality.

It has never been doubted in this country since the great case of *Marbury v. Madison*, 1 Cranch (U. S.), 137, 2 L. ed. 60, that an act of the legislative part of the government which is contrary to the constitution is void, and will be so held by the courts whenever brought to their attention. Chief Justice Marshall, upon the subject in hand, said:

“The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States: but, happily, not of intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed <sup>156</sup> is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation com-

mitted to writing, if these may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be <sup>157</sup> that an act of the legislature repugnant to the constitution is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject. If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the constitution, or conformably to the constitution disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the

courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close <sup>158</sup> their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.”

It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest. We have not been referred to a more accurate or better description of the equality required by the constitution than that contained in the report of Daniel Webster, as chairman of a senatorial committee engaged in a duty similar to that involved in the act under discussion: “The constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states, according to <sup>159</sup> their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule. It takes the place of the other rule, which



would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind—a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule.”

The definition of equality of representation as above contained, and the principle that any act of the legislature which violates a constitutional requirement for that equality of representation is void, is sustained by the following authority: *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145; *Williams v. Secretary of State*, 145 Mich. 447, 108 N. W. 749; *Denney v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 126; *Harmison v. Ballot Commissioners*, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; *State v. Wrightson*, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; *Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *Commissioners v. Blacker*, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; *State v. Cunningham*, 81 Wis. 440, 51 <sup>160</sup> N. W. 724, 15 L. R. A. 561; *People v. Thompson*, 155 Ill. 451, 40 N. E. 307; *People v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; *Baird v. Supervisors*, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. He has studied our constitution in vain who has not discovered that the key-stone of that great instrument is equality—equality of men, equality of representation, equality of burden, and equality of benefits. Section 1 of the Bill of Rights provides: “All men are by nature free and equal.” Section 3: “All men, when they form a social compact are equal.” Section 33 provides for equality of representation. Sections 171, 172, 173 and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for when our forefathers emigrated from their European home it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then ex-

pressed the evil, they had imposed upon them taxation without representation.

Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer county shall have seven times as much influence in the government <sup>161</sup> of the state as a man in Ohio, Butler or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation. It was this kind of oppression which inspired that great struggle for freedom which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth. It is no answer to the demand of appellees that the act of 1906 be declared unconstitutional to say that it will follow that the act of 1893 must also be declared unconstitutional, because it created unequal representative districts, although in a less degree than that of 1906. The conclusion sought to be drawn does not follow. The act of 1893 has gone into effect, and the government has been organized under it. To hold it void would be to throw the government into chaos; and this no court is required to do. It is now too late to question its validity. The next legislature must be elected under it, and then we have no doubt the members, impelled by their sense of duty, the obligations of their oath of office, together with that spirit of justice which is the heritage of the race, will redistrict the state as the constitution requires.

In conclusion, we do not agree with appellees that section 33 forbids more than two counties to be joined in one district. Without elaboration, we are of opinion that more than two counties may be joined in one district, provided it be necessary in order to effectuate that equality of representation which the <sup>162</sup> spirit of the whole section so imperatively demands. It may not be inappropriate, however, to say that it is difficult at this time to see how this necessity can often arise. But it must be remembered that constitutions are established for the exigencies of long periods of time, and it cannot now be told what the future may bring forth.

For the foregoing reasons, the judgment holding the redistricting act of March, 1906, void must be affirmed; and it is so ordered. Whole court sitting.

Petition by appellee for modification of opinion overruled.

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*Judicial Investigation of the Constitutionality of Legislative Apportionment* is discussed in *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, and note. The authority of the supreme court of New York to consider and determine the validity of an apportionment act dividing the state into senatorial districts is expressly conferred by the constitution of that state: *Sherrill v. O'Brien*, 188 N. Y. 185, 117 Am. St. Rep. 841.

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## LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SMITH.

[125 Ky. 336, 101 S. W. 317.]

**STATUTE OF LIMITATIONS—Basis and Purposes.**—Anciently the plea of limitation was based upon the presumption of a grant; this was a fiction invented to relieve from frequent hardship resulting from the inevitable loss of evidence by death and lapse of time. But the modern statute of limitations rests upon no fiction nor presumed ground; it is the fiat of the legislature, which cuts off the right to maintain the suit. It rests upon the wise public policy that favors peace, the settlement of disputes out of court, and the repose of conditions which the parties have suffered to remain without question so long as to indicate acquiescence. Nothing is presumed, or required to be presumed, in aid of the statute. (p. 256.)

**RAILROAD—Acquisition of Easement in Right of Way.**—Neither an individual nor the public can acquire an easement in the nature of a passageway along or across a railway right of way. But such easements are neither conferred nor protected by statutes of limitations; they are titles by prescription, as to which the fiction of a grant and its loss are still adhered to. (p. 256.)

**RAILROAD.—The Law of Adverse Possession** applies to railroad rights of way. They are generally only easements in land, but since the fee can be lost by adverse possession, it follows that every lesser estate may also be so lost. (p. 258.)

Wilbur F. Browder, Henry L. Stone, Benjamin D. Warfield and Reuben A. Miller, for the appellants.

Wm. B. Noe and Walter G. Newton, for the appellee.

**339 O'REAR, J.** The Owensboro and Russellville Railroad Company was chartered in 1867 and empowered to run its line of railroad through McLean county. It was authorized to acquire a right of way of not more than sixty feet in width. The railroad was built about 1868. The right of way extends through the town of Livermore, in Mc-

Lean county. In 1872 W. J. Rowan by deed conveyed to the Owensboro and Russellville Railroad Company a strip of ground in the town of Livermore, containing about two hundredths of an acre, being a strip about twenty-seven feet wide along the edge of Rowan's lot. This strip constituted a part of the right of way upon which the road was built, the right of way at that point being not more than sixty feet wide. Subsequently the Owensboro and Russellville Railroad Company's title was conveyed to the Owensboro and Nashville Railway Company, the present owner of the railroad line. The railroad tracks did not occupy the <sup>340</sup> whole of the right of way. Rowan inclosed in the boundary of his lot a part of the strip which he had conveyed to the railroad company, but which was unoccupied by the railway tracks. Subsequently, in 1887, he sold and conveyed the lot so inclosed to appellee Smith, who has continuously since claimed and used the whole lot to the extent of his inclosure adversely to the whole world. In 1903 the railroad company brought this action in ejectment against Smith to recover that part of the right of way which was within his inclosure, being a strip of land in the town of Livermore, beginning eight hundred and forty-eight feet north of milepost 21, running thence parallel with appellant's railroad track in said town on the east side of the track, a distance of one hundred and sixty-three feet, and being nine and two-tenths feet wide at the south end, and eleven and three-tenths feet wide at the north end of the strip. Defendant, George Smith, pleaded the fifteen years' statute of limitation in bar of the plaintiffs' right of recovery. The question to be decided is: Does the statute operate as against a railroad company concerning its right of way?

It is claimed by appellant that the question is an open one in this state, and that upon principle, and authority elsewhere, such statutes are not applied to adverse possession of railway rights of way by abutting land owners or others. The trend of the argument is that with respect to its right of way the railroad company owns only an easement, which it holds on behalf of the general public; that it could not alienate, voluntarily, its right of way, so as to divert its use to other purpose than those to which it was dedicated, and because of the same legal restraint could not do so involuntarily. There are a number of cases from other jurisdictions which hold to this doctrine, though we have been unable to discover, <sup>341</sup> either by their examination or otherwise, a sufficient reason for a refusal to apply a plain statute to such cases, which



by its terms admits of no such exception. It is said that the statutes of limitation raise the presumption of a previous grant from the rightful owner to the person in adverse possession, which has become lost, and that where the presumption cannot exist, as where the rightful owner could not legally have executed such grant, the presumption fails, and the statute, unsupported by its reason, cannot apply. Anciently the plea of limitation was based upon the suggested presumption. It was a fiction of the law invented to relieve from frequent hardships resulting from the inevitable loss of evidence by death and the lapse of time. But the modern statute of limitation does not rest upon that or any other fiction. It is the fiat of the legislature, which cuts off the right to maintain the suit. It is founded in no sense upon the ancient fiction of a supposed grant. It rests upon the wise public policy that favors peace, the settlement of disputes out of court, and the repose of conditions which the parties suffered to remain without question so long as to indicate an acquiescence in them by all concerned. Nothing is presumed, or required to be presumed, in aid of the statute. When the circumstances admit of its application, it is all sufficient that the party relying upon it invokes it.

Cases in this court are cited as opposed in effect to this reasoning, where we have held that neither an individual nor the public could acquire an easement in the nature of a passway along or across a railway right of way: *Brown's Admr. v. Louisville etc. R. R. Co.*, 97 Ky. 228, 17 Ky. Law Rep. 145, 30 S. W. 639; *Embry v. Louisville etc. R. R. Co.*, 18 Ky. Law Rep. 434, 36 S. W. 1123; *Thornton v. Louisville etc. R. R. Co.*, <sup>342</sup> 19 Ky. Law Rep. 96, 39 S. W. 694, and *Chesapeake etc. Ry. Co. v. Perkins*, 20 Ky. Law Rep. 608, 47 S. W. 259. That doctrine is not in conflict with the one here applied. Such easements are neither conferred by, nor are they protected by, statutes of limitation. They are titles by prescription, and depend upon the lapse of time to ripen them into perfect rights. While the courts have adopted a period equivalent to the statutory period of limitation affecting suits to recover possession of real estate, such statutes do not apply, and are not applied in these cases. The fiction of a grant and its loss are still adhered to, and, in cases where the circumstances shown are such as to negative the presumption of a grant by the title holder, the presumption cannot, of course, apply. It is on this principle that the court has held that easements upon railway rights of way could not be acquired by prescription, as the grant of such an easement

by the railroad corporation upon its own easement would be incompatible with the powers conferred upon, and the duties required of, the corporation by its charter.

Cases are cited from other jurisdictions to the effect that the statutes of limitation do not apply to an adverse holding of a public highway or city street. It is freely admitted that a contrary doctrine obtains in this state, and has from its earliest history: *Rowan's Exrs. v. Portland*, 8 B. Mon. 232; *Cornwall v. Louisville etc. R. R. Co.*, 87 Ky. 72, 9 Ky. Law Rep. 924, 7 S. W. 553. We have not deemed it of enough importance to trace to the end the basis of the decisions from abroad. Perhaps they rest upon the notion that statutes of limitation do not apply to the sovereign; and by analogy it may be reasoned that as the railroads in a state are engaged in serving the public as common carriers, and in that character are clothed <sup>343</sup> with the extraordinary power of exercising eminent domain—an attribute of sovereignty—in virtue of which the rights of way were acquired, statutes of limitation ought not to run against their right to use property so acquired and held. In this state, the sovereign is not exempt from the effect of the statutes of limitation. They apply to the state as they do to the individuals: *Ky. Stats.* 1903, sec. 2523; *Chicago etc. R. R. Co. v. Commonwealth*, 115 Ky. 278, 24 Ky. Law Rep. 2124, 72 S. W. 1119; *Commonwealth v. Nute*, 115 Ky. 239, 24 Ky. Law Rep. 2138, 72 S. W. 1090. If the state itself is not exempt from the operation of such statutes, it would be difficult to find a reason for holding that one of its creatures, upon whom it had conferred the right to take private property for public use, should be exempt on the ground that it was serving the state in its holding and use of the property.

Appellants contend that a railroad corporation can acquire land for right of way only to the extent allowed by its charter, and can use it for no other purpose; that therefore, when the charter allows it to acquire sixty feet width of land, only twenty of which it has any present use for, it can only hold a right of future use in the remaining forty feet; that until such time as its necessities require it to build tracks upon the residue of the strip, its right is dormant, subservient to the rights of the owner of the fee to use the unoccupied portion in any manner not inconsistent with the company's right; that such use by the owner of the servient estate is merely permissive and not hostile. The whole argument is addressed to the status of the fact. It is entirely probable that such

use by the abutting owner, who is owner of the servient estate, would not be hostile, but would be in <sup>344</sup> recognition of the title of the railroad company. But such is not necessarily the fact, nor is it a presumption of law. The law of adverse possession applies to railroad rights of way, as well as to other classes of real estate: *Pollock v. Maysville etc. R. R. Co.*, 103 Ky. 84, 19 Ky. Law Rep. 1717, 44 S. W. 359; *Louisville etc. R. R. Co. v. Wallace*, 94 Ky. 310, 15 Ky. Law Rep. 83, 22 S. W. 221. A railroad company's right of way is generally only an easement in land—an estate less than the fee simple. If the fee simple can be lost by adverse possession, and it can be, necessarily every lesser estate embraced in or carved out of the fee simple will also be tolled by it. The statutes of limitation are general statutes, indicative of a public policy of the state of great importance to society. They apply alike to everybody not excepted by them, and are suspended in their operation only in the instances which they expressly allow. Notwithstanding, the question does arise as to what is in fact an adverse possession, a matter not defined by statute, and which the courts must define. A life tenant, for example, is not deemed an adverse holder to the remainderman. Nor is one tenant in common deemed an adversary of his cotenants. Still, they may in fact become so. So, ordinarily, it may be considered that the occupation of the unused part of railroad right of way by the abutting owner of the servient estate to which it is attached is not intended to be hostile or adverse to the railroad company's claim and right. Yet if it is as a matter of fact hostile, adverse, denying the right of the railroad company, and asserting it in the occupant, and by the inclosure of it setting the railroad company out of possession, all of which is continued for fifteen years, the statute erects a bar upon these facts to a suit to recover from such <sup>345</sup> occupant the land, or any interest in it. The facts in the case at bar justify the application of the rule to the case.

The judgment of the circuit court, applying the statute of limitation, is therefore affirmed.

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*Adverse Possession of Land of a Quasi Public Character*, such as that held by railway corporations, is the subject of a note to *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 775. Subsequent decisions on this question are *Northern Pac. Ry. Co. v. Hasse*, 28 Wash. 353, 92 Am. St. Rep. 840; *St. Paul etc. Ry. Co. v. Olson*, 87 Minn. 117, 94 Am. St. Rep. 693; *Blumer v. Iowa R. R. Land Co.*, 129 Iowa, 32, 113 Am. St. Rep. 444.

## MURPHY, THOMPSON &amp; CO. v. REED.

[125 Ky. 585, 101 S. W. 964.]

**CONTRACTS—Mutuality of Obligation and Remedy.**—To constitute an executory contract there must be mutuality of obligation, but mutuality of remedy is not always essential. (p. 260.)

**OPTION TO SELL—Nature and Validity.**—An option to sell land is a standing offer to convey to the person and upon the terms named in the option, and an agreement to keep the proposition open for acceptance for the time stated, if its terms are fair, and have been understandingly entered into, it will be enforced if accepted and offered to be complied with by the payment of the consideration within the time stipulated. (p. 260.)

**OPTION TO SELL—Nature and Consideration.**—An option to sell contains two contracts, one to sell the land and the other to give the optionee a certain time within which to accept and become bound upon the first contract; each must have a consideration to support it. (p. 260.)

**OPTION TO SELL—A Consideration of One Dollar** will not support an option to sell valuable property; it is so grossly disproportionate to the value of the privilege as to be merely nominal. (p. 261.)

**OPTION TO SELL—Necessity of Consideration.**—An option to sell land, to be binding upon the owner so as to be irrevocable during the period for which it is given, must be upon a valuable and sufficient consideration. (p. 261.)

**OPTION TO SELL—When Becomes Binding.**—If an option to sell is not withdrawn prior to acceptance, it then becomes binding, notwithstanding it may have been based on an insufficient consideration. (p. 262.)

J. S. Glenn and R. E. L. Simmerman, for the appellants.

W. H. Barnes, Barnes & Anderson and J. E. Fogle, for the appellee.

588 O'REAR, C. J. These cases involve a common principle of law, viz., the binding force of an option to sell real estate. The options describe the land, and recite a consideration of one dollar paid. They obligate the owners of the soil to convey the coal in the land by general warranty deed to the optionee within a specified future period, on notice by the optionee to the owners of the acceptance of the option and the payment of five dollars per acre cash. During the life of the options the optionee did accept their terms, notified the owners thereof, and tendered the contract price recited in the options. The owners having refused to accept the money or to convey the lands, these actions were brought by the optionees to have a specific execution of the contracts. Demurrers were sustained to the petitions on the ground that the contracts were unilateral, lacking in mutuality, and unenforceable, and the petitions were dismissed.



It is generally said that one essential of every executory contract is mutuality of obligation and remedy. That there must be mutuality of obligation, by which is meant an undertaking on one side and a consideration upon the other, is true always. But it is not true always that there must be mutuality of remedy. One example is a contract for a sufficient consideration between an adult and an infant may be <sup>589</sup> enforced against the adult, although he might not enforce it against the infant. And there are others. An option to sell is a standing offer to sell to the person and upon the terms named in the option, and an agreement to keep the proposition open for acceptance for the time stated. If its terms are fair, and have been understandingly entered into, there appears no reason why it should not be enforced, if accepted and offered to be complied with by the payment of the consideration within the time stipulated. If the same proposition had been made by the owner for immediate acceptance, and it had been immediately accepted, there would be no doubt that it was binding upon the offerer. The only difference between the one imagined and the contracts in suit is, instead of an offer for immediate acceptance, there is one left open for acceptance for a certain period, within which it is accepted. The option is said to contain two contracts, as it were: One, the contract to sell the land, which is the main contract, and which is uncompleted till accepted; and the other, the agreement to give the optionee a certain time within which to exercise his option of accepting and becoming bound upon the first contract, which is a completed contract. Each must have a consideration to support it. The consideration for the main contracts in this case is the price per acre stipulated to be paid upon the execution of the deeds. When the contract was accepted by the optionee, he became bound for the payment of the purchase price, and by tendering it complied fully with the element of mutual obligation upon his part.

The consideration for the agreement to give the optionee the definite time within which to exercise his choice, called the "option," is in these cases the <sup>590</sup> one dollar recited. It might have been more, or an entirely different consideration. Though there are authorities holding a consideration of one dollar as sufficient to uphold such an agreement, we are not disposed to go so far. Such consideration is so flagrantly disproportionate to the value of the privilege in these cases—the options extending over a year—that it is merely nominal. It is not substantial, and the parties could not have

regarded it as in any sense an equivalent of the privilege which was being contracted for. While upon demurrer the courts will be slow to say that a recited consideration is no consideration, if it has any appearance of having been regarded by the parties as the agreed value of the thing contracted for, where the stated consideration is so manifestly inadequate and disproportionate to the value of the thing being sold (the privilege or option) as to represent no value, or only a nominal value, it will be construed on demurrer, as a matter of law, as not having a consideration at all. If there is doubt about the matter, then the question of its value or adequacy is a defense to be pleaded. An option, to be binding upon the owner, in the sense that it is irrevocable upon him during the period for which it was given, must be upon a valuable and sufficient consideration. It may consist in money paid or to be paid for it, or in property, services or counter-benefits accruing to the owner, or disadvantage incurred by the optionee. In short, it may be such consideration as will support any other sort of contract. In this view of the matter, the options in these cases were not supported by sufficient consideration to have bound the owners not to withdraw them during the term for which they were given. They could have been withdrawn before acceptance, without liability <sup>591</sup> to the givers of the options. But, as they were not withdrawn, they constituted, instead of binding options, voluntary offers to sell, which, like any other valid offer, were, when accepted, binding upon the person making them. The statute of frauds is not involved in these cases: *Tyler v. Onzts*, 93 Ky. 331, 14 Ky. Law Rep. 321, 20 S. W. 256.

This conclusion is reached after a careful consideration of the cases heretofore in this court and of the state of authorities elsewhere. The great weight of authority, and what seems to us to be the right of the matter, is in favor of upholding and enforcing such contracts. While formerly there was a marked difference of opinions as to the validity of pure options, there seems to have been but little divergence among the courts as to the enforceability of such options when connected with leases. However, this court in its early history took the contrary view in *Boucher v. Van Buskirk*, 2 A. K. Marsh. (Ky.) 345. But in the later case of *Bank of Louisville v. Baumeister*, 87 Ky. 6, 9 Ky. Law Rep. 845, 7 S. W. 170, and *Bacon v. Kentucky Cent. Ry. Co.*, 95 Ky. 373, 16 Ky. Law Rep. 77, 25 S. W. 747, the principle of the *Boucher-Van Buskirk* case was repudiated. The real underlying principle of the case where the option is given as part of a lease,

and is enforced, is that it was based upon a sufficient valuable consideration. Therefore any other sufficient valuable consideration ought to support an option contract to sell. In *Litz v. Goosling*, 93 Ky. 185, 14 Ky. Law Rep. 91, 19 S. W. 527, 21 L. R. A. 127, the option in suit was substantially the same as those now under consideration. It does not appear that the court considered the effect of an acceptance of the option during its term and before its withdrawal by the owner of the land. The <sup>592</sup> court said: "If the contract for an option to purchase real estate at a certain price within a certain time be based upon a sufficient consideration, which may consist, of course, either in an advantage moving to the one party, or a disadvantage to the other, then it is enforceable; but where a mere naked option, destitute of consideration, is given to one, it is not enforceable, because there is no mutuality of right and remedy."

Nor do we say now that such an option is enforceable as to the terms of the option (independent of the terms of the contract to sell the land); that is to say, the owner could not be compelled to keep the option open for acceptance for its full term, and that is the only contract embraced in the option, strictly speaking. The other contract, the one to buy the land, is yet to be consummated, and is not a contract at all until it is accepted within the time and terms stated in the agreement. What was said in *Litz v. Goosling*, 93 Ky. 185, 14 Ky. Law Rep. 91, 19 S. W. 527, 21 L. R. A. 127, as to the binding validity of the option without consideration, is adhered to; but, if it should be deducible from the opinion that it was also intended to hold that the optionee could acquire no right in the contract by accepting it during its term and before notice of its withdrawal, then we disavow the principle, and to that extent the case will no longer be regarded as authority.

The judgment in each case is reversed, and each cause is remanded, with directions to overrule the demurrers and for proceedings not inconsistent herewith.

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*A Consideration of One Dollar is not Sufficient to sustain an option to sell land and warrant a decree for specific performance: Rude v. Levy*, 43 Colo. 482, 127 Am. St. Rep. 123.

## NICHOLSON'S TRUSTEES v. NICHOLSON.

[125 Ky. 629, 101 S. W. 985.]

**HOMESTEAD—Purchase with Exempt Money.**—A debtor has the right as against his creditors to invest in a homestead money which he is entitled to hold under the exemption laws. (p. 264.)

W. J. Webb and Oliver & Oliver, for the appellant.

J. P. Evers, for the appellees.

**630** CARROLL, C. In 1903 appellee was adjudged a bankrupt, and appellant appointed his trustees in bankruptcy. Soon after his appointment he brought this suit, attacking as fraudulent a conveyance made in 1901 to the wife of appellee, alleging that four hundred dollars of the purchase money of six hundred dollars was paid by appellee, who procured the deed made to the wife with the intent to defraud his creditors. The bankrupt's debts were created prior to the purchase and conveyance of the land to the wife. **631** The evidence establishes that during the years 1901-04, inclusive, Nicholson was a housekeeper with a family, resident in this commonwealth, consisting of his wife and eight infant children. Section 1697 of the Kentucky Statutes of 1903 provides, in part, that: "The following property of persons with a family resident in this commonwealth shall be exempt from execution, attachment, distress or fee bill, . . . also sufficient provisions, including breadstuffs and animal food to sustain the family for one year; if not on hand, other personal property, wages, money or growing crop not to exceed forty dollars in value for each member of the family; provender suitable for livestock, if there be any such stock, not to exceed seventy dollars in value; and if such provender be not on hand, such other property as shall not exceed such sum in value." Section 1702, Kentucky Statutes of 1903, exempts from coercive sale at the instance of an unsecured creditor the homestead of the value of one thousand dollars of debtors who are actually bona fide housekeepers with a family, resident in this commonwealth; but this exemption does not apply, if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon.

Appellee admits that in 1901 he paid on the purchase price of this lot one hundred dollars, in 1902 one hundred dollars, and in 1903 two hundred dollars. During each of those years, appellee did not have on hand sufficient provision, including breadstuffs and animal food, to sustain his family for one year, and under section 1697, *supra*, was entitled to have set



apart, out of other personal property, wages, money or growing crop forty dollars in value for each member of his family, or four hundred dollars, each year, that was exempt from coercive sale by his creditors. It is his contention that, being entitled each year under the exemption <sup>632</sup> laws to the amount of money paid by him on the purchase price of the land, his creditors cannot complain that he invested his exemptions in a homestead or subjected it to the payment of their debts, although they were created prior to its purchase. For appellants it is said that, admitting that appellee during the years named was entitled to the amount claimed by him exempt from his creditors, when he converted it into land, the land was subject to the payment of debts created prior to its purchase. It will therefore be seen that the only question involved is whether or not a debtor can take the money or property he is entitled to hold as personal exemptions, and convert it into a homestead that will also become exempt from the payment of his debts, upon the ground that, as the money or property with which it was purchased was exempt, it follows that the land will also be. At the times the appellee paid the purchase money for the land, his creditors could not have subjected any part of it to the payment of their debts. He had the right, so far as they were concerned, to make any disposition of it he pleased. It is not fraudulent for a debtor to dispose of money or property that cannot be subjected to the payment of his debts. Creditors can only complain when the debtor has placed, or has attempted to place, beyond their reach, money or property they might seize under the processes of the law. From these conclusions, it necessarily follows that appellee had the right to invest in a homestead the money he was entitled to hold under the exemption laws. Nor is it material from what source this money was derived. The issue as to whether the disposition of it is fraudulent or not, so far as creditors are concerned, is to be determined by the fact whether or not it was exempt. It <sup>633</sup> is true that under the statute the money paid out by appellee was only allowed him because he did not have sufficient provisions to maintain his family for one year, and he was only entitled to it to supply the deficiency in the provisions he was entitled to under the exemption law. But we do not consider this fact at all material. It is sufficient to know that under the exemption law he was entitled to hold the money paid for the land. How or under what particular clause of the statute he was entitled to it does not affect the consideration of the question or the conclusion arrived at.

In *Wallace v. Mason*, 100 Ky. 560, 18 Ky. Law Rep. 935, 38 S. W. 887, this court said: "If a debtor owns just such personal property as the law exempts from the payment of his debts, why should he not be permitted to sell it and invest it in land, occupy it with his family, and hold it as a homestead exempt from the payment of his debts? Where is the difference in principle between the case where the proceeds of exempt realty and those of exempt personalty are invested in a homestead? The creditor is injured no more in the one than the other case." The opinions of this court, holding that, although pension money before it reaches the pensioner cannot be subjected to the payment of the pensioner's debts, yet, if he invests it in land, the land may be subjected, have no application to the question presented in the case before us, because the United States statute only exempts pension money from coercive process by the creditor before it reached the pensioner. When it comes into his hands, it is then liable to his debts, whether he invests it in land or not: *Johnson v. Elkins*, 90 Ky. 163, 11 Ky. Law Rep. 967, 13 S. W. 448, 8 L. R. A. 552; *Curtis v. Helton*, 634 109 Ky. 493, 22 Ky. Law Rep. 1056, 95 Am. St. Rep. 388, 59 S. W. 745.

The judgment of the lower court, holding that the land could not be subjected, is affirmed.

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*For Authorities Bearing upon the Principal Case*, see *Kiser v. Dozier*, 102 Ga. 429, 66 Am. St. Rep. 184; *Mann v. Corrington*, 93 Iowa, 108, 57 Am. St. Rep. 256; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Wright v. Westheimer*, 2 Idaho, 962, 35 Am. St. Rep. 269.

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## ROBERTS, WICKS & CO. v. LEE.

[125 Ky. 709, 102 S. W. 300.]

**SALES—Breach by Seller—Loss of Profits.**—If a manufacturer fails to deliver clothing which he has sold to a retailer, and the latter thereafter makes diligent but ineffectual efforts to purchase like goods in the market, he may recover the increased market value of the goods from the time of purchase to the time of their delivery, and the reasonable profit he would have made on them had they been delivered in accordance with the contract. (p. 268.)

Worthington & Cochran, for the appellant.

Thos. R. Phister, for the appellee.

<sup>710</sup> NUNN, J. Appellant is a manufacturer of men's and boy's clothing, located in Utica, New York. Appellee is a

retail clothing merchant doing business in Maysville, Kentucky. During and prior to the year 1901 appellee was a customer of appellant. On the 1st of December, 1901, appellee was owing appellant a balance on an account which was not due until the 1st of April, the following year. Appellee having failed to pay the balance of the account, to wit, \$609, this action was brought by appellant to recover that amount. Appellee answered, admitting the correctness of the account, and gave the following reasons why he had not paid same: That on or about the 1st of December, 1901, he had purchased from appellant's traveling salesman a bill of clothing, expressly selected for his spring trade, which was to be delivered at Maysville between the 1st and 10th of February, 1902. The amount he had agreed to pay for this bill was about \$1,600, but a short time afterward by agreement this bill was reduced about \$51, a few articles being stricken from the original bill. Appellant only delivered articles named in the bill to the value of ~~711~~ \$114. The balance of the goods purchased appellant failed and refused to deliver, and appellee alleged that he was damaged by such failure, and that it occurred in the following manner: That between the time he purchased the goods and the date on which they should have been delivered to him in Maysville the value of such goods had increased in the market at least twenty per cent, which amounted to about \$320. He also averred that he was ready, able, and willing to comply with his part of the contract, and pay for the goods as agreed when delivered; that by reason of the failure to deliver the goods he was unable to sell them in the course of his business, or at all, and he was unable to supply his customers with the character of goods they desired and asked for, and he thereby lost all the profit he would have otherwise made, which he alleged, by an amendment, was at least forty per cent, making \$619; that appellant knew that he was a retail merchant and that he had purchased the goods to sell for a profit; that he did not learn or know that appellant intended to violate the contract until after the time it was to be performed. He further alleged that, although he made diligent efforts to obtain goods to take the place of those he had contracted with appellant for, it was too late in the season for him to do so. Appellants, by reply, denied that its agent sold appellee \$1,600 worth of goods, and alleged that it was only \$1,195, and controverted all the affirmative matter in the answer and counterclaim, and gave as a reason for not shipping the goods to appellee according to contract that it had a large account upon its books against

him, which he had refused to pay. By consent of the parties the affirmative matter contained in the reply was controverted of record. The case was <sup>712</sup> tried before a jury and resulted in a verdict of \$175 in favor of appellee.

The proof of appellee tends to show the truth of the allegations of his answer and counterclaim, and, if the jury had allowed him the full amount of the anticipated profits for which he could have sold the goods and the difference between the market price of the goods on the 1st of December and the 10th of February, the verdict in his favor would have been much larger. Considering all the evidence, the verdict seems large to us, but not to such an extent as warrants this court in disturbing the finding of the jury. The preponderance of the evidence was to the effect that appellee made diligent efforts, after he received information that appellant would not comply with its contract, to purchase other goods in the market to supply their place, but could not obtain them: See the cases of *Blue Grass Cordage Co. v. Luthy & Co.*, 98 Ky. 583, 17 Ky. Law Rep. 1126, 33 S. W. 835; *Bates Machine Co. v. Norton Iron Works*, 25 Ky. Law Rep. 931, 68 S. W. 423; *Tradewater Coal Co. v. Lee*, 24 Ky. Law Rep. 215, 68 S. W. 400; *Owensboro-Harrison Telephone Co. v. Wisdom*, 23 Ky. Law Rep. 97, 62 S. W. 529.

The court gave the jury the following instructions:

"1. The court instructs the jury to find for plaintiff, Roberts, Wicks & Co., in the sum of \$495.90, with interest from April 1, 1902, and the further sum of \$114.50, with interest from October 1, 1902.

"2. The jury will find for the defendant, Lee, such sum in damages as they believe from the evidence he has sustained by reason of the failure of plaintiff to furnish the goods purchased by Lee as of December 3, 1901, not exceeding in all the sum of \$1,019.60.

<sup>713</sup> "3. The jury will then subtract the lesser from the greater, and find the balance in favor of that party to whom it may fall.

"4. The jury, in fixing the damages to defendant, will find the difference between the contract price and the actual value of the goods at the place of delivery. They will also find as damages the reasonable profit that defendant would have made on the goods had they been delivered in accordance with the contract, not exceeding in all the sum of \$1,019.60.

"5. But, should the jury believe from the evidence that defendant, Lee, could, after February 10, 1902, have purchased



the goods in the open market, to supply the place of the undelivered goods, then they will find no damages as profits."

Appellant claims that the court erred in giving instruction No. 4, for the reason it allowed the jury to find for appellee the increased market price of the goods from the time he purchased to the time they were to be delivered, and the reasonable profit he would have made on the goods, had they been delivered in accordance with the contract. We are unable to understand why appellee is not entitled to both. Certainly he was entitled to the goods with their increased value at the time they should have been delivered under the contract; and, if by reasonable efforts he could not supply the place of the goods contracted for with appellant by the purchase of others or like goods in the market, and if he suffered a loss of profits by reason of not having the goods to sell, he was damaged by reason of that fact, and was entitled thereto. The court properly refused the instruction offered by appellant. There is no intimation in the evidence that the goods were sold upon the condition that they were not to be <sup>714</sup>delivered until appellee settled the balance of his existing account, and there was no claim that there was any such condition precedent until long after the goods should have been delivered. This balance of account owing to appellee was not due until some time after the date when these goods were to be delivered, as appears from a letter of appellant's treasurer, which reads as follows:

"Utica, N. Y., March 18, 1902.

"Mr. J. Wesley Lee, Maysville, Kentucky.

"Dear Sir: While we are perfectly aware that your account is not yet due, we would appreciate it if you could send us a remittance for same, as we have obligations maturing this week we must meet, and need all the funds we can collect. You will very greatly oblige us if you can favor us in this matter, and, to recompense you for anticipating on the account, we will allow you a special discount of one per cent.

"Yours very truly,

"ARAS J. WILLIAMS, Treas."

In addition to this, the proof shows that appellee was solvent and amply able to pay all his obligations.

For these reasons, the judgment of the lower court is affirmed.

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*The Ordinary Measure of Damages for failure by a seller of goods to deliver them as agreed is the difference, if any, between the contract price agreed upon and their highest market price at the*

place and time agreed upon for the delivery: *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. Rep. 84. As to whether a retailer may recover profits lost through the default of the wholesaler or manufacturer in delivering goods according to contract, see *Guetzkow Co. v. Andrews*, 92 Wis. 214, 53 Am. St. Rep. 909; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378; *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971; *Semon Bache & Co. v. Coppes, Zook & Mutschler Co.*, 35 Ind. App. 351, 111 Am. St. Rep. 171; *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. Rep. 84.

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### EHRLOCK v. COMMONWEALTH.

[125 Ky. 742, 102 S. W. 289.]

**NUISANCE.**—In an indictment for Keeping a Pool-room, it is proper to state the particular facts relied upon to sustain the charge. (p. 270.)

**NUISANCE.**—Keeping a Pool-room to Which There is Common Resort for betting on horse-races is per se a nuisance at common law. (p. 271.)

**NUISANCE.**—A Nuisance Per Se is any Act, omission, or use of property or thing, which is of itself hurtful to the health, tranquility, or morals, or outrages the decency of the community. It is not permissible or excusable under any circumstances. (p. 271.)

**NUISANCE.**—Pool-room—Absence of Disturbance.—It is no defense to keeping a pool-room that there is no noise or disturbance, nor that the community is not disturbed by its presense. (p. 271.)

**NUISANCE.**—Pool-room—Persons Liable.—All who set up, operate, or promote a common gaming-house, including its employes, are guilty of maintaining a nuisance; and one who is shown to have been usually present at a pool-room when the betting was going on, apparently in authority, and who has admitted on more than one occasion his connection therewith, may be found guilty of maintaining the nuisance. (p. 272.)

**NUISANCE.**—Evidence of Keeping Pool-room.—On the trial of an indictment for maintaining a pool-room, prior admissions made by the defendant in the police court where he had pleaded guilty to the same offense are competent evidence against him. (p. 273.)

**NUISANCE.**—Pool-room—Former Conviction.—A conviction under an ordinance of a district for maintaining a pool-room does not bar a prosecution by the state for the same acts. (p. 273.)

**NUISANCE.**—Pool-room—Judgment of Abatement.—Upon a verdict of guilty for maintaining a pool-room, the commonwealth is entitled to a judgment of abatement. (p. 273.)

C. L. Raison, Jr., for the appellant.

N. B. Hays, attorney general, and Chas. H. Morris, for the commonwealth.

<sup>744</sup> O'REAR, J. Appellant was indicted for maintaining a common nuisance. The verdict of guilty fixed his punish-

ment at five hundred dollars fine, in addition to which the court entered a judgment of abatement against him.

The indictment was in this language: "The grand jury of Campbell county, in the name and by the authority of the commonwealth of Kentucky, accuses George Ehrlick of the offense of maintaining a common nuisance, committed as follows, viz.: That the said George Ehrlick, on the —— day of September, 1905, and within twelve months before the finding of this indictment, in the county aforesaid, and on divers other days and times, and from said —— day of September, 1905, up to the time of the finding of this indictment, did willfully, knowingly, and unlawfully suffer and procure and permit divers idle and evil-disposed persons to habitually frequent and assemble in a certain room in his possession and under his control, and there to be, remain, and habitually and unlawfully engage in the hazard of betting, winning, and losing money on horse-races, and said room was by said Ehrlick kept and controlled for such purposes, and said Ehrlick was at all times hereinbefore mentioned operating in said room what is commonly known as a 'pool-room,' to the common nuisance and annoyance of all the good citizens of the commonwealth aforesaid then and there in the neighborhood passing and repassing, residing, and being, and having <sup>745</sup> the right then and there to repass, reside, and be. That said room is located on lots 1, 2, 50, 52, 53, and 54 of the Glenn Park Land Company's subdivision, in the district of Clifton, Campbell county, Kentucky, on the west side of the Alexandria pike, south of the corporation line of the city of Newport. Against the peace and dignity of the commonwealth of Kentucky," etc.

Appellant complains that the indictment is not clear and direct as to the offense charged. There is but one offense charged, and that is correctly stated in the accusatory clause of the indictment. To properly state the offense, the facts showing it must also be stated, and, if an abatement is sought, a continuance of the nuisance must be alleged, as well, perhaps, as a description of the place where it is allowed: *Commonwealth v. Enright*, 14 Ky. Law Rep. 894; *Commonwealth v. T. J. Megibben Co.*, 101 Ky. 195, 19 Ky. Law Rep. 291, 1334, 40 S. W. 694; *Commonwealth v. City of Somerset*, 14 Ky. Law Rep. 238; *Chesapeake & O. Ry. Co. v. Commonwealth*, 88 Ky. 368, 11 Ky. Law Rep. 919, 11 S. W. 87. It was therefore proper for the pleader to state in the indictment what particular acts he would rely upon to sustain the charge. Keeping a common gaming-house, which is held to include

pool-rooms where betting on horse-races is indulged (*Bollinger v. Commonwealth*, 98 Ky. 574, 17 Ky. Law Rep. 1122, 35 S. W. 553; *Commonwealth v. Simmonds*, 79 Ky. 618, 3 Ky. Law Rep. 380; *Brown v. State*, 88 Tenn. 566, 13 S. W. 236; *Swigart v. People*, 154 Ill. 284, 40 N. E. 432), to which there is common resort for the purpose of betting, and at which money or other property is bet, won, or lost, is per se a nuisance at the common law: 1 *Hawkin's Pleas of the Crown*, 733; *Rex v. Dixon*, 10 Mod. 335; <sup>746</sup> *Kneffler v. Commonwealth*, 94 Ky. 359, 15 Ky. Law Rep. 176, 22 S. W. 446; *Bollinger v. Commonwealth*, 98 Ky. 574, 17 Ky. Law Rep. 1122, 35 S. W. 553. A nuisance per se is any act, or omission or use of property or thing, which is of itself hurtful to the health, tranquility, or morals, or outrages the decency, of the community. It is not permissible or excusable under any circumstances: *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381; 4 *Blackstone's Commentaries*, 64; *Russell on Crimes*, 449. The indictment was in proper form. The demurrer to it was properly overruled: *Bollinger v. Commonwealth*, 98 Ky. 574, 17 Ky. Law Rep. 1122, 35 S. W. 553.

A great deal of evidence was admitted on behalf of appellant tending to show that there was no noise or boisterous conduct at the house where this pool-room was conducted, but that, on the contrary, it was conducted with a care to keep down disorders, and to prevent minors, negroes, and women from coming into it. All this character of evidence was wholly immaterial. It ought not to have been admitted for any purpose. A pool-room might have been a nuisance because noisy, boisterous, fighting crowds were permitted to habitually gather and resort there; but that would have been a nuisance, whether betting was indulged or not. No such charge was made in the indictment in this case. Under a charge of maintaining a public or common nuisance, where the thing is per se a nuisance, such as a pool-room or other gaming house is, it is no defense that there was no noise or disturbance, nor that the community were not disturbed by its presence: *Kneffler v. Commonwealth*, 94 Ky. 359, 15 Ky. Law Rep. 176, 22 S. W. 446; *King v. People*, 83 N. Y. 587; *Moses v. State*, 58 Ind. 185; *Seacord v. People*, 121 Ill. 623, 13 N. E. <sup>747</sup> 194. Nor was it necessary that the game should have been visible from the outside: *State v. Mosby*, 53 Mo. App. 571.

It is complained that there was no evidence of appellant's connection with the establishment as its proprietor to sustain the verdict and judgment against him. All who set up, oper-



ate, or promote a common gaming-house, including its employes, are guilty of maintaining the nuisance. Appellant was shown to have been usually present when the betting was going on, and was apparently in authority. Besides, he admitted his connection on more than one occasion, not including the proceedings in the police court noticed hereafter. The evidence, or most of it, of his guilt, was circumstantial; but it was sufficient to satisfy the jury of his guilt beyond a reasonable doubt, as it also satisfies us.

Appellant's place was just outside of the city of Newport, in the district of Clifton, an incorporated municipality. It was on a street-car line, accessible from Cincinnati, Covington, Newport, and their environs, and was frequented by great crowds of people every afternoon through the week when horse-races were being run anywhere in the country. The crowds were attracted to the place by the opportunity its facilities afforded for betting on the results of the horse-races, which were reported by telegraph and telephone to the pool-room. It is one of the most demoralizing forms of the vice of gambling. Notwithstanding the record discloses a peculiar proceeding by which appellant operated his pool-room under a kind of license, as it were. The district of Clifton enacted an ordinance against operating pool-rooms in the district, and fixed the penalty at ten dollars per day. Each day, late in the afternoon, a warrant was issued <sup>748</sup> against appellant and placed in the hands of the marshal for execution. The marshal never disturbed appellant's business—seems to have been careful not to. He arrested appellant each day, after or about the close of business hours, and released him on a bond executed by one of his employes, who was also one of the officials of the district of Clifton. The next morning the security employe would go to the police judge, enter a plea of guilty for appellant to the charge of operating a pool-room, and pay the fine of ten dollars and four dollars and seventy-five cents costs. At first appellant went in person and entered the plea of guilty. But afterward he sent his employe along with the money. Thus was this unlawful business tolerated, and, indeed, encouraged, upon the payment of a stipend of fourteen dollars and seventy-five cents per day. The prosecution in the case at bar proved the pleas of guilty made by appellant before the police court. The evidence was objected to, but was admitted. We think the evidence was competent. The issue was whether appellant, during the period covered by the indictment, was in charge of, or was operating, the pool-room in question. His own admissions,

voluntarily made, were clearly competent evidence against him. That he made the confession in court can detract nothing from its relevancy or its probative force. He was not bound to have pleaded guilty in the police court. His plea was voluntary, was understandingly made, and was made for the express purpose of admitting the truth to be that he in fact had operated the pool-room on the date named. Precisely this practice was approved in *Bibb v. State*, 83 Ala. 84, 3 South. 711. The conviction of appellant under the ordinance of the district of Clifton was not a bar to the prosecution by the state for the same acts: *Respass v. Commonwealth*, 107 749 Ky. 139, 21 Ky. Law Rep. 789, 53 S. W. 24; *Lucas v. Commonwealth*, 118 Ky. 818, 26 Ky. Law Rep. 740, 82 S. W. 440.

There was a judgment of abatement entered against appellant, requiring him to abate the nuisance found by the verdict of the jury and the judgment of the court. The object of criminal law is mainly to prevent crime. A common nuisance can be abated only at the suit of the commonwealth, unless some member of the community suffers exceptional and peculiar damages from it. A way open to the commonwealth is to proceed by indictment, as was done in this case, where, upon a verdict of guilty, the commonwealth is entitled as a matter of law and right to have the nuisance so found thereafter abated: *Seifried v. Hays*, 81 Ky. 377, 5 Ky. Law Rep. 369, 50 Am. Rep. 167; *Gates v. Blincoe*, 2 Dana, 158, 26 Am. Dec. 440; *Bollinger v. Commonwealth*, 98 Ky. 574, 35 S. W. 553; *Ashbrook v. Commonwealth*, 1 Bush, 139, 89 Am. Dec. 616. It is not adequate to leave the commonwealth to repeated prosecutions. The offense is one, in its nature almost always continuous, that may require immediate cessation. Punishment afterward might be wholly inadequate to protect the community from the consequences of the nuisance. Hence the judgment of abatement operates upon the person of the accused, and may be executed by process of contempt, as well as upon the property employed by him in maintaining the nuisance. As to the latter the judgment of the court may be executed by a writ, addressed to the sheriff, who with sufficient force will remove the objectionable feature which has been found and adjudged to constitute the nuisance.

There is no error in the proceedings as against appellant, while those in his favor are not available to <sup>750</sup> him to reverse the judgment of which he complains.

Judgment affirmed.

*A Pool-room Maintained to Facilitate Betting on Horse-racing is a common-law nuisance: State v. Vaughan, 81 Ark. 117, 118 Am. St. Rep. 29; State v. Ayers, 49 Or. 61, 124 Am. St. Rep. 1036.*

*The Same Act may Constitute an Offense Against Both the State and a Municipality, and may be punished by either or by both without offending the rule that no man shall be twice put in jeopardy for the same offense: See the note to People v. McDaniels, 92 Am. St. Rep. 100.*

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## GROWBARGER v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

[126 Ky. 118, 102 S. W. 873.]

**OFFICIAL BOND—Liability for Death of Prisoner.**—When a marshal wrongfully kills a person whom he has arrested, the sureties on his bond are liable therefor. (p. 279.)

**OFFICIAL BOND—Extent of Liability for Death.**—A statutory provision that the recovery against a principal and sureties shall not be limited by the amount of the penalty named in the bond, applies to an action on the bond of a marshal for wrongfully killing a person whom he arrests. (p. 280.)

**OFFICIAL BOND.—Punitive Damages** may be recovered of a marshal who wrongfully kills a person whom he has arrested, but only compensatory damages can be recovered of his sureties. (p. 280.)

**OFFICIAL BOND—Failure to Accept or Record.**—The failure of town authorities to make or keep a record of the execution of a marshal's official bond, or of its acceptance, does not relieve the sureties from liability, if in fact it was executed and accepted. (p. 280.)

**OFFICIAL BOND.—Only a Substantial Compliance** with statutory requirements is necessary in executing an official bond. (p. 281.)

W. H. Barnes and G. B. Likens, for the appellants.

H. P. Taylor and Ernest Woodward, for the appellees.

**120 SETTLE, J.** R. Flem Stevens, marshal of the town of McHenry, after arresting W. L. Growbarger, and while having him in custody, for a misdemeanor committed in his presence, shot and killed him. Thereafter this action was brought by appellant Viola Growbarger, widow of the deceased, and S. O. Fogle, administrator of his estate, against the marshal and appellee United States Fidelity & Guaranty Company, surety on his official bond, to recover of them twenty thousand dollars damages for the killing of deceased by the marshal, upon the alleged ground that it was not done by that officer in self-defense, but unnecessarily, wantonly, and maliciously. At the appearance term the appellee United States Fidelity &

Guaranty Company insisted that the petition contained a misjoinder of plaintiffs and actions, and entered motion to correct same by requiring plaintiffs to elect. The court sustained the motion, but, plaintiffs refusing to make an election, the court made it for them by entering an order, striking the name of the administrator from the petition, and directing that the action be prosecuted in the name of the widow alone. Several amendments to the petition were filed, in one of which the commonwealth of Kentucky was made a plaintiff, <sup>121</sup> because the official bond of the marshal is in the nature of a covenant to the commonwealth, as well as the town of McHenry. Stevens and appellee United States Fidelity and Guaranty Company filed demurrers to the petition, as amended, which were overruled. They then filed separate answers, after which the lower court reconsidered its ruling on the demurrers to the petition, and again overruled the demurrer of Stevens, but sustained that of appellee, and dismissed the action as to it. This appeal is from that judgment.

It seems to be conceded by counsel for appellee that the petition, as amended, states a good cause of action against Stevens as an individual, but denied that there can be any recovery against appellee as surety in his official bond, as marshal. The bond is as follows: "Commonwealth of Kentucky, County of Ohio. We, R. Flem Stevens, principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., surety, do hereby covenant to and with the town of McHenry, Kentucky, in the sum of one thousand (\$1,000.00) dollars, lawful money of the United States, that the said R. Flem Stevens, marshal of the town of McHenry, Ky., shall well and truly discharge all the duties of said office and pay over to such persons, at such times as they may be respectively entitled to the same, all money that may come to his hands as marshal. Witness our hands, this the 4th day of January, 1904. R. Flem Stevens. The United States Fidelity & Guaranty Co., Thos. S. Dugan, Gen. Agt. and Atty. in Fact."

The bond in question was executed pursuant to section 3690 of the Kentucky Statutes of 1903, which provides: "The marshal, before he enters upon the duties of his office, shall execute a bond with approved surety, to such <sup>122</sup> town in the sum of one thousand dollars, conditioned for the faithful performance of his duties, and for any unlawful arrest, or unnecessary or cruel beating or assault on any person in making an arrest, he and his sureties shall be liable to the person so injured on said bond." Section 3751, which prescribes the form of the bond, reads as follows: "The obligation required



by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the commonwealth of Kentucky, from the person and his sureties that the principal shall faithfully discharge the duties of the office, trust or employment, but a bond or obligation taken in any other form shall be binding on the parties thereto according to its terms." Section 3752 allows the right of action on such official bond in the name of the commonwealth for her benefit, or for that of any county, corporation, or person injured by a breach of its covenant or undertaking. Its language is as follows: "Actions may be brought from time to time on any such covenant or bond in the name of the commonwealth, for her benefit, or for that of any county, corporation or person, injured by a breach of the covenant or condition, at the proper costs of the county suing, against the parties jointly or severally, together with the personal representative, heirs and devisees or distributees of such of them as may be dead; and the recovery against the principal and surety shall not be limited by the amount of the penalty named in such bond. Nor shall the recovery be restricted only to such duties or responsibilities as belong to the office, post, trust or employment at the date of the covenant or bond, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed." Appellant <sup>123</sup> rests her right to maintain the action upon section 4 of the Kentucky Statutes of 1903, which provides: "The widow and minor child, or either, or both of them, of a person killed by the careless, wanton or malicious use of fire arms, or by any weapon popularly known as Colts, brass knuckles or slung-shots, or other deadly weapon, or sandbag, or any imitation or substitute therefor, not in self-defense, may have an action against the person who committed the killing, and all others aiding or promoting, or any one or more of them; and in such actions the jury may give vindictive damages."

It is contended by appellee that, as surety, its liability upon the marshal's bond cannot be extended beyond the precise terms of that instrument. Therefore it is bound for nothing which is not within the letter thereof. In other words, that its liability is limited to the official acts of the principal, and does not extend to an illegal act, done under color of office, of which he may be guilty, and that for this reason appellee is not responsible to appellant in damages for the homicide charged to the account of Stevens, if, as alleged in the petition, it was without justification or excuse. The following excerpts from section 283 of Mechem on Public Officers well

states the rule as to the liability of a surety in an official bond for the acts of his principal: "It is an official act, a failure to perform an official duty, or performing it in an improper manner, which comes within the scope of the surety's undertaking." In further discussing the subject, the same author, in section 284 says: "Acts done by virtue and authority of the office (*virtute officii*) are clearly to be regarded as official acts, and render the sureties responsible; but acts done merely under color of the office <sup>124</sup> (*colore officii*) do not stand upon so clear a ground. The distinction between the two has been stated thus: Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises the authority improperly, or abuses the confidence which the law reposes in him. Whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them. For acts of the latter kind, it is held in many states that the sureties are not responsible. This question has been most frequently raised, and is well illustrated in cases in which it has been sought to hold liable the sureties of a sheriff, marshal, constable, or other executive officer, who has seized upon process against one person the goods or other property of another, or who has levied upon property which was exempt from such seizure. Upon the one hand, it is said that the officer acts officially, and hence binds his sureties, only when acting in pursuance and by virtue of his writ, and his writ justifies only the seizure of the property of the defendant therein named, not exempt from execution. His seizure of the goods of a stranger, or his seizure of exempt property, is a purely voluntary and unauthorized trespass, which neither his writ nor his official character can justify, and which imposes upon the officer merely personal, and not official, responsibility. On the other hand, it is said that the undertaking of the securities is that their principal will well and faithfully execute the duties of his office, and that he cannot be deemed to have done so when he seizes the property of a stranger, or levies upon property exempt from execution. There is, therefore, such a breach of the condition of the bond as renders the sureties liable."

<sup>125</sup> The rule last stated prevails in quite a number of states, and is approved by numerous lawwriters. Thus, in *Murfree on Sheriffs*, section 60, the author, after quoting with approval from a Massachusetts case, which held a sheriff and his sureties liable for the wrongful act of a deputy of the former, performed merely under color of his office, makes the following statement of the law: "Sureties are not needed on a

sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts and bind themselves to make good any damage he may cause to anyone while acting under color of his office." In *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512, 23 South. 388, 42 L. R. A. 423, it was held that a sheriff, whose deputy shot one charged with a misdemeanor while fleeing to escape arrest under a warrant therefor, was liable on his official bond in an action for damages brought by the person injured. But the most recent authority on the question under consideration is the case of *Johnson v. Williams' Admr.*, 111 Ky. 289, 23 Ky. Law Rep. 658, 98 Am. St. Rep. 416, 63 S. W. 759, 54 L. R. A. 220, the facts of which were very similar to those presented by the petition in the case at bar. The action was instituted by the administrator to recover on the bond of the sheriff damages for the wrongful shooting and killing of his decedent by two of that officer's deputies. The defense interposed was that no liability existed, because the decedent was killed by the deputies under the mistaken belief that he was a person charged with a felony, whose arrest they were seeking under a warrant, and that, as the decedent was trying to escape when the arrest was attempted, they had the right, or would have had such right as to the criminal, to prevent it by shooting <sup>126</sup> him; and, furthermore, that the act of the killing was not an official act for which the sheriff and sureties in his bond were responsible. But this defense was not deemed good, and it was held by this court that the sheriff was liable on his official bond for the wrongful act of his deputies in question, and that the lower court properly permitted a recovery: *Shields v. Pflanz*, 101 Ky. 407, 19 Ky. Law Rep. 648, 41 S. W. 267.

According to the averments of appellant's petition, her husband was unnecessarily and maliciously killed by Marshal Stevens, appellee's principal, when under arrest, and in the custody of the latter. It matters not that the arrest was legal; if, as alleged, the decedent was not resisting or attacking the officer, and the latter was in no danger at his hands, the homicide was wholly inexcusable. Whether the facts alleged will be established by the evidence to the satisfaction of a jury cannot be known in advance of a trial, but our only concern at present is to determine whether, as set forth in the petition and confessed by the demurrer, they manifest a good cause of action. Accepting as true the version of the homicide contained in the petition, it must be regarded as having resulted either from the improper performance by the marshal of an official duty, or from an abuse of the confidence which

the law reposed in him. In either event, the act was virtute officii. This being true, it is an act for which the officer and his surety may be held liable, for the undertaking of the surety, as expressed in the bond, is that the marshal "shall well and truly discharge all the duties of said office," and that he cannot be deemed to have done, when in making an arrest he unjustifiably kills the person arrested. There is, therefore, such a <sup>127</sup> breach of the condition of the bond as renders the surety liable. To so hold would not be such an enlargement of the covenant quoted as to do violence to the rights of the surety. The bond in character and terms substantially conforms to the requirements of section 3690 of the Kentucky Statutes of 1903. But, if this were not so, section 3751 provides that a bond taken in any other form than that specified "shall be binding on the parties according to its terms," and certainly the terms of this bond are broad enough to allow a recovery thereon for such a breach of the covenant in question as is alleged in the petition. Moreover, section 3690, after prescribing the terms of the bond required of a town marshal, declares that for any unlawful arrest, or unnecessary or cruel beating or assault on any person in making an arrest, he and his sureties shall be liable to the person injured on the bond. If the marshal and his sureties could not escape liability for a wrongful assault committed by the former in making an arrest, much less should they be permitted to do so for the unjustifiable killing by the officer of a person in attempting to arrest him, or while holding him in custody after the arrest.

It is further insisted for appellee that, even if responsible in damages for the killing of appellant's decedent, by the marshal, in no event can its liability exceed one thousand dollars, the amount of the bond. We do not concur in this conclusion. The question is, we think, settled by section 3752 of the statute, supra, which allows actions on such a bond as that here sued on by appellant, and in addition contains the following provision: "And the recovery against the principal and surety shall not be limited by the amount of the penalty named in such bond." The bond, being controlled by the section supra, must be considered in <sup>128</sup> connection with it. In other words, the provisions of the statute must be read into the bond in order to determine the extent to which appellee may be held liable, in the event appellant on the trial shows herself entitled to recover at all: *Moss v. Rowlett*, 112 Ky. 121, 23 Ky. Law Rep. 1411, 65 S. W. 153, 358. Treating the provisions of the section supra as a part of the bond, we conclude



that the amount that may be recovered is not limited to the one thousand dollars named therein, but, while this is true if appellant shows herself entitled to recover, the jury cannot properly award her punitive damages as against appellee. Punitive damages may be recovered of the marshal, Stevens, but only compensatory damages can be recovered of the surety in his official bond. In *Johnson v. Williams' Admr.*, 111 Ky. 289, 98 Am. St. Rep. 416, 63 S. W. 759, 54 L. R. A. 220, this court, in respect to the liability of the sureties of the sheriff, said: "The covenants of the bond do not require the sureties to do more than compensate an injured party for the actual damages which he may have sustained by reason of the misconduct of the sheriff or his deputies. Its covenants do not require them to pay a sum of money which is inflicted by way of punishment. They have committed no wrong, and therefore the reason of the law which allows exemplary damages against wrongdoers cannot make it apply to them."

It is further contended by counsel for appellee that the judgment of the lower court sustaining the demurrer and dismissing the petition as to appellee was authorized, because of the admission in the petition that the council or other authorities of the town of McHenry had neither made nor kept a record of the execution of the marshal's official bond, or of its acceptance by that body. It is true that the <sup>129</sup> petition contains, in substance, the admission that the records of the council fail to show the execution or acceptance of the bond; but it also contains the averments, in substance, that the bond was required of the marshal by the council, that it was duly executed by him as principal and appellee as surety, and also that it was duly approved and accepted by the town council, and, in addition, an attested copy of the bond, obtained of the proper authorities of the town, was filed with and made a part of the petition. These averments, being confessed by the demurrer, constituted a sufficient statement of the facts showing the proper execution and acceptance of the bond. If no such bond was required of the marshal, or it was not executed by him, or signed by appellee as surety, or accepted at all, as alleged in the answer filed by appellee without waiving its demurrer to the petition, such matters of defense, or any of them, if sustained by sufficient evidence, on the trial, would prevent a recovery as to it, though the mere failure of the council to make the record of the execution or acceptance of the bond would not do so, if in fact it was executed and accepted. In executing an official bond, only a substantial

compliance with the requirements of the statute is necessary. If statutes compelling the giving of bonds prescribe what they shall express, it is to subserve a twofold purpose: (1) Uniformity in the terms and conditions; (2) the best protection possible from the bond to the public and those dealing with the officer. But as said in Mechem on Public Officers, section 268, such statutes are usually directory; "and, inasmuch as the substance is ordinarily more to be regarded than the form, it is quite generally held that, unless the statute expressly declares that a bond not executed in the form <sup>130</sup> prescribed shall be void, the statute will be construed to be directory only, and a substantial compliance with it will suffice." In section 269, the author mentions various informalities which would not invalidate an official bond: "Thus, that the bond is not taken by the proper person or in the prescribed manner, or that it was not approved, or was not approved by the designated officer, or that it was not signed or acknowledged in the presence of a particular officer, or that it was given before the time specified, or not until the time fixed had expired, or was not stamped as required, or that the officer who gave it had not been sworn, is immaterial, and the bond, if otherwise perfect, will be enforced." Again, in section 270, it is said: "So the fact that the officers charged with the duty of approving of filing the bond had not performed it will not defeat the validity of the bond, or release the sureties from it." Also, in section 313, it is declared: "Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted into the office, his sureties cannot escape liability for his defaults because the bond was not approved by the proper officer or was not approved at all."

Applying to the facts alleged in the petition the law as announced by Mechem in the several sections, supra, it is patent that the lower court erred in sustaining the demurrer to the petition upon the ground last indicated. Indeed, our consideration of all the questions raised by the demurrer to the petition has constrained us to disagree with the conclusions reached by the learned judge of the circuit court, for we are of opinion that the demurrer should have been overruled.

<sup>131</sup> Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

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*The Liability of Sureties of a Sheriff for personal injuries inflicted by him is the subject of a note to Brown v. Weaver, 71 Am. St. Rep. 519. See, also, Greenberg v. People, 225 Ill. 174, 116 Am.*

St. Rep. 127. If a sheriff's deputies attempt to arrest an innocent person, erroneously supposing him to be a felon whom they have been sent to apprehend, and kill him as he tries to escape, the sheriff and his sureties, under the Kentucky statutes, are liable therefor: *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416.

## CITIZENS' BANK v. BANK OF WADDY.

[126 Ky. 169, 103 S. W. 249.]

**BANKS—Limit of Indebtedness.—One Who Loans Money to a Bank Without Knowledge** or reason to believe that it has exceeded the borrowing limit prescribed by its articles of incorporation is not affected by the limitation, his own loan being within the same. (p. 283.)

**BANKS—Authority of Cashier to Borrow Money.—It is within** the apparent authority of the cashier of a bank to borrow money for it, and pledge its notes therefor, in the regular course of business. (p. 285.)

**BANKS—Loan to Cashier—Spurious Resolution.—The fact that** the cashier of a bank in borrowing money for it delivers to the lender a spurious resolution of the directors authorizing the loan, when there is no president nor directors, does not place the lender in a worse position than he would otherwise have been. (p. 285.)

**BANK—Notice that It has No Directors.—The fact that one** bank holds a majority of the stock of another as collateral security for a loan to its cashier does not apprise the first bank that the second has no directors, or that its stockholders are taking no interest in its management. (p. 286.)

**BILLS AND NOTES—Double Liability upon Renewal.—A person** who renews his note to a bank without exacting a surrender of the old one, when it has been pledged as security for a loan to the bank by other persons, may be liable on both notes if the new one is pledged to another bank without notice. (p. 286.)

Dodd & Dodd and Willis & Todd, for the appellants.

J. C. Beckham & Son and Beard & Marshall, for the appellee.

<sup>172</sup> **HOBSON, J.** In the year 1900 the Bank of Waddy was incorporated under the Kentucky Statutes, the capital stock being fixed at \$15,000. It was provided by the articles of incorporation that the indebtedness of the bank, <sup>173</sup> except to depositors, should not exceed one-half the amount of the capital stock. L. W. Ditto was elected president and T. B. Hancock cashier. They were also two of the directors of the bank. The latter part of the year 1903 some of the directors became dissatisfied with Hancock as cashier, and at this juncture Hancock bought the stock of all the directors, the stock being assigned to him in blank constituting

a majority of the stock in the bank. From this time on there was no board of directors. Hancock ran the bank as cashier, and there was no stockholders' meeting and no action was taken by the minority stockholders. Hancock took the stock which he had gotten from the directors and hypothecated it with the First National Bank of Louisville for a loan of \$4,000. He made some payments on the note afterward, but there was a balance of \$3,000 of this debt outstanding when the Bank of Waddy made an assignment in January, 1906. The First National Bank still held the shares of stock as collateral to the note. On September 15, 1905, while Hancock was running the Bank of Waddy as above stated, in the name of the Bank of Waddy he borrowed \$4,000 of the Fifth National Bank of Cincinnati, hypothecating to secure the note a number of notes executed to the Bank of Waddy by persons who had borrowed money from it. This note to the Fifth National Bank was renewed on January 16th, just before the assignment. In the same way in July, 1905, he borrowed \$3,000 of the Bank of Commerce of Louisville giving a note which was secured by a number of notes as collateral, and it was renewed from time to time until about the time the bank failed. In November, 1905, he borrowed in like manner from the First National Bank of Louisville \$3,000, and hypothecated a number of notes <sup>174</sup> executed to the Bank of Waddy. All of these three last loans were made in the name of the Bank of Waddy by Hancock as cashier, and the money was paid over to the Bank of Waddy by the banks lending the money. It was used by the Bank of Waddy. When the bank failed, it owed its depositors about \$23,000 and the assets, outside of the notes which had been pledged to the three banks above referred to, were sufficient to pay only a small part of the indebtedness. In the suit brought to settle the accounts of the assignee the circuit court held that the three banks above referred to had claims against the Bank of Waddy for the amount of money which they had paid it, but it denied them a lien upon the collateral which they held and required them to turn over the collateral notes to the receiver. From this judgment they appeal.

The limit of indebtedness for borrowed money which the Bank of Waddy could contract was \$7,500, and every person dealing with a corporation is charged with notice of its powers under its articles of incorporation. But a creditor whose own debt against the corporation does not exceed the limit, and who has no reason to know that the limit has been exceeded, is not affected by the fact that there are other



debts of which he has no notice which, when added to his own, make an aggregate indebtedness greater than the corporation can legally incur: *Bell & Coggeshall Company v. Kentucky Glass Works*, 106 Ky. 7, 20 Ky. Law Rep. 1684, 21 Ky. Law Rep. 133, 50 S. W. 2, 1092, 51 S. W. 180; 3 Cyc. 472. The debt of each bank was less than the limit, and none of them knew, or had reason to know, of the debts of the others, or that the limit of indebtedness had been exceeded. The debts of the banks are therefore <sup>175</sup> not affected by this provision of the articles of incorporation.

The proof is unquestioned that the money borrowed was paid to the Bank of Waddy, and was used by the Bank of Waddy. The Bank of Waddy is therefore liable for the money, as it cannot be allowed to take the money and use it without accounting for it. It is insisted, however, that the cashier, Hancock, was without power to borrow money or hypothecate the notes of the Bank of Waddy for it, and that the lending banks, therefore, acquired no lien upon the collateral. Hancock, to deceive the banks, furnished two of them what purported to be authority from the board of directors to him to make the loans, but these papers turn out to be forgeries. There was in fact no board of directors and no entries were ever made on the directors' books after January, 1904, when Hancock bought the stock of the directors, and there was never an election of directors after this. The two banks required Hancock to furnish them these papers out of abundance of caution, and, as they were void, the question remains whether Hancock as cashier had apparent authority to do the acts referred to, for, if he acted within his apparent authority, the Bank of Waddy is bound by his action, although he did not have the express authority which he professed to have. The case is an unusual one, in this: that there were no directors of the bank and no president. The only officer it really had was the cashier. The stockholders allowed the bank to be run by Hancock as cashier. Under such circumstances he had all the authority, as to one having no notice of the facts, that a bank cashier may properly exercise. As he was admittedly cashier, and there were no limitations upon his authority, he could exercise those powers <sup>176</sup> which are within the apparent scope of the authority of a bank cashier. The cashier is the agent of the bank. His acts, within his official sphere, are binding on the bank, and by the general current of the later authorities he may borrow money in the regular course of the bank's business and pledge its property for its payment: 5 Cyc. 579;

4 Thompson on Corporations, sec. 4748; 1 Morse on Banking, secs. 158, 160; Davenport v. Stone, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722; Chemical National Bank v. City Bank, 160 U. S. 646, 16 Sup. Ct. Rep. 417, 40 L. ed. 568; Auten v. U. S. National Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628, 43 L. ed. 920; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. Rep. 498, 44 L. ed. 611. It follows from these authorities that it was within the apparent scope of the cashier's authority to pledge the notes of the Bank of Waddy to secure the money borrowed by it. Such transactions between country banks and city banks are of common occurrence, and there was nothing in the circumstances known to the lending banks to put them on notice that there were any defects in the authority of Hancock as cashier. The resolution of the directors was required by two of the lending banks so as to apprise the directors of what the cashier was doing and the better to secure the payment of their money at maturity. The fact that Hancock delivered to them spurious resolutions which had not been passed by the board of directors did not put the lending banks in a worse position than they would have been without these papers, which were simply nullities. The lending banks stand just as they would have stood if they had lent the money to the Bank of Waddy through Hancock as cashier without requiring anything from the board of directors. The spuriousness <sup>177</sup> of the papers deprived the banks of the added security they expected to derive from the co-operation of the board of directors, but it had no other effect on the transaction. The lending banks are entitled to a lien on the collateral pledged to them for the payment of their loans. They acted in good faith, and in the usual course of business, and there was nothing in the transactions to put them on notice that Hancock as cashier was exceeding his authority or misapplying the funds of the bank, or that the bank authorities were not regularly constituted and doing their duty. The fact that the First National Bank of Louisville held a majority of the stock as collateral security for a loan to Hancock did not apprise it that there were no directors, or that the stockholders in the bank were taking no interest in its management. Everybody in this record treated Hancock as cashier of the bank and as possessing all the powers incidental to the position. The depositors intrusted their money to him. The stockholders treated him in the same way. Under such circumstances they who trusted most should lose rather than those who required security before parting with their money.

A bank may restrict the authority of its cashier, and, when this is done, it will be only bound to those having notice, actual or constructive, of the restriction, to the extent of his actual authority. But here there was no restriction upon the authority of the cashier. Obviously a bank cashier has authority, when he finds his cash running low at the close of a day's business, to borrow cash from another bank upon collateral to make ends meet; and, if he foresees that he may get in this condition, he may make such a loan in advance. It is said here that, when the notes were renewed from time to time, the lending <sup>178</sup> banks had notice that something unusual was going on. But the transactions are to be judged by what the banks each knew when it lent the money and not by what it learned afterward when it was too late to help matters.

E. J. Paxton executed to the Bank of Waddy a note on April 5, 1905, for \$2,000. Hancock as cashier pledged this note to the Bank of Commerce as collateral security for the money above referred to borrowed from it. When Paxton's note fell due in September, Hancock called upon Paxton to renew it. This Paxton did, and Hancock said to him that he would get the old note in a few days and deliver it to him. Instead of doing this, however, Hancock pledged this note to the Fifth National Bank of Cincinnati to secure the loan made by it. The question now presented is whether Paxton is bound to both the banks as innocent holders of the paper. In *Wilkins v. Usher*, 123 Ky. 696, 29 Ky. Law Rep. 1232, 97 S. W. 37, it was held that the holder of a note to whom it is assigned as collateral security is a holder for value, although his debt had been previously created. Neither of the banks had notice of any infirmity in the note which it took. Under the present statute Paxton is therefore liable to each bank, but each bank should be required to exhaust first its other collateral before he is required to pay to both of them anything more than \$2,000 and interest in the aggregate. He owes \$2,000, and whatever he has to pay beyond \$2,000 and interest will be a debt against the Bank of Waddy, whose debt he will to this extent pay off. If either of the banks to which his notes are assigned can collect its debt out of its other collateral it should be required to do so as to protect him from having to pay twice.

<sup>179</sup> Judgment reversed, and cause remanded for a judgment and further proceedings as herein indicated.

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*Cashier of a Bank* is regarded as its chief executive officer. His office is to manage all affairs of the corporation not peculiarly com-

mitted to the directors: See the note to *Corser v. Paul*, 77 Am. Dec. 759, on the implied powers of bank cashiers. He is the agent of the bank and his conduct is governed by the general laws of agency; so long as a person deals with him in a matter wherein he has a right to believe he is dealing with the bank, the transaction is obligatory upon the latter: *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438; *Home Savings Bank v. Otterbach*, 135 Iowa, 157, 124 Am. St. Rep. 267.

*A Person Extending Credit* to a municipal corporation must ascertain at his peril whether the municipality has exceeded the statutory or constitutional limit of its indebtedness: *Helena W. W. Co. v. Helena*, 24 Mont. 521, 81 Am. St. Rep. 453; *National Life Ins. Co. v. Mead*, 13 S. D. 37, 79 Am. St. Rep. 876; note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 242.

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### BECKNER v. COMMONWEALTH.

[126 Ky. 318, 103 S. W. 378.]

**ATTORNEY**—Disbarment for Perjury.—An attorney at law who makes a false affidavit for use in a pending cause wherein he is not acting as attorney cannot be disbarred therefor; like other witnesses giving false testimony, he is amenable to no other punishment than for the crime of perjury. (p. 290.)

William Lindsay, Lewis Apperson, McQuown & Brown, Jouett, Byrd & Jouett, Lucien Beckner and W. M. Beckner, for the appellant.

George B. Nelson, N. B. Hays, attorney general, D. L. Pendleton and Chas. H. Morris, for the commonwealth.

**318 BARKER, J.** This is a proceeding commenced in the Clark circuit court to disbar the appellant, an attorney, from practicing law in the state of Kentucky. It is based upon the following facts: In an action between Thomas G. Stuart and Archer Harman, in the Clark circuit court, Stuart obtained a judgment for a large sum of **319** money against Harman. Harman left the state and engaged in business in various parts of the world, and is reputed to have made a large fortune in South America. He finally went to England, where Stuart instituted an action against him on his judgment in the court of king's bench, and sought by proceedings there to enforce it and collect his debt. It seems that under the law of England, if there be no reason shown against it, the collection of a foreign judgment may be enforced by a summary procedure. Harman undertook to balk this procedure instituted by Stuart against him by showing that the judgment had been unfairly or fraudulently awarded against



him in Kentucky; or, in other words, that he had not had a fair and impartial trial. When the case between Harman and Stuart was pending in the Clarke circuit court, the appellant, William M. Beckner, was of counsel for Harman for at least a part of the time, and understood the issues between the parties litigant, the result of the trial, and the mode of procedure by which the judgment was obtained. In order to induce the court of king's bench to refuse to summarily enforce the Kentucky judgment against him, Harman obtained from Beckner the following affidavit to be read as evidence in his behalf:

"I, William Morgan Beckner, of the city of Winchester, in the county of Clark, state of Kentucky, in the United States of America, make oath and say as follows: (1) I am an American citizen, resident in the city and state aforesaid, am a lawyer by profession and have an office in said city. I am sixty-four years of age past. (2) I have known plaintiff, Thomas Goff Stuart, for a period of at least thirty-five years past, and during all that time said Stuart has been practically insolvent and hard pressed for <sup>320</sup> money, and has now no estate of any kind known to me. (3) That from 1884 to 1892, A. D., defendant Archer Harman was frequently in Clark county, Kentucky, as said Stuart well knew. That he was a partner in a large contracting firm which built many miles of the Kentucky Union Railroad, a line of railroad that ran through said county, and was in active charge of the construction of a large section of said road. (4) That said Stuart takes an active interest in politics in the state of Kentucky. (5) That this cause was first decided by the regular judge of the circuit court of Clark county, Kentucky, in favor of defendant Harman. That said judge, who was a very able lawyer and judge, held that said Stuart was not a partner of defendant Harman in the land deal in controversy, and that the judgment of said circuit judge was reversed by the court of appeals of Kentucky on said question chiefly because of certain letters introduced by said Stuart, but which said Harman by reason of his absence had no opportunity to see so as to determine whether or not they were authentic. (6) That the special judge by whom the judgment relied on in this court was rendered is the nephew of a prominent politician in Kentucky, and himself takes an active interest in politics and belongs to the same party to which Stuart is a member. (7) That plaintiff Stuart in the suit wherein said judgment was rendered was represented by several lawyers of power and influence who were spurred

on by a contract for a contingent fee. (8) The defendant Harman lived in so many places in the prosecution of his business as a contractor that his papers had become scattered, and he was himself too far away to be able to assist his counsel in preparing said cause for said trial. (9) That by reason of the undue influence of plaintiff <sup>321</sup> Stuart and his counsel and the absence of the defendant Harman from the United States and the state of Kentucky said defendant did not have a fair trial of said cause. William Morgan Beckner. Sworn to at Winchester, Kentucky, U. S. A., this 28th day of May, 1906. C. C. Page, Notary Public. Clark County, Kentucky. "Before me, C. C. Page, Notary Public, Clark County. My commission expires October 8, 1908."

Upon the trial of this case below the court rendered a judgment finding appellant guilty as charged, and suspended him from the practice of his profession as a lawyer for a term of two years. From that judgment this appeal is prosecuted. The court's conclusion of the issue between the commonwealth and appellant is thus stated: "The court's conclusion is that the affidavit in question in these proceedings was deliberately and cunningly drawn, so as to support a charge of fraud and unfairness in the trial of the case therein referred to, and that said charge was known to be wholly untrue by the affiant."

As we see it, the first question with which we are confronted is whether or not an attorney who is a witness in a judicial investigation may be prosecuted and punished for his testimony by such a procedure as we have before us. Appellant was not the attorney of Harman at the time he gave his affidavit. The action in which the testimony contained in the affidavit was to be used was pending in a judicial tribunal in England. Appellant was none the less a witness because his evidence was given voluntarily. We do not think it can be questioned that what one may be compelled by law to do he may do voluntarily. Suppose the appellant had been in England, and there summoned before the court of king's bench as <sup>322</sup> a witness for Harman, and had deposed substantially as is contained in the affidavit copied above, could he then have been disbarred in Kentucky for his testimony in England? Or suppose a commission had issued from the court of king's bench for the taking of his deposition in Clark county, and he had been summoned before the proper officer and required to testify, would he then have been subject to disbarment because of his testimony? If so,

then it must be conceded that an attorney summoned as a witness stands in a different attitude with reference to responsibility for his testimony than any other witness. It seems to us that the public policy which shields a layman who is a witness from all punishment except criminal prosecution for perjury if he bears false witness protects an attorney at law, who is a witness, to the same extent.

In the case of *Sebree v. Thompson*, 126 Ky. 227, 103 S. W. 374, 11 L. R. A., N. S., 723, we held, in an opinion written for the court by Judge Lassing, that a witness is absolutely privileged from any punishment except a criminal prosecution for perjury by reason of his testimony given in court in a pending cause. In the opinion a great many authorities are reviewed, and the rule above stated clearly announced and fully maintained. The principle is rested upon the broad public policy that witnesses should not be harassed except by prosecution for perjury because of their testimony in court. It is not necessary to reproduce the reasoning of the opinion, or the authority cited to sustain it. We deem it sufficient to say that it is conclusive of the question under discussion. In the matter before us there was a cause pending in a court of justice, and one of the parties called on the defendant to testify upon the issue joined. The <sup>323</sup> party had a right to the testimony of the witness, and the latter had a right to give his testimony voluntarily without waiting for the process of the court to enforce it. This being true, the witness was not amenable to any other procedure or punishment except prosecution for the crime of perjury if he spoke falsely.

We deem it not inappropriate to say that there is nothing in this record that warrants any sort of adverse reflection upon the conduct of the learned trial judge who awarded the judgment against Harman, or the counsel who obtained it, or the attorney general of the state, who is the relative of the trial judge referred to in the affidavit of appellant. All of these men are officers of this court, and are known to be incapable of striving for unworthy ends, or the practice of unworthy means. But this does not alter the principle that it is the policy of the law that a witness should go upon the witness stand untrammelled by the fear of prosecution by those who may be offended by or disappointed in his testimony.

For these reasons, the judgment is reversed, with directions to dismiss the proceeding against the appellant.

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*Disbarment of Attorney for Criminal Acts* is discussed in the notes to *Matter of Philbrook*, 45 Am. St. Rep. 79; *Matter of Thresher*,

114 Am. St. Rep. 839. The very remarkable position assumed in the principal case that the disbarment of an attorney is a punishment seems to us altogether unjustifiable. We had supposed that its purpose was to protect the public against an unprincipled class of practitioners, whose preying upon that public was made the more easy by their remaining officers of the court.

## LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. BEELER.

[126 Ky. 328, 103 S. W. 300.]

**RAILROADS—Fire—Weeds and Grass Along Track.**—The owner of property along a railroad owes the corporation no duty to keep his land free from grass, weeds or brush to guard against fire. (p. 291.)

**DAMAGES—Measure of for Destruction of Orchard.**—In an action against a railroad company for injury to an orchard from fire, the measure of damages is not the difference in value between the whole farm before and after the fire, but the reasonable value of the trees destroyed and the difference in value of those injured before and after the fire. (p. 294.)

Benjamin D. Warfield, for the appellant.

Bennett H. Young, Chapeze & Halstead and E. C. Waide, for the appellees.

331 **HOBSON, J.** Margaret M. Beeler owns a tract of land adjoining the right of way of the Louisville and Nashville Railroad Company in Bullitt county. She had on her tract an orchard of apple and other fruit trees. In the fall of the year 1904 her orchard was burned over, and a number of the trees were killed or seriously injured. She brought this suit against the railroad company, charging that the fire was caused by its negligence. The defendant filed an answer, in which it denied the allegations of the petition and charged in the second paragraph that the fire was due to the plaintiff's negligence, in that she had suffered her orchard to grow up in weeds, grass and brush, and but for this it would not have been injured. In the third paragraph it pleaded that its engines were provided with spark arresters, as provided in section 782 of the Kentucky Statutes of 1903. The court struck out the second paragraph and part of the third paragraph of the answer.

The owner of land adjoining a railroad violates no duty to the railroad when he allows his land to grow up in grass, weeds or brush. There is no negligence without the violation



of some duty, and there can be no contributory negligence when no duty is placed on the plaintiff to exercise care. Unless the plaintiff has been guilty of a breach of duty, the question of contributory negligence cannot arise: Jaggard on Torts, 960. The rule as to contributory negligence in cases of this character is thus stated in 2 Shearman and Redfield on Negligence, section 690: "The occupant of land near to, or even next to, the track <sup>332</sup> of a railroad, is not chargeable with contributory negligence merely by reason of leaving his land in its natural state or making any legitimate use of his property. It makes no difference if by so doing his property may be extremely liable to take fire, in the event of the railroad trains being negligently managed. He is not required to anticipate such negligence, nor to give up the lawful use of his property, in such manner as would be deemed prudent under ordinary circumstances, simply because a railroad has been constructed beside his land": See, also, 2 Thompson on Negligence, sec. 2315; 3 Elliott on Railroads, sec. 1228. This rule was recognized by us in Louisville etc. R. R. Co. v. Samuels' Exrs., 22 Ky. Law Rep. 303, 57 S. W. 235, although that case was distinguished, because there Samuels had built the house in controversy on the right of way of the railroad company.

The court seems to have intended to strike out the matter pleaded in the third paragraph as a defense. At any rate, he treated it throughout the trial as matter of evidence, and this view seems to have been concurred in by counsel on both sides. The plaintiff charged that the defendant negligently burned her property. When the defendant traversed the allegations of the petition, the issue was made up. That the engines were screened as provided by the statute was matter of evidence on the question of negligence; but it is unnecessary for the defendant to plead his evidence, and, if he does plead it, it is unnecessary that the plaintiff should take issue upon it. Sections 782 and 790 of the Kentucky Statutes of 1903 are as follows:

"Sec. 782. All companies shall place in, on or around the tops of the chimneys of engines, a screen, fender, damper or other appliance, that will prevent, <sup>333</sup> as far as possible, sparks of fire from escaping from such chimneys."

"Sec. 790. Every company shall keep its right of way clear and free from weeds, high grass, and decayed timber, which, from their nature and condition, are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property."

The proof for the plaintiff showed that the fire originated on the railroad's right of way, and spread from it to the plaintiff's land. The proof also showed that the defendant had mowed the grass and weeds upon its right of way some time before the fire, but had left them lying upon the ground. This dry material lying upon the ground was more dangerous than if it had not been cut. There was also proof that a train passed along about ten minutes before the first occurred, which did the damage sued for. The court, therefore, properly refused to instruct the jury peremptorily to find for the defendant: *Cincinnati etc. R. R. Co. v. Falconer*, 30 Ky. Law Rep. 152, 97 S. W. 727; *Southern Ry. v. McGeoughy*, 31 Ky. Law Rep. 291, 102 S. W. 270. There was no evidence tending to show that the fire could have originated from anything except the trains, and the circumstances leave no doubt that it did originate from the passing trains.

The proof for the plaintiff was to the effect that eight hundred or nine hundred apple trees were destroyed or greatly injured. There was no controversy in the evidence as to the number of trees burned or as to the amount of injury done to the trees. The only conflict in the evidence was as to the value of the trees or the value in money of the injury done to them. The proof for the plaintiff put the damages much higher than that <sup>334</sup> for the defendant. One witness for the defendant, who testified very clearly and seemed to understand the subject, put the damages at two dollars and fifty cents a tree. Not long after the burning the railroad company had two neighbors who handled fruit and fruit trees to go upon the land and assess the damages. They assessed the damages at two thousand four hundred and sixty-one dollars. There was other proof for the defendant putting the damages considerably lower, and some higher. The jury fixed the damages at two thousand dollars. Under all the evidence, we cannot say that this was excessive.

It is earnestly insisted for the railroad company that the court erred in the admission of evidence and in its instructions to the jury on the measure of damages. The court allowed evidence to be given by both parties as to the value of the trees, the amount of the injury done them, and the value of the trees that were injured before and after the injury. He instructed the jury that they should find for the plaintiff the fair and reasonable value of the trees destroyed and the difference in value of those injured before and after the injury. He refused to instruct them that the measure of damages was the difference in value of the whole farm just

before the injury and just after. The rule insisted on by the railroad company was approved by the New York court of appeals in an opinion by Chief Justice Parker in *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199, 28 Am. St. Rep. 563, 30 N. E. 398, 15 L. R. A. 612. That case has been followed since in some of the text-books and is supported by some decisions in other states. But the contrary rule was followed by this court in *I. C. R. R. Co. v. Riney's Admx.*, 21 Ky. Law Rep. 1056, 54 S. W. 1011, *Illinois etc. R. R. Co. v. Scheible*, 24 Ky. Law Rep. 1708, 70 S. W. 825, and *Cincinnati etc. R. R. Co. v. Falconer*, 30 Ky. Law Rep. 152, 97 S. W. 727. These cases are, we think, in accord with the weight of authority: *Norfolk etc. R. R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236; *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227; *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401; *Stoner v. Texas Pac. Ry. Co.*, 45 La. Ann. 115, 11 South. 875; *Burdick v. Chicago etc. R. R. Co.*, 87 Iowa, 384, 54 N. W. 439; *Freemont etc. R. R. Co. v. Crum*, 30 Neb. 70, 46 N. W. 217; *White v. Chicago etc. R. R. Co.*, 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; *Bailey v. Chicago etc. R. R. Co.*, 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653.

The cardinal error in the New York rule seems to us to lie in this: That, while the railroad company has the right to take private property for public uses, it has no right to take or destroy private property by negligence. Ordinarily, where one person has negligently destroyed the property of another, he is required to compensate the person injured for the fair value of the property destroyed, and it does not lie in his mouth to say that "in destroying your property, which represented a large investment, I did you a service, rather than an injury." The owner of an estate is entitled to have his estate in such a condition as he wants it, and to keep upon it such things as he pleases. An aviary, a skating-rink, a dancing pavilion, or the like, might in the judgment of the average person add very little to the value of an estate in land; and yet these things might represent a considerable investment of money. An orchard cannot be grown in a day. It requires patience and an outlay of money or labor to produce an orchard. Yet there are not a few persons who would think that the land without the fruit trees would be worth more than with them. Still the person who wants an orchard, <sup>336</sup> and has invested his money in it, cannot be deprived of his property by the act of a wrongdoer, and left without remedy for the loss sustained, simply because his land for other purposes or to other people might be worth as much

without the orchard as with it. The railroad company here did not take the land. It simply destroyed the trees growing upon the land. We cannot see a sound distinction between the destruction of a house and the destruction of a fruit tree. The question in both cases is the same: What is the fair value of the thing destroyed?

Ordinarily in cases of this sort the court should allow evidence to be given as to what was the value of the entire premises before and after the injury, for this will be a circumstance to be considered by the jury with other evidence as to what was the value of the thing destroyed. It is not conclusive, but it is a circumstance which may be considered by the jury in determining the weight to be given the opinion evidence as to the value of the thing destroyed. But in the case at bar to have admitted the evidence would but little have elucidated the matter; for, in the end, the difference between the statements of the witnesses and those proposed to be admitted lay in the fact that the latter placed a lower value on the fruit trees than the others—some of them, perhaps, thinking they were of little or no intrinsic value. In view of the large amount of evidence that was admitted and the facts that were brought out on the trial, we conclude that the jury had the case fairly before them, that twelve practical men with the proof before them could intelligently pass upon the case, and that no substantial injury resulted from the refusal of the court to admit the evidence rejected in the case at bar.

Judgment affirmed.

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*Fires.*—*A Farmer Who Permits Dry Grass or Cornstalks to Remain in the Field* near a railroad track, where they are grown, as is customary with farmers, is not chargeable with contributory negligence nor deprived of his right of action against the railroad company for its negligence in setting out a fire: *Walker v. Chicago etc. Ry. Co.*, 76 Kan. 32, 123 Am. St. Rep. 119.

*The Measure of Damages for the Destruction of Orchards and Trees* is considered in *Evans v. Keystone Gas. Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681; *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199, 28 Am. St. Rep. 563; and the measure of damages for the destruction of growing crops is considered in *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668.



## HOWE'S EXECUTOR v. GRIFFIN'S ADMINISTRATOR.

[126 Ky. 373, 103 S. W. 714.]

**CONTRACTS—Enforcement Against Public Policy.**—If a contract is against public policy, courts will not lend their aid to its enforcement. The defense need not be pleaded; if at any time it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief. (p. 299.)

**INSURANCE COMPANY—Conspiracy to Defraud—Rights of Parties.**—When two persons enter into a fraudulent conspiracy to cheat a life insurance company, neither of them can recover of the company, and if either of them does obtain the proceeds of the policy, the other cannot recover of him. (p. 300.)

**INSURANCE—Right to Proceeds of Policy Fraudulently Procured.**—Where the insured and beneficiary participate equally in a fraud whereby a contract of life insurance is obtained which is void for want of insurable interest, and the insurance is paid to the beneficiary, the administrator of the insured cannot recover it from the beneficiary on the ground that he holds it as trustee. (p. 302.)

Robert H. Winn, for the appellant.

John A. Judy and Hazelrigg, Chenault & Hazelrigg, for the appellee.

**376** CLAY, C. This is an action by John Hays, as administrator of Morris Griffin, deceased, appellee against John G. Winn, executor of C. W. Howe, appellant, to recover the proceeds of a policy of insurance for \$9,500, which was issued upon the life of Morris Griffin by the Equitable Life Assurance Society and made payable to Howe & Johnson, a firm composed of J. G. Johnson and C. W. Howe.

The petition alleges that on the —— day of April, 1893, Morris Griffin made a written application to the Equitable Life Assurance Society for a policy of insurance to be issued upon his life for the sum of \$9,500, to be made payable to Howe & Johnson, which firm was composed of C. W. Howe and J. Gano Johnson, and that upon said application to said Equitable Life Assurance Society a policy of insurance upon the life of said Morris Griffin was issued, by which and in which it, in consideration of the advanced payment of \$266 and of an annual payment of \$266 to be made thereafter at the office of the society in the city of New York on or before the 24th day of April of each year during the continuance of the contract, promised to pay the sum of \$9,500, upon satisfactory proof of the death of Morris Griffin of Mt. Sterling, Kentucky; that all of the premiums upon said policy were paid for and in the name of said Morris Griffin, but were paid by said Howe & Johnson, **377** and the premiums were all paid upon the twenty-fourth day of April up until said

Griffin's death; that, while the application stated on its face that said Howe & Johnson were creditors of Griffin, they were not in fact creditors of his except in the sum of about \$300, of which amount \$266 was loaned him to pay said premium, and the balance was for merchandise furnished said Griffin; and that the said Howe & Johnson had no insurable interest in the life of said Griffin other than as creditors, and had no greater insurable interest in his life than the sum so loaned and the value of the merchandise so furnished; that said policy was held by said Howe & Johnson in trust for said Griffin and his estate, and to secure to them the amount owing them by said Griffin with legal interest thereon; that after the death of said Griffin satisfactory proof was presented of the death of said Griffin to the Equitable Life Assurance Society, whereupon it paid to the said Howe & Johnson on the fifteenth day of August, 1900, the proceeds of said policy in the sum of \$9,361.58, found to be due on said policy, all of which said sum was paid to said Howe & Johnson in trust for said Griffin's estate, except to the extent of the money loaned and the value of the merchandise so furnished, which amounts were due to Howe & Johnson; that the said Howe and Johnson, nor either of them, have ever paid the appellee the proceeds of said policy or any part thereof, and wrongfully withhold said sum from this plaintiff. After certain preliminary motions, which it will not now be necessary to consider, appellant filed a demurrer to the petition, which was overruled by the court. Thereafter appellant filed an answer in eight paragraphs. Paragraph 1 is a traverse, based upon appellant's want of information and <sup>378</sup> belief of the facts set out in the petition. In view of the conclusion reached by the court, it will not be necessary to set forth the defenses contained in paragraphs 2, 3, 4, 5, 7 and 8. Paragraph 6 is a plea of fraudulent conspiracy on the part of Griffin, Howe and Johnson, by which they deceived the Equitable Life Assurance Society and induced it to believe that said Howe & Johnson were creditors of said Griffin, when in truth they were not his creditors in any sum. Said paragraph further states that the consideration which moved Morris Griffin to enter into said conspiracy was the issuance of an insurance policy on said Griffin's life in the sum of \$500, to be made payable to said Griffin or his wife and children, who were dependent on him, and that the said Howe & Johnson agreed to and did maintain and keep alive said \$500 policy until it became a claim against the Equitable Life Assurance Society which issued it. Demurrers were sus-

tained to the second, third, fifth, sixth and eighth paragraphs of appellant's answer. A motion to make more specific paragraph 4 was sustained and appellant declined to plead further, and the fourth paragraph was stricken from his answer. The net result of these steps was to eliminate all defensive matter, save the traverse of the petition and the counterclaim and setoff of the premiums paid. By agreement the case was then transferred to the equity docket, and an agreed state of facts was filed. From the agreed state of facts we gather the following undisputed points: (a) "On the twenty-fourth day of April, 1893, Morris Griffin made a written application for a policy of insurance to be issued upon the life of said Morris Griffin, for the sum of \$9,500, payable to Howe & Johnson." Then the application is inserted in full. (b) In answer to <sup>379</sup> question 1 on page 2 of the application, as to the relationship of the beneficiaries, Howe & Johnson, to Griffin, the latter's answer is "Creditors." (c) Then the following question: "Has the person in whose favor the assurance is to be effected an interest in the life of the assured equivalent to the amount of the assurance applied for?" Griffin's answer is "Yes." (d) A policy of insurance for \$9,500, upon the life of Griffin was issued by the Equitable, and made payable to Howe & Johnson. This policy is set forth in the agreed facts. (e) The amount of premiums paid by Howe & Johnson and the dates when the payments were made are fixed. (f) The proceeds of the policy amounting to \$8,728.22 were paid to Howe and Johnson (Griffin having died) on August 15, 1900. (g) Neither Howe nor Johnson was a creditor of Griffin, and neither had any insurable interest in his life. From the above it will be seen that Griffin made a written application for the insurance; that he represented Howe & Johnson, not only as creditors, but creditors to the full amount of the insurance applied for. Griffin's consent was necessary in order to obtain the insurance. When he signed the application and stated that Howe & Johnson were creditors to the full amount of the policy, when they were in fact not creditors at all, he knew as well as they that it was a lie and a fraud upon the Equitable Assurance Society. These facts taken alone are sufficient to show the fraudulent character of the scheme which they had devised for the purpose of cheating the insurance company. With this view of the record, it will not be necessary to discuss the propriety of the trial court's action in sustaining the demurrer to the sixth paragraph of appellant's answer, but the rights of the parties to this action <sup>380</sup> may be determined by the agreed

facts which appear in the record, for this court has, in the case of Bromley's Administrator v. Washington Life Ins. Co., 122 Ky. 402, 121 Am. St. Rep. 467, 28 Ky. Law Rep. 1300, 92 S. W. 17, 5 L. R. A., N. S., 747, laid down the doctrine that, "if a contract is against public policy, the court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief." The only question, therefore, to be determined, is whether or not the admitted facts show a contract that is against public policy.

Prior to the institution of this action appellee instituted suit in the Lawrence circuit court against the Equitable Life Assurance Society for the purpose of recovering upon the same policy upon which suit was brought in this action. That case was before this court and is reported in Griffin's Admr. v. Equitable Life Assur. Soc., 119 Ky. 856, 27 Ky. Law Rep. 313, 84 S. W. 1164. It was decided in that case that the Equitable Life Assurance Society was not liable to Griffin's administrator on two grounds: 1. That the Equitable Life Assurance Society, in ignorance of its rights and by mistake, had paid the proceeds of the policy to Johnson & Howe, without any knowledge of the fact that they were not creditors; 2. That the transaction was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policy void, because against public policy. This court has determined, therefore, that the policy sued upon in this action is void as against public policy; and, if Griffin's administrator could not recover on that policy, it necessarily <sup>381</sup> follows then that, if the Equitable Life Assurance Society had not paid the proceeds of the policy to Johnson & Howe, neither of them could have recovered upon it. That being the case, we are unable to see upon what principle of law a right of action arises in favor of Griffin's administrator against Howe's executor to recover money to which neither is entitled. In the case of Smead v. Williamson, 16 B. Mon. (Ky.) 492, wherein one of the parties transferred his property to another to avoid the payment of his debts, this court said: "It is a contract in violation of good morals, inconsistent with honest purposes, and therefore against public policy, and not countenanced by the law nor by the tribunals which administer the law. To such a transaction the maxim applies, 'Ex turpi causa non oritur actio.' From such a foundation no cause of action can arise; and this is true, not only as to any action for the enforcement



or for a breach of the vicious contract itself, but also as to any action by which either party may attempt to regain from the other what, by reason of the invalidity of the transaction as to third persons, he may have lost for the benefit of the other party, and he could not sustain an action either on the contract or for its breach, or on any implied liability to refund what he had paid on it. The law regarding both parties as equally implicated in the illegal transaction will not interpose in behalf of one of them, either to enforce the illegal contract or to relieve him from the consequence of either a partial or a full performance of it." In the case of *Chapman v. Haley*, 117 Ky. 1004, 25 Ky. Law Rep. 2182, 80 S. W. 190, wherein the plaintiff sought to recover \$300 from one who had induced him to pay it in purchase for counterfeit money, which was never <sup>382</sup> delivered, this court said: "It is unnecessary to say that this conspiracy between these two men to purchase counterfeit money constituted an illegal transaction and was void. (The facts of the Highwayman case are then set forth.) Taken as a whole, we do not believe that the books disclose a parallel in audacity to the case at bar, saving always the history of the dark-lantern firm of Hounslow Heath, detailed above; that a like judgment did not overtake the parties litigant here, as dissolved the ancient partnership, marks the lapse of our modern procedure from the vigorous integrity with which the ancient judges administered the common law in its primitive virtue." Additional authorities might be cited, but these are sufficient to show the principle of law applicable to this case.

Counsel for the appellee, however, insist that the contract of insurance in this case should not be held to be void as against public policy, claiming that it would better comport with sound public policy to require the executor of Howe's estate to pay over the money to the widow and children of Morris Griffin. We are unable, however, to take this view of public policy. We think, if two parties enter into a fraudulent conspiracy to cheat a life insurance company, it should be held, first, that neither one of them can recover of the insurance company, and, second, that, if either one of them should obtain the proceeds of the policy, the other can, under no circumstances, recover of him. Thus, the chances of either obtaining the proceeds will be rendered as remote as possible by making such guilty participant understand that at no stage of the proceeding can he invoke the aid of the law.

Counsel for appellee further contend that Howe <sup>383</sup> being a participant in the fraud, and the Equitable Life Assur-

ance Society having paid the money to Howe & Johnson without knowledge of the fraud, and without availing itself of the plea it could have made, Howe's administrator has no right now to set up such a defense. If this be true, then Griffin's administrator would be without a cause of action, for it would be impossible for him to recover without proving that Howe & Johnson were not creditors, when the application, which he signed, alleged that they were. We do not accede to this doctrine, however, for, as has well been said in the case of *Hall v. Coppell*, 7 Wall. (U. S.) 542, 19 L. ed. 244, and cited with approval by this court: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Counsel for the appellee further invokes the doctrine laid down in the case of *Anderson's Administrator v. Merideth*, 82 Ky. 564, 6 Ky. Law Rep. 622, wherein this court said: "Where there is imposition, duress, oppression, threats, undue influence, taking advantage of necessity, or weakness, the party thus placed at disadvantage, although participating in the fraud, may be relieved in a court of equity as against his wrongdoer." For the purpose of applying this rule to this case, counsel for appellee call attention <sup>384</sup> to the fact that Morris Griffin could not write, but signed his name to the application by making his mark. Aside from this one thing, there is nothing else in the record to show that Griffin was a mere creature of Howe & Johnson, or that he was subject to their control and dominion. The petition does not allege, nor is it shown in the agreed facts, that Griffin was mentally weak, or that he was imposed upon by either Johnson or Howe, or that any fraud was practiced upon him. This court will not conclude from the mere fact that he was unable to write his name that he was deceived or imposed upon. Many of our worst criminals have been men who could neither read nor write. In the absence of anything to the contrary in the record, we must assume that Griffin, Johnson and Howe were all equally guilty. That being the case, there is certainly nothing upon which may be based the doctrine invoked by counsel for appellee.

Counsel for appellee cite a number of authorities to the effect that the designation of a beneficiary outside the prescribed class does not render the policy void, but merely renders that designation invalid, but, as was said by this court in the case of *Griffin's Admr. v. Equitable Life Assur. Society*, 119 Ky. 856, 84 S. W. 1164: "It will be found, however, that these were all cases of benevolent aid societies, the charters of which provide that only members of the family of the insured could be the beneficiaries of the insurance. Therefore the opinions hold that, where one was named as the beneficiary in a certificate or policy issued on the life of a member of the society to whom it would be ultra vires for the society to pay the insurance because not a member of the class authorized by the charter to be beneficiaries, the <sup>385</sup> insurance should nevertheless be paid to the persons authorized by the charter." In other words, with very few exceptions, the doctrine goes to this extent: That where the insurance company pays the money to the beneficiary, who has no insurable interest in the life of the assured, he simply holds the proceeds as trustee for the party who is entitled to the proceeds. In the case under consideration, however, neither the beneficiary nor the insured is entitled to the proceeds. The money paid to Howe & Johnson is in good morals the money of the Equitable Life Assurance Society. How, then, can a right of action arise in favor of Griffin's administrator as against Howe's executor to recover money which rightfully belongs to some one else?

Holding that the contract of insurance is void as against public policy, and that the parties who obtained it participated equally in the fraud by which it was obtained, and that appellee, therefore, has no cause of action against appellant, judgment herein is reversed, and cause remanded, with directions to the trial court to dismiss the petition.

O'Rear, C. J., not sitting.

Petition for rehearing by appellee overruled.

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**LIFE INSURANCE IN FAVOR OF PERSONS HAVING NO INSURABLE INTEREST.**

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#### I. Scope of Note.

We shall confine this note to the discussion of cases involving the designation of beneficiaries in the policy of insurance. The validity of assignments of life insurance to persons who have no insurable interest in the life of the insured has been exhaustively considered in other notes in this series of reports: *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906; *Chamberlain v. Butler*, 87 Am. St. Rep. 484. The assignment of benefits arising from benevolent societies or associations was considered in the note attached to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 790. The necessity of an insurable interest in the life of the insured on the part of the beneficiary was exhaustively considered in the note attached to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 93, where the earlier authorities were discussed.

#### II. Nature of Life Insurance as Distinguished from Fire or Other Insurance.

A contract of life insurance is not one of indemnity, but a mere contract to pay a certain sum of money on the death of a person, in consideration of the payment of certain annual premiums during the lifetime of the insured. The particular object of fire or marine insurance is to indemnify against pecuniary loss and the event upon which the money is made payable is the happening of the loss; but a life insurance contract is a valued policy and the event upon which the money is payable may or may not occasion a pecuniary loss: *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Appeal of Elliott's Exr.*, 50 Pa. 75, 88 Am. Dec. 525. In other words, it is important in connection with this subject to bear



in mind that life insurance is not now considered as a contract of indemnity: *Nye v. Grand Lodge*, 9 Ind. App. 131, 36 N. E. 429; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Trenton Mut. Life Ins. Co. v. Johnson*, 24 N. J. L. 576; *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Reed v. Provident Sav. Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370.

### III. Rule Where the Insurance is Procured by a Beneficiary Having No Insurable Interest.

The rule is well established that where insurance is procured by one person upon the life of another person, in whose life he has no insurable interest, the policy of insurance is void as a wagering contract which is against public policy: *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4; *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; *West v. Sanders*, 104 Ga. 727, 31 S. E. 619; *Golden Rule v. People*, 118 Ill. 492, 9 N. E. 342; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; *American Mut. Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; *Metropolitan Life Ins. Co. v. Elison*, 72 Kan. 199, 115 Am. St. Rep. 189, 83 Pac. 410, 3 L. R. A., N. S., 934; *Basye v. Adams*, 81 Ky. 368; *Rembach v. Piedmont etc. Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Loomis v. Eagle Life etc. Ins. Co.*, 6 Gray, 396; *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 473, 9 N. W. 497; *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191; *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516; *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 391; *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 81 Am. St. Rep. 644, 59 N. E. 230, 53 L. R. A. 462; *Appeal of Corson's Exr.*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; *Mayher v. Manhattan Life Ins. Co.*, 87 Tex. 169, 27 S. W. 124. The contrary rule has been declared in New Jersey: *Trenton Mut. Life Ins. Co. v. Johnson*, 24 N. J. L. 576; *Vivar v. Supreme Lodge*, 52 N. J. L. 455, 20 Atl. 36.

### IV. Reasons Urged Against Validity of Insurance in Favor of One Having No Insurable Interest.

Mr. Justice Bradley in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, said: "It is generally agreed that mere wager policies, that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance; first, with regard to marine risks, by statute of 19 George II, chapter 37, and next, with regard to lives, by the statute of 14 George III, chapter

18. In this country, statutes to the same effect have been passed in some of the states; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of real interest to him.

"It is well settled that a man has an insurable interest in his own life and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

"The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice Shaw, in a case which arose in Connecticut (in which state the present policy originated), seem to us characterized by great good sense; he says: 'In discussing the question in this commonwealth (Massachusetts), we are to consider it solely as a question of common law, unaffected by the statute of 14 George III, passed about the time of the commencement of the Revolution, and never adopted in this state. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt,' he continues, 'that a parent has an interest in the life of a child, and vice versa, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support

their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law': *Loomis v. Eagle etc. Ins. Co.*, 6 Gray, 399. We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject: See *May on Insurance*, secs. 102-111; *Bliss on Life Insurance*, secs. 20-31."

The early case of *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516, went exhaustively into the question whether the statute of 14 George III was declaratory of the common law. The court, in arriving at the conclusion that a wagering policy of insurance is void independent of the statute, said: "A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong?"

"Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurance against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England at an early day by Lord Chancellor King, in *Lynch v. Dalzell*, 4 Bro. P. C. 431, and by Lord Hardwicke, in *Saddler's Company v. Babcock*, 2 Atk. 557; and the courts in this country have generally acquiesced in and approved of the doctrine. In this state such policies would fall under the condemnation of our statute avoiding all wagers and gambling contracts of every sort; but they would, no doubt, also be held void, independently of that statute, at common law. In *Howard v. Albany Ins. Co.*, 3 Denio, 301, Bronson, C. J., asserted the necessity of an interest in the insured in all such cases, referring, in support of the doctrine, not to the statute, but to the decisions of the Lord Chancellor King and Harwicke, *supra*.

"In regard, however, to marine insurances, a different rule seems to have prevailed in England; and the cases of *Clendinning v. Church*, 3 Caines, 141, *Jubel v. Church*, 2 Johns. Cas. 333, and *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318, are supposed to have established the same rule in this state. No reason, that I am aware of, has ever been given for this difference between fire and marine policies. The latter, when of a wagering character, are vicious and evil in their tendencies as well as the former, and have been generally considered as noxious and dangerous, whenever the question has arisen. They should, therefore, as it would seem, for the reasons applied to policies against fire, have been held void, as contrary to public policy." The court, after referring to the statute of 19 George II, relative to

marine insurance and to several cases on the question whether an insurable interest was essential in marine insurance, continued: "It must have been, I think, in consequence of the doctrine initiated by that case [*Depaba v. Ludlow*, Comyn, 361], that it came to be understood in England that, in insurances upon lives, it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet that such was the prevalent impression is to be inferred from the enactment of the statute of 14 George III, chapter 48, prohibiting insurances upon lives where the person insuring had no interest in the life. Angell, in speaking of this statute, says: 'At common law it seemed to have been thought unnecessary that, at the time of effecting the policy, the assured should have had any interest which might be prejudiced by the happening of the event insured against': Angell on Life and Fire Insurance, sec. 297. In New Jersey they have no such statute; and the question now to be decided, therefore, is whether the impression which seems to have prevailed in England prior to the statute of 14 George III, was well founded.

"That impression does not appear to be supported by any adjudged case. Life insurance seems not to have been practiced to a great extent in England until a comparatively modern date, and the probability is, that as soon as such insurance became frequent, the evils of gambling in them was so apparent that parliament interfered, upon the assumption that the same rule would be applied to them as to insurances upon ships. I cannot regard that act as affording any very strong evidence that, at common law, wagering policies upon lives were valid. It seems to me that, were the naked question presented, whether such a policy comes within the admitted exception to the validity of wagers in general, that is whether it is repugnant to a sound public policy, no court, not hampered by some unfortunate or mistaken precedent, would hesitate for a moment in holding the affirmative. In Massachusetts, in Vermont, in Pennsylvania, and I believe other states, it has been so held in regard to wager policies in general. But policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies; because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds.

"Chancellor Kent was evidently embarrassed by the position of this question in England. He commences his remarks on the subject by saying that 'the party insuring must have an interest in the life insured,' and then immediately refers to the English statute of 14 George III, chapter 48, but says not a word upon the question whether at common law an interest was necessary. He however, concludes by saying that 'the necessity of an interest in the life insured, in order to support the policy, prevails generally in this country, because wager contracts are almost universally held to be unlawful, either in consequence of some statute provision, or upon principles of the common law': 3 Kent's Commentaries, 368.



"This obscure manner of treating the subject is plainly to be attributed to the reluctance of the learned author to admit (notwithstanding the impression that appears to have obtained in England), that gambling in life insurance could be tolerated at common law. That impression has been here traced, as I think, with justice to the very questionable doctrine of the English courts in regard to marine policies. It has never, that I am aware of, been recognized and adopted by any American court, and is so obviously repugnant to the plainest principles of public policy, that it is somewhat surprising that it should ever have existed. My conclusion, therefore, is, that the statute of 14 George III, avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would have been void, independently of that act."

The doctrine that a wagering policy of life insurance is void independent of the statute of 14 George III was also announced in *Hinton v. Mutual Reserve etc. Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545, 47 S. E. 474, 65 L. R. A. 161. And in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, Mr. Justice Field, in speaking of such policies of insurance, said: "Such policies create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."

Considerations of public policy are at the foundation of the rule which requires an insurable interest as a support for an insurance policy: *New York Life Ins. Co. v. Greenlee* (Ind. App.), 84 N. E. 1101; *Siegrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47. "Such insurance has a tendency to create a desire to destroy the life of the insured to obtain the insurance, there being no tie of blood or kindred, or interest, to wish its prolongation; and a person who procures for his benefit insurance upon the life of another, when he is not connected with that life by ties of kindred or dependency, or interested in its continuance from business motives, may be actuated solely by a purpose to derive profit from its destruction, and be rewarded by wagering against the amount payable at his death the sums expended in premiums during his life": *Hess' Admr. v. Segenfelter*, 32 Ky. Law Rep. 225, 105 S. W. 476.

In *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276, the court laid great stress upon the point that to allow a person to procure insurance upon a life in which he had no insurable interest would be to tempt the commission of assassination and murder. In speaking upon this point, the court observed: "Our population is rapidly becoming heterogeneous. Innumerable recruits are yearly discharged upon our shores from countries where human life is of less value than the smallest premium upon the most trivial life policy. If to all of the encouragements and facilities for the commission of homicide which now exist the rule established by the supreme court shall be annulled, and a system for the issuance or assignment of life insurance policies shall be generally adopted, by which the party taking a policy, where the assignment is direct, is, in the language of Justice Field, 'directly interested in the early death of the assured,'

not only will it have a tendency, as he says, 'to create a desire for the event,' but in a multitude of cases to make the event inevitable."

In *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4, the court took the view that life insurance is protection given to one person against the damage he may suffer through the death of another, and hence that where this element of protection is wanting, the insurance is a wagering contract.

But the reason assigned by the supreme court of Kansas in *Metropolitan Life Ins. Co. v. Ellison*, 72 Kan. 119, 115 Am. St. Rep. 189, 83 Pac. 410, 3 L. R. A., N. S., 934, is more in accord with that universally announced. It is that: "The theory of life insurance is that one who is interested in the preservation of the life of the insured may safely take and hold insurance, but that insurance in favor of one who has no interest in the life of the insured, who would be interested in his early death, is contrary to good morals and a sound public policy."

In Texas the court has placed the inhibition against insurance in favor of persons having no insurable interest strictly on the ground that no inducement shall be offered to anyone to take the life of another. The observation of the court was as follows: "In some states it is held that an element of wagering likewise enters into such contracts, which has led, as we believe, to inconsistencies in the decisions in some of the courts. Our court has placed the inhibition against such contracts upon the higher and sounder ground that the public, independent of the consent or concurrence of the parties, has an interest that no inducement shall be offered to one man to take the life of another. Making this the test in every phase of such cases, there can be no inconsistency in our decisions, and the public good will be better guarded. Applying this salutary rule, the conclusion has been reached by our courts that such policy cannot be beneficially owned by anyone not interested in the life insured, whether the policy be taken out in the first instance by the noninterested party, with or without the consent of the insured, or that he acquired the policy by assignment from the person whose life is insured, or from another who had an insurable interest": *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274.

In *Trenton Mut. Life etc. Co. v. Johnson*, 24 N. J. L. 576, the court, in holding that no insurable interest was necessary to support an action on a policy of insurance on the life of another, reviewed the English cases and discussed the statute of 14 George III, which has been referred to before in this discussion. The court said: "It was insisted by counsel, and with much apparent force, that wagers on the life of a third person are in their very nature dangerous, and contrary to the policy of the law, and to sound morality. But the danger, if any exists, would apply with great, although not with equal, force, to policies where there is an interest, as well as to those where there is none. . . . Modern experience has proved the value of insurances upon the insurer's own life, or upon the life of another upon whom the insurer may be dependent, or in whose life

he has a real or supposed interest. And it is worthy of notice that, even in England since the statute, so great is considered the injustice of requiring the continued subsistence of an insurable interest, that in practice it is disregarded, and the offices find it to their interest, and are in the common practice of paying, without any inquiry as to the interest: *Bunyon*, 23; *Barber v. Morris*, 1 *Moody & R.* 66. An insurance upon life has, in fact, but a remote resemblance to a marine or fire insurance. In the latter, the particular object is to indemnify against a pecuniary loss; and the event upon which the money is made payable is the happening of the loss, the contract being in terms to pay whatever is lost, not exceeding a specified sum. But a life insurance is a contract to pay a certain specific sum on the happening of a particular event, which may or may not occasion a pecuniary loss. Where that event is the death of the insured himself, there is nothing like an indemnity against loss to him, for he can never receive the money. In such a case, the object is to provide for some relative or friend, or creditor, and this person who is to be benefited by his death has, in many cases, the same motive to desire it as in the case where the premium is paid and the insurance obtained by a third person. Upon a view of the whole matter, I think it admits of great doubt whether the English statute, by throwing impediments in the way of life insurances, and by raising questions often of difficult solution as to the nature and amount of the required interest, can be regarded as wise and salutary. At all events, in the absence of any such legislation here, I see no solid ground upon which we can safely depart from the doctrines of the common law, and, upon reasons of doubtful expediency, hold a policy of life insurance to be something different from what it purports to be—that is to say, a contract to indemnify against loss, and not a contract to pay a given sum upon the happening of a particular event.”

#### **V. Rule Where the Insured Himself Makes a Person Having No Insurable Interest the Beneficiary.**

There is some apparent conflict amongst the authorities as to whether a person having no insurable interest may become the beneficiary of a life insurance policy. This conflict manifests itself most strongly in cases involving the assignment of a policy of insurance to a person having no insurable interest: *Gordon v. Ware Nat. Bank*, 132 *Fed.* 444, 65 *C. C. A.* 580, 67 *L. R. A.* 550. In subdivision III of this note we showed that the rule is well settled that insurance procured by one having no insurable interest is void as a wagering contract which is against public policy. The gist of the rule against such policies of insurance is the fact that they are procured by a beneficiary of that class.

A distinction is observed where the insurance is procured by the insured himself. In such a case it is well settled that he may designate as a beneficiary a person who has no insurable interest, provided that the transaction is done in good faith and not as a mere cover to evade the law against wager policies. Every person has an

insurable interest in his own life. It is the insurable interest of the insured in his own life which supports the policy of insurance. The beneficiary in such a case is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the insured. The fact that the policy of insurance was not a cover for a wager policy is generally shown by the insured paying the premiums himself. It will generally be found in those cases wherein insurance, procured by the insured himself, was held to be void on the ground that the beneficiary had no insurable interest, that the insurance was procured at the instance and request of the beneficiary, who had some understanding or agreement with the insured that he would pay the premiums: *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *United States Mut. etc. Assn. v. Hodgkin*, 4 App. D. C. 516; *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317, 46 L. R. A. 424; *A. O. U. W. v. Brown*, 112 Ga. 545, 37 S. E. 890; *Bloomington Mut. Life Ben. Assn. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; *New York Life Ins. Co. v. Greenlee (Ind. App.)*, 84 N. E. 1101; *Hess' Admr. v. Segenfelder*, 32 Ky. Law Rep. 225, 105 S. W. 476; *Campbell v. New England etc. Co.*, 98 Mass. 381; *Dolan v. Supreme Council etc.*, 152 Mich. 266, 116 N. W. 383, 16 L. R. A., N. S., 555; *Van Cleave v. Union Casualty etc. Co.*, 82 Mo. App. 668; *Locher v. Kuechenmiester*, 120 Mo. App. 701, 98 S. W. 92; *Olmsted v. Keyes*, 85 N. Y. 593; *Classey v. Metropolitan Life Ins. Co.*, 84 Hun. 350, 32 N. Y. Supp. 335; *Reed v. Provident Sav. etc. Soc.*, 190 N. Y. 111, 82 N. E. 734; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Hill v. United Life Ins. Co.*, 154 Pa. 29, 35 Am. St. Rep. 807, 25 Atl. 171; *Crosswell v. Connecticut Indemnity Assn.*, 51 S. C. 102, 28 S. E. 200; *Fairchild v. Northeastern Mut. Life Assn.*, 51 Vt. 613; *Foster v. Preferred Acc. Ins. Co.*, 125 Fed. 536; *Aetna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287.

Thus, in *Hess' Admr. v. Segenfelder*, 32 Ky. Law Rep. 225, 105 S. W. 476, the court said: "All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life: *Vance on Insurance*, sec. 49; *Heinlein v. Imperial Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 409, 59 N. W. 615, 25 L. R. A. 627; *Morrell v. Trenton Mut. Life Ins. Co.*, 10 Cush. 282, 57 Am. Rep. 92; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *May on Insurance*, sec. 112; *Bliss on Insurance*, sec. 76; *Bacon on Insurance*, sec. 729; *Beach on Insurance*, sec. 861; *Joyce on Insurance*,



sec. 729; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317, 46 L. R. A. 424; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327. On the other hand, what is known as 'wagering or gambling insurance' is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance."

The observations made by Mr. Justice Little in *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317, 46 L. R. A. 424, are very pertinent to this phase of the subject. He said: "The rule which restricts the execution of a valid contract of insurance on the life of another to one who has an insurable interest in that life is founded alone on public policy; and it may be stated in general terms that where one has an interest in a life, that interest is insurable. Beyond all controversy, a man has an insurable interest in his own life, and we fail to see when, having that interest, he enters into a contract with an insurer by which, for a stipulated sum which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the insured, why he who is most interested, whether actuated by the ties of relationship, motives of friendship, gratitude, sympathy, or love, may not make the object of his consideration the recipient of his own bounty. If it be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he should receive the amount of the policy (and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity), we might well ask ourselves why executory devises, bequests, provisions for support and maintenance provided for friends and even strangers are not subject to the same inhibition, as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly hold that unless the beneficiary or assignee has an insurable interest in the life of the insured, the policy or assignment is void, we shall undertake to show by authority that such is not the rule of the law." After an exhaustive discussion of the authorities, the learned justice concluded: "We feel assured, both by reason and the long line of adjudicated cases to which only partial reference has been made, that the true rule which should obtain in such cases is, that where

one obtains a contract of insurance on his own life and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another, whom from love, friendship, or any other reason he desires to benefit, the named beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life of the deceased than exists in his goodwill and emanates from his expressed wish to benefit. It is, after all, but a gift from him to one whose interests he desired to promote and whose welfare he wished to protect when he was dead. Such a contract is in no sense a mere hazard, and is composed of none of the elements which make up a wagering policy, and it is only these that the law, unmindful of the best interests of the citizen, prohibits."

So, also, in *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, the court, though admitting the invalidity of insurance procured by one having no insurable interest on the ground that such insurance constituted a gambling contract, refused to approve the agreement that such insurance was an incentive to crime. The court said: "In some cases they have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty for such a crime. This doctrine carried to its logical result has a far-reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in remainder after the death of a life tenant. Every like conveyance of property in consideration that the grantee shall support the grantor during his life, falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances in which the same result would follow from the application of this doctrine could be readily suggested, but we need not pursue the subject further."

In *Foster v. Preferred Acc. Ins. Co.*, 125 Fed. 536, Judge McPherson, in sustaining the validity of policies of insurance of this character, said: "But the principal reason, as it seems to me, for holding such a policy to be objectionable, is the fact that the insured retains control of the contract. He pays the premiums year by year, or at the appointed time, and it is therefore in his power to bring the contract to an end whenever he may desire. If he permits the policy to lapse, he defeats at once the interest of the beneficiary, and he may do this at pleasure. For these reasons, and also in reliance on the unbroken line of the decisions, I am of opinion that an insurable interest was not necessary to enable the plaintiff to recover upon the policy in suit."

The basis of the distinction was also shown in *Reed v. Provident Sav. Life etc. Soc.*, 190 N. Y. 111, 82 N. E. 734, Mr. Justice Gray saying: "If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy—that is to say, a speculative contract—which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to anyone whom he may appoint, or assign the policy to. What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer, and the distinction is substantial and controlling accordingly."

**VI. Rule Where the Policy of Insurance is Apparently in Favor of One Having an Insurable Interest, but in Fact not so.**

The essential thing is that the insurance be obtained in good faith and not for the purpose of speculating upon the hazards of human life: *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *Loomis v. Eagle Life etc. Co.*, 6 Gray, 396; *Kentucky Life etc. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. Although a person may procure insurance on his own life and make one having no insurable interest the beneficiary, still where the insured in procuring the policy does not act in good faith for himself, and, as a matter of fact, merely procures the insurance because of some understanding or agreement with the beneficiary, who has prevailed upon him to obtain it, and who agrees to pay the premiums and other expenses connected with the matter, the insurance will be deemed as having been procured by the beneficiary and not by the insured, and hence declared to be void as a wagering contract where the beneficiary has no insurable interest: *Cisna v. Sheibley*, 88 Ill. App. 385; *Reynolds v. Prudential Ins. Co.*, 88 Mo. App. 679; *Hinton v. Mutual Reserve etc. Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545, 47 S. E. 474; *Key-stone Mut. Ben. Assn. v. Morris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638; *Tate v. Commercial Bldg. Assn.*, 97 Va. 74, 75 Am. St. Rep. 770; *Brookway v. Mutual Ben. Life Ins. Co.*, 9 Fed. 249.

In *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890, the court, in sustaining a policy under which the beneficiary paid the premiums, said: "The public policy which prevents one person from insuring the life of another in whose life he has no insurable interest, is based upon the presumption that a temptation would be held out to the one taking out the policy to hasten, by improper means, the time when he should receive the amount of the insurance named in the policy. Such temptation would be as strong, we think, in a case where the insured took out a policy upon his own life for the benefit of one having no interest therein, and was to keep up the premiums or assessments, as it would be where the premiums or assessments were to be paid by the beneficiary. Indeed, the temptation to hasten the death of the assured might be stronger where the assessments were to be paid by him than where they were to be paid

by the beneficiary, for the reason that the beneficiary could not be certain that the insured would continue to pay the assessments. But, be that as it may, the temptation generally would be to hasten the time for the payment of premiums or assessments."

Where the insurance is for the benefit of one who has an insurable interest, it is immaterial that the person paying the premiums has no insurable interest: *Prudential Ins. Co. v. Leyden's Admr.* (Ky.), 47 S. W. 767; *McCann v. Metropolitan Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026.

The keynote of the law on this subject is that the transaction must not be a mere scheme on the part of one having no insurable interest to obtain speculative insurance: *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908. So, also, where in accordance with a previous arrangement between the parties, a policy of insurance is taken out and made payable to one who has an insurable interest, who immediately thereafter assigns it to one who has not such an interest, but who agrees to pay the premiums for his chance upon his investment, the policy is unenforceable as a wagering contract: *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A., N. S., 128; *Bromley's Admr. v. Washington Life Ins. Co.*, 122 Ky. 402, 121 Am. St. Rep. 467, 92 S. W. 17, 5 L. R. A., N. S., 747; *Bendet v. Ellis* (Tenn.), 111 S. W. 795.

## VII. Rule Where the Insurable Interest is Terminated Subsequent to the Issuance of the Policy.

a. **In General.**—The general rule is, that if the beneficiary had an insurable interest in the life of the insured at the inception of the policy, it is not necessary, in the absence of an express stipulation to the contrary, to show its existence at the maturity of the policy: *Caldwell v. Grand Lodge of United Workmen*, 148 Cal. 195, 113 Am. St. Rep. 219, 82 Pac. 781, 2 L. R. A., N. S., 653; *Schmidt v. Hauer* (Iowa), 111 N. W. 966; *Rittler v. Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Rawls v. American Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Appeal of Carson*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; *Sides v. Knickerbocker Life Ins. Co.*, 16 Fed. 650; *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625.

Mr. Justice Bradley, in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, said: "We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.



"But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But in any case it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them."

A contrary view was expressed by the supreme court of Texas in *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274, the court saying: "This we regard as opposed to the paramount reason for holding such insurance to be unlawful; that is, the danger in offering an inducement to destroy human life. If the inhibition against such transactions be that they are considered wagering contracts, as appears to be the ground upon which the decisions cited are placed, it is consistent to hold as in the cases quoted. If, however, the making of such agreements be placed upon the ground that it is against public policy for one to be interested in the death of another where he has no interest in the continuance of his life, the decisions cannot be sustained upon principle. The want of insurable interest is just as absolute where it has ceased as where it never existed, and the inducement to destroy the life insured for gain is just as strong in the one case as in the other."

**b. Effect of a Divorce on Rights of Husband or Wife as a Beneficiary.**—A wife, who is divorced from her husband after the issuance of an insurance policy on his life, in which she is named as the beneficiary, is nevertheless entitled to recover as such beneficiary. The divorce does not avoid the policy by terminating her interest, in the absence of any provision to that effect: *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 26, 64 Pac. 103; *Phoenix Mut. Life Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *White v. Brotherhood of Am. Yeoman*, 124 Iowa, 293, 104 Am. St. Rep. 323, 99 N. W. 1071, 66 L. R. A. 164; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129; *Wallace v. Mutual Ben. Life Ins. Co.*, 97 Minn. 27, 106 N. W. 84, 3 L. R. A., N. S., 478; *American Legion v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Overhiser's Admr. v. Overhiser*, 63 Ohio St. 77, 81 Am. St. Rep. 612, 57 N. E. 965, 50 L. R. A. 552; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; contra: *Schonfeld v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411.

Some conflict apparently exists in regard to the rule, but it exists merely because of the various provisions which obtain in respect to

benefit certificates. Many such certificates require the beneficiary to be some relative of or person dependent upon the insured. Hence such cases must be determined by the provisions of the constitution and laws of the benefit society in connection with the terms of the certificate. The divorced wife has been allowed to recover in some cases: *Courtois v. Grand Lodge etc.*, 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; *Schmidt v. Hauer* (Iowa), 111 N. W. 966. But in other cases where the beneficiary is restricted to certain members of the family or dependents, the divorced wife, not being within the prescribed class, is not entitled to recover: *Tyler v. Odd Fellows Mut. etc. Assn.*, 145 Mass. 134, 13 N. E. 360; *Order of Railway Conductors v. Koster*, 55 Mo. App. 186; *Dahlin v. Knights of Modern Maccabees*, 151 Mich. 644, 115 N. W. 975. But where the decree of divorce decreed the wife certain annual payments of alimony, it has been declared that she comes within a beneficiary class of "dependents" who are entitled to be made beneficiaries to such insurance: *Martin v. Modern Woodmen of America*, 111 Ill. App. 99.

In *Farra v. Braman* (Ind.), 82 N. E. 926, the court, in holding the divorced wife not entitled to recover, said: "The rights of the parties depend upon the contract entered into, and such rights must be determined by an interpretation of said contract. The decision must rest, of course, upon this particular contract. The authorities are numerous and seemingly in great conflict, but there are grounds for valid distinctions. In cases where the contract provides that the designated beneficiary must be of a particular class, it has been held that, if the person so designated is a member of the required class at the time of such designation, the fact of a subsequent divorce will not, in the absence of a sufficient designation of some other capable beneficiary, bar the right of such beneficiary to recover the amount of the policy: *Brown v. Grand Lodge A. O. U. W.*, 208 Pa. 101, 57 Atl. 176; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970. A divorced wife could not by any construction be designated as 'the wife' of the member at the time of his death, nor is she the widow of the deceased: *Fletcher v. Monroe*, 145 Ind. 56, 43 N. E. 1053; *Billan v. Hercklebrath*, 23 Ind. 71; *Smith v. Smith*, 35 Ind. App. 610, 14 N. E. 1008. But where the contract provides that the benefit fund is payable, in event of death, to persons of a particular class, a beneficiary who claims such fund must, in the absence of a valid designation, establish the fact of membership in such class at the time of the death of the insured. Therefore, to make a designation available after the death of the insured, there must have existed such relation between the beneficiary and the member at the time of the death of the member as is contemplated by the agreement and the laws and by-laws of the order: *Order of Railway Conductors v. Koster*, 55 Mo. App. 186; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Tyler v. Odd Fellows etc. Assn.*, 145 Mass. 134, 13 N. E. 360; Niblack on Accident Insurance and Benefit Societies, 2d ed., sec. 164."

## c. Effect of Termination of Relation of Debtor and Creditor.

1. By Payment or Participation in General Assignment by Debtor. In *Ferguson v. Massachusetts Mut. Life Ins. Co.*, 32 Hun, 306, the court said: "There being a debt at the time the policy is issued, it is then valid. It contains no condition referring to the continuance of the indebtedness. But, on the contrary, the policy evidences a flat and positive promise to pay a given sum at the termination of the life named. Death removes the last condition precedent, except, perhaps, the delivery of proofs of the death. Then the holder becomes entitled to demand the sum named in the promise. Of course, in fire policies, the nature of the promise is different. That is a contract of indemnity against loss. The nature and extent of the loss must be shown, and only to the making good of the loss is the insurer bound in the very terms of his contract. No statute has gone so far as to declare that a life policy, valid in its inception because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid: *Goodwin v. Massachusetts Life Ins. Co.*, 73 N. Y. 497. Besides, from the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor; he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy. So, too, in the case at hand, if we were to hold that the policy was avoided by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid, after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its promise, which it had not kept. It would be the gainer by the incidental circumstance that the debtor had paid what only he justly owed his creditor or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of their business. We are, upon principle, prepared to agree with the English court in its conclusion in *Dalby v. India and London Life Assurance Co.*, 28 Eng. L. & Eq. 312. Indeed, we think the doctrine of that case has been accepted in this state, and that both upon principle and authority we should say that the insurer is bound to fulfill its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom."

So, also, in *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625, in a case where the creditor, who was the beneficiary, participated in a general assignment by the debtor, the court said:

"Justice seems to favor the view that the policy is good if an insurable interest existed when the contract of insurance was made, because otherwise, in cases like the one here under consideration, actual loss would result to the holder of the policy without fault on his part. If the debt of Hennessy to the J. L. Mott Iron Works had been paid, as claimed, there is no pretense that the premiums paid by the latter to the insurance company have ever been returned. The sum of the premiums would be a complete loss if the assignment of the policy is to lose all validity by the payment of the debt."

But in *Crotty v. Union Mut. Life Ins. Co.*, 141 U. S. 621, 12 Sup. Ct. Rep. 749, 36 L. ed. 566, Mr. Justice Brewer said: "If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectible by his executors or administrators. In 2 May on Insurance, 3d ed., sec. 459a, the author says: 'A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums and expenses, should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property': *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370."

2. **Running of Statute of Limitations Against the Debt.**—A debt, though barred by the statute of limitations, gives to the creditor, nevertheless, such an insurable interest in the life of the debtor as will support a policy of insurance in his favor: *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Chicago Title etc. Co. v. Haxtun*, 129 Ill. App. 626; *Townsend v. Tyndale*, 165 Mass. 293, 52 Am. St. Rep. 513, 43 N. E. 107; *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280.

#### VIII. Right of Insurance Company to Waive Want of Insurable Interest.

The want of an insurable interest may be waived by the insurance company, and in such case a claimant of the proceeds of the policy cannot take advantage of it: *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650, 55 Atl. 191.

In *Alfsen v. Crouch*, 115 Tenn. 352, 89 S. W. 329, it was said: "A provision in the constitution or by-laws of a mutual aid society, limiting the parties who may be made beneficiaries under certificates issued by the society, may be waived by the society, and cannot be taken advantage of by third parties: *Manley v. Manley*, 107 Tenn. 191, 64 S. W. 8; *Johnson v. Knights of Honor*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125. And the payment by an insurance company of an illegal and invalid insurance policy does not confer any basis in equity for outside parties to lay claim to the money: *Smith v. Pinch*, 80 Mich. 335, 45 N. W. 183."



**IX. Matters in the Nature of an Estoppel to Raise Question of Want of Insurable Interest.**

a. **In General.**—In *United States Mut. Acc. Assn. v. Hodgkin*, 4 App. D. C. 516, the insured, in his application for insurance, described the beneficiary as one "whose relationship to me is that of a friend." The court, in holding that the insurance company was estopped from claiming that the beneficiary had no insurable interest, said: "Here was a proposition to become a member of the association upon a distinct and unequivocal condition that the person designated by him—who clearly had no insurable interest in his life—should receive the benefit in the event of his death while a member. The application is in the form required, and is expressly referred to and made a part of the policy. This proposition was received, considered and accepted by the directors, who received the required fee and extended the certificate of membership. There was no misrepresentation and no mistake. This is no case of waiver by an unauthorized agent. It is the act of the association itself, and ought to estop it to say that the acceptance was upon a condition utterly at variance with the proposition for membership, and which would render the certificate wholly inoperative as regards the express intent of the assured. By this deliberate act the association must be presumed to have changed their new rule, and to have gone back to the plan contemplated by the by-laws for the express purpose of receiving this applicant into their membership."

And in another case where the insurance company sought to take advantage of a stipulation in the policy that "All claims under this policy shall be subject to proof of interest," the court said: "As it seems to me, the company is estopped from taking advantage of this provision. Whatever effect it may have in a case where the company has no knowledge of the lack of insurable interest upon the part of the beneficiary until after the death of the insured, it cannot be held to be available where such lack of interest was communicated to the company at the time the insurance was taken out, and where the company has received renewal premiums with continued knowledge of the fact. In such a case all the elements of estoppel by conduct are present. The company had timely knowledge of the fact of which it now desires to take advantage, but, without interposing any objection, either when the policy was issued, or afterward as it came to be renewed, put the insured in a worse position by taking and retaining his money under the guise of a contract which it must have had no real intention to fulfill. The company was under a duty to speak if it meant to insist upon the provision, and therefore, having misled the insured by its silence, and by receiving his money, it must be held to have waived the proof of interest on the part of the beneficiary. To my mind it is so clear that the company is estopped from setting up this defense that further discussion of the subject seems to be unnecessary": *Foster v. Preferred Acc. Ins. Co.*, 125 Fed. 536.

But it has also been said in this connection that "An unlawful agreement cannot defeat a lawful right. A contract which is void as being against public policy cannot create an estoppel, if indeed it has vitality for any purpose": *Tate v. Commercial Bldg. Assn.*, 97 Va. 74, 75 Am. St. Rep. 770, 33 S. E. 382, 45 L. R. A. 243.

Where a plaintiff who was named as beneficiary surrendered the policy to defendant to be canceled, upon an agreement that defendant would receive the proceeds in trust for plaintiff, defendant cannot, after receiving the proceeds, refuse to pay it over to plaintiff on the ground that the latter had no insurable interest in the life of the insured: *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. Where the insured did not object during his lifetime, and the insurance company does not object to the attempt of the beneficiary, who was a creditor of insured, to reimburse himself for premiums formerly paid by him on canceled policies on the life of insured by effecting subsequent insurance, the administrator of the insured cannot do so: *Grant's Admr. v. Kline*, 115 Pa. 618, 9 Atl. 150. In a suit to recover premiums paid on insurance which was void as against the insurance company for fraud of the agent, the plaintiff is estopped by the recitals in the application that he had an insurable interest from claiming that he had no such interest: *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100. Payment of the amount of the policy in court waives the question whether the beneficiary belongs to the prescribed class of beneficiaries which are limited by the constitution of the association to the family or dependents of the insured: *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125.

**b. Effect of Clause Making Policy "Incontestable" After Certain Period.**—A policy of life insurance which is opposed to public policy because of a want of insurable interest in the beneficiary is not rendered enforceable by a clause in the policy making it incontestable after a certain period. A rule resting on general principles of public policy cannot be defeated by a private convention: *Bromley v. Washington Life Ins. Co.*, 122 Ky. 402, 121 Am. St. Rep. 467, 92 S. W. 17, 5 L. R. A., N. S., 747; *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561, 42 L. R. A. 247; *Auctil v. Manufacturers' Life Ins. Co.*, [1899] App. Cas. 604.

But in *Wright v. Mutual Ben. Life Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749, 23 N. E. 186, 6 L. R. A. 731, the court, after an exhaustive consideration of the subject, came to a contrary conclusion. The court said: "It is not a stipulation absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after

its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law, and such an agreement is in accord with the policy of statutes of that character: *Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166.

"No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years, when in the end, and after the payment of premiums, the death of the insured and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not and never had an existence except in name. While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement, to the effect that if cause be not found and charged within a reasonable and specified time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid."

#### **X. Right to Proceeds Where Designation of Beneficiary is Invalid or Ineffective.**

a. **In General.**—In *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, the court, in an exhaustive opinion reviewing cases involving the want of insurable interest, said: "Some of these cases were actions against insurance companies upon what we regard as wagering policies, and others of them involved controversies over the proceeds of such policies which the insurance companies had voluntarily paid. No agreement is required to show that, in cases of either character, the courts ought not to afford any relief whatever, but should, in every instance, leave the parties exactly as they were before the litigation began. No court can properly concern itself with the enforcement of a contract which is contrary to public policy, and for that reason void, nor with the adjustment of alleged rights or equities growing out of such a contract. This doctrine is so thoroughly established and so universally recognized that it will not, we apprehend, be questioned; but it has evidently been too often overlooked by the courts in their efforts to do what they conceived to be 'justice.' Our Civil Code (section 3668) declares that 'a contract which is against the policy of the law cannot be enforced,' and that 'wagering contracts' are of this character. Whenever, therefore, it appears that a particular contract of life insurance falls within the prohibited class, no court of this state should have anything to do either with its enforcement or the distribution of its proceeds." So, also, in *Griffin's Admr. v. Equitable Assur. Soc.*, 119 Ky. 856, 84 S. W. 1164, the court said: "The transaction as to each policy was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policies void, because against public policy; and, if void, no cause of

action against appellee exists in favor of Griffin's administrator for the recovery of their proceeds: *Bayne v. Adams*, 81 Ky. 368; *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 924; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572. . . . The authorities cited by appellants' counsel in support of the last proposition do, in the main, hold that the designation of a beneficiary 'outside the prescribed class' does not render the policy void, but merely renders that designation invalid. It will be found, however, that these were all cases of benevolent aid societies, the charters of which provided that only the families of the members could be the beneficiaries of the insurance. Therefore the opinions hold that, where one was named as beneficiary in a certificate or policy issued on the life of a member of the society to whom it would be ultra vires for the society to pay the insurance because not a member of the class authorized by the charter to be beneficiaries, the insurance should nevertheless be paid to the persons designated by the charter. Other cases cited by counsel for appellant, such as *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460, 24 L. ed. 251, *Mayher v. Manhattan Life Ins. Co.*, 87 Tex. 169, 27 S. W. 124, and *Warnock v. Davis*, 104 U. S. 781, 26 L. ed. 924, seem to hold that, where policies are issued to beneficiaries who have no insurable interest, and the circumstances are not such as to make the policies absolutely void as wagering policies, then the beneficiaries are to be treated as assignees or appointees for the purposes of receiving the money for whoever may be lawfully entitled to enjoy it. The doctrine applied in these cases cannot obtain here."

In Texas a recovery is allowed against the insurance company in cases where the policy is made payable to one who has no insurable interest or assigned to one having no such interest, the court stating the following strong reasons for the rule: "This rule does no wrong to the insurance company. It, having agreed to pay the money on the death of a named person, ought not to be permitted to avoid liability upon its contract upon the ground that it has made an unlawful agreement, when that contract can be enforced in favor of a person who is in nowise concerned in the unlawful part of the transaction. It is held by the courts of this and other states that when one secures a policy upon his own life and transfers it to another who has no insurable interest, the want of insurable interest cannot be set up as a defense by the insurance company; the policy or the assignment is not void as to the insurance company, but will be enforced. If this be correct, then why should it be said that the policy issued by the company contrary to law should be held void as to it? The reason would seem to be equally strong to enforce the contract in favor of one who was entirely innocent of participation, as in favor of him who voluntarily places the insurance in the name of one who cannot lawfully receive it. If the insurance company may set up the illegality of such a contract, then the object of the law will be frustrated and the making of such unlawful agreements by



insurance companies will be encouraged, for they would thus be enabled to reap the benefit without incurring the risk of such business. If the insurer is held liable, and the payee in a policy is denied its benefits when unlawfully obtained, both parties to the unlawful contract will be denied relief, and the beneficial objects of insurance upon the life be attained by giving the benefits to the estate of the insured, and no inducement will be offered to destroy the life upon which the risk is placed": *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274.

In accordance with the above rule the heirs of the insured were allowed to recover against the insurance company in a case where the beneficiary had no insurable interest: *Mayher v. Manhattan Life Ins. Co.*, 87 Tex. 169, 27 S. W. 124.

In numerous instances in the case of beneficial insurance, the heirs of the insured have been allowed to recover the proceeds of the insurance where the designation of a beneficiary has been found to be invalid or ineffective for want of an insurable interest: *Order of Mutual Companions v. Griest*, 76 Cal. 494, 18 Pac. 652; *Knights of Columbus v. Rowe*, 70 Conn. 545, 40 Atl. 451; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065; *Sargent v. Supreme Lodge Knights of Honor*, 158 Mass. 557, 33 N. E. 650; *Shea v. Massachusetts Ben. Assn.*, 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Doherty v. Ancient Order of Hibernians etc.*, 176 Mass. 285, 57 N. E. 463; *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675.

**b. Effect Where the Proceeds have been Paid by the Insurance Company.**—In the principal case the rule was laid down that where the insured and the beneficiary fraudulently conspire to obtain life insurance which is void for want of an insurable interest in the beneficiary, and the insurance is paid to the beneficiary, the administrator of the insured cannot recover it from the beneficiary on the theory that it is held by him as a trustee. And the mere fact that the insured could not write and signed his name to the application for insurance, by making his mark is not evidence that he was a mere creature under the control and dominion of the beneficiary and hence that circumstance is not sufficient ground to allow his heirs to recover the proceeds of the policy from the beneficiary: *Howes' Exr. v. Griffin's Admr.*, 126 Ky. 373, ante, p. 296, 103 S. W. 714. The same rule has been applied where the insurance policy was procured under an agreement between the insured and a person having no insurable interest, that such person should pay the premiums and receive the proceeds of the policy, even though the policy was procured in the name of the insured and assigned to such person pursuant to the previous agreement: *Hinton v. Mutual Reserve etc. Life Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545, 47 S. E. 474, 65 L. R. A. 161. But the maxim, in pari delicto, is not inflexibly applied to an agreement which is not intrinsically immoral or evil, where no fraud or deception upon anyone is designed by it, and where it is condemned by the law because contrary to the interests of society; but

the court will consider whether public policy will be promoted and like agreements be discouraged by enforcing or avoiding the agreement. If the policy of the law will be advanced by granting relief, it will be given. Thus the court said: "To allow anyone to retain the proceeds of a policy of insurance, if the insurance company chose voluntarily to pay it, which was effected for his benefit upon the life of another, in which life he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary or for the benefit of the insured and then assigned by him to the beneficiary, would encourage speculation upon the chances of human life, with a direct interest in its early termination, contrary to the public interest, and in contravention of the policy of the law. The denial of all right in the beneficiary to retain in such case more of the proceeds of the policy of insurance than is necessary to reimburse him for premiums paid and expenses incurred dissipates all hope of profit and removes the temptation to speculate in insurance upon human life": *Tate v. Commercial Building Assn.*, 97 Va. 74, 75 Am. St. Rep. 770, 33 S. E. 382, 45 L. R. A. 243.

Where the insurance company pays the money to the beneficiary who has no insurable interest in the life of the insured, it is sometimes declared that he simply holds it as trustee for the heirs, or other legal representatives of the insured: *Howe's Exr. v. Griffin's Admr.*, 126 Ky. 373, ante, p. 296, 103 S. W. 714; *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17; *Riner v. Riner*, 166 Pa. 617, 45 Am. St. Rep. 693, 31 Atl. 347; *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286.

In *Bendet v. Ellis* (Tenn.), 111 S. W. 795, the court in a case where the policy had been assigned pursuant to an agreement to that effect made prior to the procurement of the policy, in allowing the administratrix to recover the proceeds of the policy less certain premiums paid by the assignee, observed: "It has been thought by the judges in some of the cases above cited that the best way to prevent wager contracts of insurance is, not only to deny relief in contracts of this character when they are sued on, but to deprive the persons who finance such enterprises of the power to hold the proceeds when paid over to them by the insurance company. We find the theory, if not decided, intimated, that a kind of trust is raised in behalf of the representatives of the person whose life is insured, or at least that a duty to pay is imposed by law, or a right of action is raised out of the facts. This is somewhat similar to the rule that, although a fund was realized as the result of an illegal transaction, yet if paid over to a third person for one of the participants, that person cannot retain it on the ground of the original illegal transaction, but the law will raise an indebtedness in assumpsit against him in favor of the party for whose benefit the fund was placed in his hands: *McMullen v. Hoffman*, 174 U. S. 656, 657, 19 Sup. Ct. Rep. 846, 43 L. ed. 1117; *Tenant v. Elliott*, 1 Bos. & P. 2. In the last case cited 'it was held that where two persons had entered into an illegal contract in regard to insurance, and, a loss having accrued, the insured paid the

money to a third person to be paid to plaintiff, the third person could not himself retain the money, because it arose out of an illegal contract.' It seems to be in analogy to the rule, or rather this exception to the general rule, that some courts have construed the transaction as money paid for the benefit of the representatives of the insured, and further, it may be said that, the illegal arrangement being completed and at an end, there is no question of enforcing any illegal contract. Another view is: The recovery is not allowed in the way of enforcing an illegal contract; but it is said in substance that the party had an insurable interest in his own life, and that far the contract is good. The assignment simply is void. This seems to be the principle on which *Warnock v. Davis* [104 U. S. 775, 26 L. ed. 924] proceeds. . . . Whatever may be the true theory underlying the action, it is certain that the policy of the law, in respect of wager contracts of insurance, is best subserved by granting the relief."

But where the heirs of the insured are allowed to recover from one having no insurable interest, who has collected the proceeds of the policy, the latter is allowed to retain his disbursements in keeping the policy alive: *Ruth v. Katterman*, 112 Pa. 251, 3 Atl. 833; *Cammack v. Lewis*, 15 Wall, 643, 21 L. ed. 244.

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### YOUNG v. COMMONWEALTH.

[126 Ky. 474, 104 S. W. 266.]

**BURGLARY—Entry by Trick or Fraud.**—Where a farm laborer, who occupies a house with the owner's family, while on leave of absence obtains a key ostensibly to obtain some of his clothing, but really with the intent of stealing property therefrom, and does so enter and steal, he commits the offense of house-breaking, a statutory crime akin to burglary. (p. 328.)

Max Hanberry, for the appellant.

N. B. Hays, attorney general, and C. H. Morris, for the commonwealth.

<sup>474</sup> O'REAR, C. J. Appellant was convicted of house-breaking. The indictment was returned under section 1162 of the Kentucky Statutes of 1903, which reads: "If any person . . . shall feloniously break any dwelling-house or any part thereof, or any outhouse belonging to or used with any dwelling-house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years." <sup>475</sup> Appellant was a laborer on the farm of the owner of the mansion house charged to have been broken into. He seems to have occupied the house with the

owner's family. He got leave of absence for several days under pretense of visiting another point. The owners locked up their house and left for the day. Appellant went to the wife of one of the owners, and got from her the key to the house, ostensibly to take away some of his clothing. Thus gaining an admission to the house, he stole and carried therefrom a suit of clothes and other articles, the property of another. The circuit court instructed the jury that if appellant obtained the key by deception, fraud, or device, with the felonious intention to break and enter the house with intent to steal therefrom property of value, and did so enter and steal, it was a violation of the statute. This appeal raises the correctness of this instruction.

The offense involved is akin to the crime of burglary. It has most of the elements of the latter, except that it need not be done in the night-time, and the offense to be committed after the entry to complete the felony is confined to larceny. So that the decisions bearing upon the essential features of burglary are apposite to the question at bar. It is held without exception that any force applied to effect the entry is sufficient to constitute that part of the offense—as, for example, the raising of a latch (*State v. Wilson*, 1 N. J. L. 439, 1 Am. Dec. 216), the raising of a window (*State v. Boon*, 13 Ired. (N. C.) 244, 57 Am. Dec. 555), or pushing open a closed door (*State v. Conners*, 95 Iowa, 485, 64 N. W. 295). It is also held that there is a constructive forcible entry if by fraud or deception an entry is obtained, as where by a knock at the door the owner is induced to believe <sup>476</sup> he is unbarring to a friendly or business call (*Johnston v. Commonwealth*, 85 Pa. 54, 27 Am. Rep. 622), or by impersonating one having a right to enter an entrance is gained (*State v. Johnson*, Phil. (N. C.) 186, 93 Am. Dec. 587), or obtaining an entrance under a pretense of doing a permissible act and using the advantage to enter other apartments for the purpose of the theft (*Commonwealth v. Ballard*, 18 Ky. Law Rep. 872, 38 S. W. 678. From all the cases it will be gathered that the crime of burglary, as well as the kindred crime of housebreaking under the statute, is an offense against the security of the habitation. It is the possession that must be invaded to breach the statute: *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; 1 Bishop's Criminal Law, 6th ed., sec. 577.

The law regards force and fraud with equal abhorrence; and whether the tenant's possession is invaded by one means or the other for the purpose of stealing from his home is all one in the eye of the law. Conceding that appellant had the



right to enter the house in question to take away his own clothes, and had he entered under such circumstances and then formed and executed the intention to steal the landlord's clothes he would not have been guilty under the statute, our case comes down to a narrower state of facts; for, appellant having gone away under arrangement with his landlord, his relation as cotenant of the house had ceased for the time being. Though he had the right, notwithstanding, to remove his clothes from the house, he had not the right to enter the house for that purpose, except by the consent of the landlord. When, therefore, he simulated that he desired the key for that purpose, but in reality for the purpose of stealing from the house, he <sup>477</sup> resorted to a trick that was a fraud upon the landlord, and one that gave him no right of entry, and therefore no protection. The case where one having the right to enter executes a previous purpose to steal is not guilty of larceny (*State v. Moore*, 12 N. H. 42; *Clarke v. Commonwealth*, 25 Gratt. (Va.) 908) is quite different from the one at bar, where there is no right of entry, the permission and means of entry having been obtained by fraud, and therefore conferring no right: *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9.

We perceive no error in the instructions. The judgment is consequently affirmed.

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*For Authorities upon the Question Decided in the Principal Case, see Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9; State v. Howard, 64 S. C. 344, 92 Am. St. Rep. 804; note to People v. Richards, 2 Am. St. Rep. 386.*

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## SPAULDING v. GRUNDY.

[126 Ky. 510, 104 S. W. 293.]

**PARTY-WALL—Payment for Use.—One Who Uses a Wall Erected on the Dividing Line** by the owner of an adjacent lot should pay a reasonable price for the use estimated as of the time the user takes place, and this although neither he nor his vendor was a party to the erection of the wall, and made no agreement express or implied concerning it. (p. 333.)

H. W. Rives, for the appellants.

John McChord, for the appellee.

<sup>512</sup> CARROLL, J. Appellants are the owners of a lot, with a store building thereon, in the city of Lebanon. Appellee owns the adjoining lot. Both lots were formerly owned

by one Ben Spalding, and the parties to this litigation acquired their respective lots by various conveyances. For a considerable time, the buildings on both lots extended back the same distance from Main street; the dividing wall between them being recognized as a joint or partnership wall. Afterward, appellants' vendors increased the depth of their store building by extending the division wall on the line between the lots, and erected a wall two stories in height above the ground. The extension of the partnership wall between the two buildings was <sup>513</sup> made by the appellants' vendors at their own expense, with the expectation, belief, and assurance that, when appellee or his vendors should extend their building and use the wall erected by appellants' vendors for the purpose of building on or to it, they would contribute their share of the expense of erecting, it, or pay to appellants one-half of the value of the wall so taken and used at the time it should be used. Appellee acquired title to his lot in 1881, and since then at various times he has extended the store building on his lot, until the storeroom now reaches to the end of the wall erected by appellants' vendors, and is using and utilizing the wall as the eastern wall of his building. Appellee refusing to contribute anything to the expense of erecting the wall made by appellants' vendors, or pay any part of the value of the wall used by him, they brought this action, seeking to recover from appellee one-half the value of the wall erected by their vendors and used by him. To their petition a demurrer was sustained, and judgment entered dismissing it.

The statement of the facts heretofore made is taken from the petition, and for the purposes of this appeal must be accepted as true. There was no written or other agreement between any of the parties concerning the erection or use of this partition wall, so that the question to be decided may be thus stated: Will a person, who uses for his own convenience and benefit an adjoining wall erected by another person, be required to contribute to the vendee of the person erecting the wall one-half, or his fair proportion of the cost thereof? The center of the wall erected by appellants' vendors was the dividing line between their lot and the adjoining lot, now owned by appellee, and it may be conceded that, at <sup>514</sup> any time before appellee took possession of the wall or commenced to use it as a party or partnership wall, it might have been removed by the persons who erected it or their vendees. Appellants, under the conveyances, became entitled to all the rights in the wall that their vendors had; in other words, their

status was the same as if the wall had been erected by them. So that the question, when narrowed down, resolves itself into this: If A erects a wall, the center line of which is the dividing line between his property and that of B's, and afterward B uses the wall without any agreement or arrangement, written or otherwise, to contribute to the expense of erecting the wall, will the mere fact that B is using it as one of the walls of the building erected by him entitle A to recover from B his proportionate cost of the wall?

When appellee built up to this wall, and used it as one of the exterior walls of his building, appropriating to himself the use of the wall, and enjoying the benefits of the labor and money expended by the persons who erected it, it would seem fair and just that he should be required to contribute toward the cost thereof. Numerous questions concerning party-walls have come before the courts, and in many material particulars there is wide conflict and difference in the opinions concerning the rights and liabilities of the persons who erected the walls and those who use them. Generally, party-walls are erected under an agreement as to their use, and in many states are regulated by statute, and often an issue has arisen as to whether these agreements are personal to the parties or covenants running with the land and enforceable by and against remote vendees of the persons who made the agreement at the time <sup>515</sup> the wall was built. There was no privity of contract respecting this wall between appellants and appellee; nor can it fairly be said that appellee had any connection with the "expectation, assurance, and belief" existing in the mind of appellants' remote vendor when he erected this wall. But, back of this, there stands out in support of appellants' claim the substantial fact that appellee has appropriated to his own use a part of this party-wall erected by appellants' vendors, without having paid anything therefor. So that, aside from any of the distinctions that involve the law of party-walls in obscurity and doubt, there remains the proposition strongly put in behalf of appellants that justice and fair dealing demand that appellee should contribute toward the payment of a wall that he has used to his advantage and benefit. Indeed, it might with propriety be said that the question here involved partakes more of the nature of a suit for contribution than one involving the doctrine of party-walls. Placing the case upon this ground simplifies very much the question to be disposed of. We need not inquire into the law concerning covenants running with the land, as it bears upon the question of party-walls; nor is it necessary to attempt to

reconcile the conflicting decisions touching the rights of remote vendees in respect to them. There is authority founded in reason and justice that requires a person who uses a party-wall, in the absence of any agreement or contract, to contribute his fair proportion of the cost thereof to the person erecting the wall, or, to put it in another and perhaps a better way, to pay a reasonable price for the use of the wall.

One of the earliest cases in support of this doctrine is *Campbell v. Mesier*, 4 Johns. Ch. 335, 8 Am. Dec. 516 570, where Chancellor Kent, writing, held that where one owner rebuilt a party-wall that was used by the adjacent owner, the latter might be required to contribute to the expense of its erection, saying: "I have not found any adjudged case in point, but it appears to me that this case falls within the reasonable and equitable doctrine of contribution, which exists in the common law, and is bottomed and fixed on general principles of justice." Looking in the same direction is *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347, where the court held that, although a promise to pay for a party-wall would not be implied from the fact that the builder, with the knowledge of the adjacent owner, erected the wall, yet such promise might be inferred from the fact that the person erecting the wall undertook and completed it with the expectation that the adjacent owner would pay for it. In *Sanders v. Martin*, 2 Lea (Tenn.), 213, 31 Am. Rep. 598, the facts were very similar to those here presented. Sanders and Martin owned adjoining lots in the city of Memphis, separated by a party-wall. The houses were two stories high without any cellar. Sanders erected a three-story brick house on his lot, and used the party-wall, raising it one story higher. He also, with the consent of Martin, made a cellar, which necessitated underpinning the party-wall by a wall of the same thickness, one-half on his lot and the other half on the lot of Martin. Sanders expected that, when Martin came to use the cellar and raise his house higher, he would contribute one-half the actual cost of these improvements. Afterward Martin erected a building on his lot, using in its construction the wall erected by Sanders. Thereupon Sanders brought an action for contribution against Martin. In the opinion, the court said: 517 "The common law is singularly obscure on this subject, and the decisions few, conflicting, and unsatisfactory. It seems certain that the common law does not recognize the right of the owner of land to compel the owner of an adjoining lot to build a party-wall; nor can either demand contribution from the other for a wall erected in whole or in part on



the land of such other person, nor for any incidental benefit the latter may derive from a wall erected entirely on the land of the builder. The authorities stop short of the case before us, and that is, whether, after the wall has been underpinned and raised in height by one for his own convenience, he can claim contribution from the co-owner when the latter actually uses these additions. In the forum of conscience the answer would at once be that the latter ought to pay the former for the benefit received by his labor and expenditure. The argument of the learned counsel for the defendants is that this court is governed by the law, not by principles of abstract right; that the defendant Martin is not entitled to treat any erection made by a third party on his own land as his own; and, in fine, that the client stands upon the letter of the law, and claims all he can get. If one owner can rebuild a party-wall, which has become dangerous, and compel contribution, it is clearly upon the equitable and moral principle that the expenditure is for the benefit of both, and that the right of easement is a sufficient basis upon which to justify interference and raise an implied contract. The same basis exists where a wall is added to and actually used. If both of these parties had dug their cellars and added additional stories to their houses at the same time, although only one of them built the addition to the party-wall, a promise by the other to pay for the moiety of the <sup>518</sup> wall would be implied. Is there any reason in law why the same implied promise would not arise where, after the addition had been made by one, the wall was used by the other? The relation of the parties created by the joint easement in the new wall would seem to be as efficient in the case of an addition to the wall as in the case of rebuilding the same wall. Upon the case made in the bill, if established by the testimony, the complainant is entitled to relief. The measure of relief, however, is not the cost of the additions to the wall, but the moiety of the value of the additions at the time they were actually used by the defendants. They might never have been used, in which case no contribution whatever could be had. They might have been erected when the work for some reason, was exceptionally costly, and used when the wall could have been done at half price, or when the wall itself had become dilapidated by time. Martin cannot be called upon to pay more than half the value of the wall when used." In *Willford v. Gerhard*, 22 Ky. Law Rep. 203, 56 S. W. 416. the court quoted with approval *Campbell v. Mesier*, 4 Johns. Ch. 335, 8 Am. Dec. 570, and *Sanders v.*

Martin, 2 Lea (Tenn.), 213, 31 Am. Rep. 598, and upheld the doctrine of contribution in cases of party-walls.

The conclusion we have reached is not free from doubt, and is contrary to the views held by a respectable number of courts; but we are of the opinion that a person who uses a wall erected on the dividing line by the owner of the adjacent lot should pay a reasonable and fair price for the use thereof, estimated as of the time when the user takes place. And this, although neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it.

519 The judgment is reversed, with directions to proceed in conformity with this opinion.

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*The Liability of an Adjoining Owner to Make Compensation for his use of a wall erected on the dividing line between his property and that of his neighbor, is discussed in the note to Dunscomb v. Randolph, 89 Am. St. Rep. 939.*

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## CITY OF GEORGETOWN v. HAMBRICK.

[127 Ky. 43, 104 S. W. 997.]

**PUBLIC STREETS**—Purposes for Which Dedicated.—When a street has been dedicated for ordinary street purposes, it must be presumed that the parties contemplated that it is to be used in the usual way, that is, for a carriageway in the center and sidewalks on the sides. (p. 334.)

**PUBLIC STREETS**—Regulating Width of Sidewalks.—A city council may fix the width of the carriageway or the sidewalks of a street, or determine how much space shall be given to each, but it cannot say that the whole street shall be used as a carriageway and no part of it used as a sidewalk. (p. 334.)

**PUBLIC STREETS**—Right of Abutting Owner to Construct Sidewalk.—The owner of property abutting on a public street is entitled to construct a sidewalk of a reasonable width, and the city cannot arbitrarily prevent him from so doing. (p. 334.)

James B. Finnell, Jr., for the appellant.

B. M. Lee, for the appellee.

45 HOBSON, J. About the year 1888, appellee's husband, who then owned property on the south side of Bourbon street, in Georgetown, between Hamilton and Mulberry, put down a curb and built for part of the front a sidewalk four feet wide. The street was in the outskirts of the town and was thirty feet wide. He devised the property to appellee, and she began in the year 1906 the construction of a pavement four feet wide

within the curb for the entire front of the property. The city council notified her not to build it, and, she declining to recognize the notice, it filed this suit to enjoin her building the sidewalk. On final hearing the circuit court dismissed the proceeding, and the city appeals.

The street was dedicated for ordinary street purposes, and it must be presumed the parties contemplated it was to be used in the usual way. In ordinary city streets there is a carriageway in the center and sidewalks on the side. The sidewalks are as necessary as the carriageway, and both are equally within the contemplation of the parties in the dedication. The city council, under its power to regulate and control the streets, may fix the width of the carriageway or the sidewalks, or determine how much space shall be given to each; but it cannot say that the whole street shall be used as a carriageway, and that no part of it shall be used as a sidewalk. The owner of the abutting property is entitled to have a reasonable space for sidewalk, and the council cannot <sup>46</sup> act arbitrarily. It can determine what is reasonable space, but in so doing it must exercise a fair judgment. If it fails to give a reasonable space for sidewalks, and the proof is such as to show arbitrariness, the property holder is not without remedy.

In this case the city council has not by ordinance defined the space in the street to be used as a carriageway or what may be used as a sidewalk. It does not appear that the sidewalk the defendant is constructing unreasonably interferes with the use of the street. It is within the curb put there in 1888 and is only four feet wide. There is therefore no ground for interference by the chancellor. If, as the evidence tends to show, the street is too narrow for the increasing public needs if sidewalks are built in it, the remedy of the city is to widen the street by condemning property for this purpose if it cannot agree with the owners as to the matter.

Judgment affirmed.

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*The Rights in Public Streets or Highways* peculiar to persons whose property abuts thereon are considered in the notes to *Wright v. Austin*, 101 Am. St. Rep. 102; *Commonwealth v. Morrison*, 125 Am. St. Rep. 343. Additional servitudes in streets and highways are discussed in the note to *Mordhurst v. Ft. Wayne etc. Co.*, 106 Am. St. Rep. 232; and nuisances in public streets are considered in the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195.

## DUDLEY v. ILLINOIS CENTRAL RAILWAY COMPANY.

[127 Ky. 221, 96 S. W. 835.]

**RAILWAY EMPLOYE—Liability to Coemployé.**—A railway employé in charge of the tanks and pumps of the company at a station is not liable to a brakeman injured by a water pipe placed too near passing trains, if the offending employé is merely a subordinate who has had nothing to do with constructing or placing the fixtures of the plant, and at most has merely failed to take affirmative action to remedy the dangerous condition after his attention has been directed to it. (p. 338.)

**REMOVAL OF CAUSES.**—It is for the State Court to Determine from the record, when a motion for the removal of a cause to a federal court is made, whether or not there is then present a state of case authorizing a removal. (p. 339.)

**REMOVAL OF CAUSES.**—The Motive or Purpose of the Plaintiff in joining the defendants will not be inquired into, on motion to remove the cause to a federal court, provided a cause of action is stated against them jointly. (p. 339.)

**REMOVAL OF CAUSES—Fraudulent Joinder of Defendants.** When it becomes apparent during the progress of a trial, wherein a resident defendant has been joined with a nonresident, that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption that a stronger case could have been made out when the petition was filed, the court may grant a renewed motion by the nonresident defendant for a removal of the cause to a federal court; state courts will not permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of the right of removal guaranteed by law. (p. 339.)

Hendrick, Miller & Marble, for the appellant.

John C. Gates, Trabue, Doolan & Cox, J. M. Dickinson and P. H. Darby, for the appellees.

**222 CARROLL C.** The appellant, who was a brakeman on one of appellee's freight trains, brought this suit against the appellee company and Calvin Mitchell to recover damages resulting from injuries sustained by being struck by a water-spout attached to a tank operated by the defendant company near Cerulean Springs. The petition averred: "That the defendant Calvin Mitchell was in the employ of the company, and was acting as its pumper or superintendent or supervisor or manager of pumps, tanks, and all the appliances and water tanks, along its road; that he had charge and management of the pumps, tanks, cranes, chains, **223** posts, and all appliances of the pumping stations which furnished water to the engines of the company, and was paid by the company to do this work under its orders; that he was especially and directly in charge and control of the tank and crane and spout and pumping station and all the appliances thereof at Cerulean



Springs, and of the supplying of water to the engines, and was actually managing and controlling said tanks, pump, spout and appliances; that the company and Mitchell, as its agent and servant in charge of said tank, had carelessly, wrongfully and negligently placed the post, pillar and support supporting the spout and crane which was used in supplying the engine with water, dangerously and unnecessarily near to the track, making the position of same improper, defective and dangerous, because of its proximity to the track, and had negligently permitted the chains, spout and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the train, so as to endanger the lives of the employés engaged in discharging their duties; that by the negligence of the defendant company and Mitchell in placing the post, pillar and support so near the track, and by their negligence in suffering and permitting the support and connections of the tank to be in such condition as to put the spout in dangerous proximity to the train, the plaintiff was struck by the spout upon the head and injured." The petition also contained other allegations necessary in cases of this character. In due time the railroad company, a foreign corporation, filed its petition and bond for removal of the cause to the United States court. This motion the trial court overruled. Upon a trial of the case, at the conclusion of the evidence for plaintiff, now appellant, <sup>224</sup> the defendant Mitchell entered a motion for a peremptory instruction, which was sustained by the court, and thereupon the jury returned a verdict for Mitchell. When the action against Mitchell was terminated in this way, the defendant company renewed its motion for removal, and it was sustained by the court. Appellant complains of the action of the trial court in giving the peremptory instruction and in removing the cause.

The petition stated a good cause of action against both the defendants, and the court properly refused to transfer the action when the motion was first made: *Illinois Cent. R. R. v. Coley*, 121 Ky. 385, 28 Ky. Law Rep. 336, 89 S. W. 234, 1 L. R. A., N. S., 370; *Pierce's Admr. v. Illinois Cent. R. R.*, 27 Ky. Law Rep. 801, 86 S. W. 703. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some weight, but is not in itself con-

clusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine therefore whether or not the action of the trial court was proper, we will examine the evidence introduced by appellant, and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars, supporting <sup>225</sup> the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective, and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spout, and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville & Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been seen repairing the tanks and machinery attached thereto; that the water-pipe from the tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the track. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it hung too far over the track, or was negligently permitted to hang in that condition by some person when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the rack, or have supplied it with different pipes or appliances, or that he was furnished by the master with any other appliances than those in use, or that he <sup>226</sup> had it in his power to do anything more than he had done. Mitchell was a subordinate employé of the railroad company, working

under the superintendent or person who had charge of the tanks or pumping stations.

Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water-pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant sued as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in *Cincinnati etc. R. Co. v. Robinson*, 115 Ky. 858, 25 Ky. Law Rep. 265, 74 S. W. 1061, and it was there held that the petition having failed to show any cause of action against Robinson, the employé joined with the company, that it was proper to remove the case to the United States circuit court. In the case at bar, the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fraudulent design, of preventing the transfer of the case to the United States circuit court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

In *Illinois Cent. R. Co. v. Coley*, 121 Ky. 385, 227 28 Ky. Law Rep. 336, 89 S. W. 234, 1 L. R. A., N. S., 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal, and overruled. On a trial, a verdict was rendered against the defendants. In discussing the question of removal, this court said: "If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself." In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employé, was jointly liable with his

principal for his negligent conduct. The court further said: "If the plaintiff trifled with the court, and joined a defendant who is a resident of the state simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and remove the case to the federal court. The court should not at any stage of the proceeding allow a party to trifle with its process, or to defeat the courts by fraudulent joinder of a person as a defendant."

If the plaintiff can by stating in his petition a good cause of action against a resident defendant, and thereby prevent the nonresident defendant from <sup>228</sup> transferring the case, although upon the trial the evidence wholly fails to show any cause of action against the resident defendant, the result would necessarily be that in every case where this was done a removal could be prevented, and the plaintiff, by the fraudulent or mistaken joinder of a person as a defendant, could defeat the jurisdiction of the federal court: *Powers v. Chesapeake etc. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. Rep. 264, 42 L. ed. 673. It is true that it is for the state court to determine from the record, when the motion for a transfer is made, whether or not there is then presented a state of case authorizing a transfer: *Illinois Cent. R. Co. v. Jones' Admr.*, 118 Ky. 158, 26 Ky. Law Rep. 31, 80 S. W. 484; *Rutherford v. Illinois Central R. Co.*, 120 Ky. 15, 27 Ky. Law Rep. 397, 85 S. W. 199. And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly: *Winston's Admr. v. Illinois Cent. R. Co.*, 111 Ky. 954, 23 Ky. Law Rep. 1283, 65 S. W. 13, 55 L. R. A. 603; *Chesapeake etc. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. Rep. 67, 45 L. ed. 121; *Rutherford v. Illinois Cent. R. Co.*, 120 Ky. 15, 27 Ky. Law Rep. 397, 85 S. W. 199. But when, during the progress of the trial—for instance, at the close of the plaintiff's evidence—it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of a right guaranteed to it or him by <sup>229</sup> the law. However reluctant state courts may be to surrender their jurisdiction, they cannot lend themselves to a scheme to defeat



rights to which each one of the parties litigant is entitled, or permit a skillful pleader to determine the question of removal without reference to the merits of the case.

The case of *Whitecomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. Rep. 248, 44 L. ed. 303, is not in conflict with these views. It is true that in that case, at the close of the testimony for plaintiff, the trial court sustained a peremptory instruction offered by the resident defendant, and thereupon the non-resident defendant again moved to transfer the case, and this motion was overruled. In sustaining this ruling, the supreme court said: "This was a ruling on the merits, and not a ruling on the jurisdiction. It was adverse to the plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them. As we have said, the contention of that railway company that it was fraudulently joined as a defendant had been disposed of by the United States circuit court. But, assuming without deciding that that contention could not have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it." It will thus be seen that the decision of this question is rested upon the grounds: First, that it had been disposed of by the United States circuit court; and, second, that the record did not show a fraudulent joinder.

The judgment of the lower court is affirmed.

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*The Removal of a Cause to a Federal Court cannot be demanded by a foreign railroad company when it and its engineer, who is a resident of the state, are sued jointly for his negligence: Southern Ry. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191. To the same effect see Illinois Cent. Ry. Co. v. Houchins, 121 Ky. 526, 123 Am. St. Rep. 205.*

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## EUBANK v. MONTGOMERY COUNTY.

[127 Ky. 261, 105 S. W. 418.]

**OFFICER DE FACTO—Right to Compensation.**—One who holds an office to which he knows his right is denied cannot claim compensation for services, upon its being decided that he has no right to the office, although there is no other claimant. (p. 341.)

**OFFICER DE FACTO—Right to Compensation.**—It is a general rule of public policy that those who hold public offices without right are not entitled to the emoluments thereof. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves for the discouragement of the seizure of public offices. (p. 342.)

C. C. Turner, Jas. H. Hazelrigg and Jno. E. Cooper, for the appellant.

C. F. Thomas, county attorney, for the appellee.

**263** HOBSON, J. W. W. Eubank presented to the Montgomery fiscal court a claim for six hundred dollars for services as supervisor of roads from April 1, 1905, to January 1, 1906. The fiscal court allowed the claim. The county appealed to the circuit court, and the circuit court disallowed the claim. From that judgment Eubank appeals.

The facts of the case are set out in *Eubank v. Commonwealth*, 126 Ky. 348, 31 Ky. Law Rep. 746, 103 S. W. 368. That was a proceeding against Eubank for usurpation of office. We there held that Eubank was a *de facto* officer, and that he was not guilty of usurpation of office under our statute. The general rule is that a *de facto* officer is not entitled to the emoluments of the office. In *Commonwealth v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680, the court thus stated the rule: "His acts are good so far as others are concerned. But the rule seems to be established that none but the officer *de jure* can successfully claim compensation for official services." In *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715, where a similar question was made, the court said: "The question at issue here is whether he can assert against the state or against a county, which is a constituent part of the state, a demand for official fees which he claims to have earned by a violation of her constitution. If he can do so, there is an end at once between a *de jure* and a *de facto* officer, since it is impossible to perceive how the latter, while undisturbed by *quo warranto*, occupies a position at all inferior to the former. The acts of both are alike valid, both would be alike protected from the assaults <sup>264</sup> of private persons, and each would have an equal claim upon the state for compensation. Such a construction of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over would be liable, indeed, to be ejected at the end of a long and costly litigation, but in the meantime he would have grown rich by the fees and salaries which he would have extorted from the state, whose laws he had violated in holding the position."

It is insisted for the appellant that the above is the rule where there is one who is rightfully entitled to the office, but that the rule has no application where there is no other claimant of the office. In support of this distinction, we are referred to *Behan v. Prison Commrs.*, 3 Ariz. 399, 31 Pac. 521.

and *Adams v. Insane Asylum*, 4 Ariz. 327, 40 Pac. 185. It was held in the first of these cases that a superintendent of the prison who had been appointed by the commissioners and had performed the services should be paid, although it was subsequently held that the governor was the only person who could make the appointment. There are some other cases to the same effect, but the weight of authority is to the contrary: 8 Am. & Eng. Ency. of Law, 812. Waiving the question whether the fiscal court of a county may create a claim upon the county under our statute by implication from its conduct when it did not do so by record, we are satisfied that in the case at bar Eubank was standing on his legal rights with notice that his right was disputed, and that he took the risk of his right being upheld. A man cannot be allowed to hold on to an office to which he is not entitled when he knows his right to the office is denied and then claim compensation for his services after it is held that he had <sup>265</sup> no right to the office. By holding on to the office under such circumstances he takes the risk of his right being established. The record leaves no doubt that Eubank knew in April that his right to the office was denied, and that from that time on he insisted upon holding to the office notwithstanding this. We have held that he could not be punished for usurpation of office, and, if we should now adjudge him entitled to the emoluments of the office, he would be in the same status as if he had been adjudged the office. It is a sound rule of public policy that those who hold public offices without right are not entitled to the emoluments of the office. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves, for the discouragement of the seizure of public offices. If their acts are invalid as to themselves, they cannot be adjudged compensation from the public for these acts.

Judgment affirmed.

Nunn, J., Dissents from so much of the opinion as holds Eubank not entitled to pay from April to October, 1905, when there was no other claimant to the office.

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*An Officer De Facto* has no right to the emoluments of the office the duties of which he performs under color of appointment but without legal title: *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280; *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163; *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228. But the payment to an officer de facto of the salary appertaining to the office, according to the prevailing opinion, releases the municipality from liability to pay it to the officer de jure for the same period: *Board of Commissioners v. Rohde*, 41 Colo. 258, 124 Am. St. Rep. 134. Compare *Tanner v. Edwards*, 31 Utah, 80, 120 Am. St. Rep. 919.

**HESS' ADMINISTRATOR v. SEGENFELTER.**

[127 Ky. 348, 105 S. W. 476.]

**LIFE INSURANCE—Who may be Named Beneficiary.**—A person obtaining insurance on his life in a mutual benefit society may designate whom he pleases as the beneficiary, in the absence of any statutory restriction. (p. 345.)

**LIFE INSURANCE—Absence of Insurable Interest.**—A person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor; nor can he obtain an assignment of such insurance. (p. 345.)

**LIFE INSURANCE.**—One cannot Insure His Own Life for the benefit of another, when the latter induces him to procure the insurance and pays the premiums thereon, or when the insurance is obtained with a view to evade the law against speculative insurance. (p. 345.)

**LIFE INSURANCE—Insurable Interest.**—When it is contrary to the statute for benefit associations to issue certificates unless the beneficiaries have a legal insurable interest in the life of the insured, a member who insures his life and pays the premiums cannot, though permitted by charter of the society, designate first cousins as beneficiaries. (p. 346.)

**LIFE INSURANCE—What Law Governs.**—The Rights of the Parties to a contract of insurance in a benefit society are governed by the laws in force at the time of the issuance of the certificate. (p. 347.)

**LIFE INSURANCE—Insurable Interest.**—In order that there may be an insurable interest the relationship of creditor and debtor must exist, or the beneficiary must have or expect some pecuniary relief, benefit or advantage from the continuance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the belief that loss or disadvantage will naturally and probably arise to the beneficiary from the death of the insured. (p. 348.)

**LIFE INSURANCE.**—Insurable Interest is not Dependent upon pecuniary loss, if the relationship between the parties is so close as to preclude the probability that mercenary motives will induce the sacrifice of life to gain the insurance. (p. 349.)

**LIFE INSURANCE—Insurable Interest.**—First Cousins have, from the mere fact of relationship, no insurable interest in the life of the insured. (p. 349.)

Hendrix & Miller and James W. Eden, for the appellant.

L. D. Husbands and T. B. Harrison, for the appellee.

349 **CARROLL, J.** C. F. Hess died in 1904, a member in good standing of the Knights of Honor, a corporation created under the laws of the state of Missouri, "to promote benevolence and charity by establishing a widows' and orphans' fund from which, on satisfactory evidence of the death of a member of the order who had complied with all its lawful requirements, and who is at the time of his death in good standing according to the laws of the order, a sum not exceed-



ing two thousand dollars shall be paid to said member or members of his family, blood relatives, or person or persons dependent on him, as he may direct or designate by name, to be paid as provided by general law; provided, however, any member desiring to have <sup>350</sup> afterborn children to participate in his certificate may so designate without doing so by name"—the constitution also providing that "a member desiring to change his beneficiary may at any time while in good standing surrender his benefit certificate and obtain a new one in lieu thereof, payable as he shall have directed within the limitations prescribed by the laws of the order." In 1901 Hess surrendered the certificate he then held in this order, payable to his aunt, and upon his request there was issued a certificate for two thousand dollars payable to the appellees, who are his first cousins. This controversy is between the appellees and the appellant, Mary E. Morgan, the only surviving sister of Hess, who asserts claim to the fund by reason of her relationship and also as administratrix of his estate. The Knights of Honor paid the money into court, and upon hearing the case the circuit court adjudged that the appellees were entitled to the fund in controversy, and a reversal of this judgment is sought.

For appellant it is urged that appellees had no insurable interest in the life of Hess, and therefore are not entitled to the insurance upon his life under the certificate issued to him by this fraternal organization. The appellees contend that, being blood relatives of Hess, he had the right under the provisions of the charter before quoted to designate them as the beneficiaries of the fund, and the circuit court properly adjudged them entitled to it. Whether or not a member of a fraternal or benevolent organization who obtains insurance upon his own life and himself pays the premiums can designate as a beneficiary a person who has not what is generally known as an insurable interest in his life, but who is permitted to be made a beneficiary by the charter of the order, presents <sup>351</sup> a most interesting question, and one that has attracted a great deal of attention from courts as well as text-writers. If we did not feel constrained to follow the provisions of the statute that will be hereafter noticed, we would announce the principle that the question of insurable interest was not involved, when a member of a fraternal or benevolent association in good faith obtained insurance upon his own life, and himself paid the premium, and there was no fact or circumstance connected with the transaction tending to show that it had any of the elements

of a wagering or speculative contract, and rule that a person obtaining such insurance might designate any person as a beneficiary within the limits prescribed by the rules of the order. All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life: Vance on Insurance, sec. 49; Heinlein v. Imperial Ins. Co., 101 Mich. 250, 45 Am. St. Rep. 409, 59 N. W. 615, 25 L. R. A. 627; Morrell v. Trenton Mut. Life Ins. Co., 10 Cush. 282, 57 Am. Dec. 92; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 25 L. ed. 251; May on Insurance, sec. 112; Bliss on Insurance, sec. 76; Bacon on Insurance, sec. 729; Beach on Insurance, sec. 861; Joyce on Insurance, sec. 729; Bloomington Mut. Ben. Assn. v. Blue, 120 <sup>352</sup> Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; Union Fraternal League v. Walton, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317, 46 L. R. A. 424; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; Northwestern Masonic Aid Assn. v. Jones, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; Albert v. Mutual Life Ins. Co., 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327. On the other hand, what is known as "wagering or gambling insurance" is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of a kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance: Griffin's Admr. v. Equitable Assur. Soc., 27 Ky. Law Rep. 313, 84 S. W. 1164; Brembley v. Washington Life Ins. Co., 28 Ky. Law Rep. 1300, 92 S. W. 17, 5 L. R. A., N. S. 747; Beard v. Sharp, 100 Ky. 606, 18 Ky. Law Rep. 1029, 38 S. W. 1057; New York Life Ins. Co. v. Brown's Admr., 23 Ky. Law Rep. 2070, 66 S. W. 613; Baldwin v. Haydon, 24 Ky.

Law Rep. 900, 70 S. W. 300; *Wrather v. Stacey*, 26 Ky. Law Rep. 683, 82 S. W. 420; *Lee v. Mutual Life Ins. Co.*, 26 Ky. Law Rep. 577, 82 S. W. 258; *Barbour's Admr. v. Larue's Assignee*, 106 Ky. 546, 21 Ky. Law Rep. 94, 51 S. W. 5; *Basye v. Adams*, 81 Ky. 363, 5 Ky. Law Rep. 91; *Lockett v. Lockett*, 26 Ky. Law Rep. 300, 80 S. W. 1152; *Scott v. Scott*, 25 Ky. <sup>353</sup> Law Rep. 1356, 77 S. W. 1122; *Adams' Admr. v. Reed*, 18 Ky. Law Rep. 853, 38 S. W. 420, 35 L. R. A. 692; *Bramblett v. Hargis*, 29 Ky. Law Rep. 610, 94 S. W. 20. Such insurance has a tendency to create a desire to destroy the life of the insured to obtain the insurance, there being no tie of blood, or kindred, or interest, to wish its prolongation; and a person who procures for his benefit insurance upon the life of another, when he is not connected with that life by ties of kindred or dependency, or interested in its continuance from business motives, may be actuated solely by a purpose to derive profit from its destruction, and be rewarded by wagering against the amount payable at his death the sums expected in premiums during his life.

In subdivision 3, article 4, chapter 32, of the Kentucky Statutes of 1903, relating to assessment and co-operative life insurance companies, it is provided, in section 678, that "no corporation doing business under this law shall issue a certificate or policy upon the life of any person more than sixty years of age, nor upon any life in which the beneficiary named has no interest." And, by section 680, an insurance company organized under the laws of any other state for the purpose of furnishing life or accident insurance upon the assessment plan shall not be authorized to do business in this state until it has filed with the commissioner of insurance a certificate showing, among other things, that "its certificates or policies are payable only to beneficiaries having a legal insurable interest in the life of the member or insured." And this court in *Supreme Commandery of Golden Cross v. Hughes*, 114 Ky. 175, 25 Ky. Law Rep. 984, 70 S. W. 405, *Ancient Order of United Workmen v. Edwards*, 27 Ky. Law Rep. 469, 85 S. W. 701, *Supreme Lodge of K. P. v. Hunziker*, 27 Ky. Law Rep. 1201, 87 S. W. 1134, and <sup>354</sup> *American Guild v. Wyatt*, 30 Ky. Law Rep. 632, 100 S. W. 266, held that section 679 of the subdivision *supra* applied to fraternal and benevolent associations. Under the authority of these cases we see no escape from the conclusion that sections 678 and 680, *supra*, also apply to them. This being true, at the time this contract of insurance was made, and when the insured died, it was contrary to the statute for these associa-

tions to issue certificates unless the beneficiary named therein had a legal insurable interest in the life of the insured. The legislature in 1906, by an act which became a law March 24, 1906 (Laws 1906, p. 481, c. 142), exempted from the operation of the subdivision in question "fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and securing members through the lodge system exclusively, and paying no commissions, nor employing any agents except in the organization and supervision of the work of local subordinate lodges or councils." So that, hereafter, members in fraternal and benevolent associations such as the Supreme Lodge of the Knights of Honor will not be limited by statute in the designation of beneficiaries to persons who have an insurable interest in their lives; but this statute has no application to the case before us. The rights of the parties must be adjudged by the laws in force at the time the certificate was issued.

The only remaining question is: Did appellees, who were first cousins of the insured, have, in the meaning of the statute, an insurable interest in his life? It will be observed that the statute does not undertake to define "insurable interest," and we are left to ascertain its meaning by our own conceptions of what is the proper definition of the words, guided by the <sup>355</sup> opinions of courts of last resort and text-writers dealing with the question. In the widely quoted case of Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924, Mr. Justice Field, speaking for the court, said: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the parties obtaining the insurance, either as creditor of, or surety for, the insured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and the child of his parent, a husband in the life of his wife, and the wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from



the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured." And in *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, the court said: "It is well settled that a man has an insurable interest in his own life and that of his wife and children, a woman in the life of her husband, and a creditor in the life of his debtor. Indeed, it may be said generally that <sup>356</sup> any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life." It has been held a son has an insurable interest in the life of his father: *Reserve Mut. Life Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741. A father has an insurable interest in the life of his child: *Williams v. Washington Life Ins. Co.*, 31 Iowa, 541. Sisters and brothers have an insurable interest in the life of each other: *May on Insurance*, sec. 107. A wife has an insurable interest in the life of her husband, and a husband in the life of his wife: *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134; *Ky. Stats.* 1903, sec. 654. A person dependent upon the life of another has an insurable interest in that life: *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38. A granddaughter has not an insurable interest in the life of her grandfather, nor has a nephew, as such, an insurable interest in the life of an aunt, nor a son in law an insurable interest in the life of his mother in law: *May on Insurance*, sec. 107. In *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321, an uncle was held not to have an insurable interest in the life of his nephew. In *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 12 Am. St. Rep. 405, 21 N. E. 746, the court held that a grandchild had no insurable interest in the life of his grandfather. A stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own: *United Brethren Mutual Aid Soc. v. McDonald*, 122 Pa. 324, 9 Am. St. Rep. 110, 15 Atl. 439, 1 L. R. A. 238.

These authorities illustrate the limitations that have been placed on insurable interest, and the extent to which the courts have gone in an effort to prevent <sup>357</sup> wagering and speculative contracts of insurance. Although an examination of them will show various reasons for the conclusion reached, it may safely be said that the relationship of creditor and debtor must exist, or that the beneficiary must have or expect some pecuniary relief, benefit or advantage from the continuance of the life of the insured, or the relationship

growing out of ties of blood or marriage must be so close as to justify the well-founded belief that loss or disadvantage would naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured. Generally the courts have endeavored to make insurable interest dependent on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy. But looking at the question from any standpoint, cousins, who are not dependent on or creditors of the insured, cannot fairly be said to have an insurable interest in his life.

Wherefore the judgment is reversed, with directions to enter a judgment giving to appellant the insurance.

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*Life Insurance in Favor of One Having No Insurable Interest is the subject of a note to Howe v. Griffin, 126 Ky. 373, ante, p. 302.*

*Insurable Interest in the Life of a Person is defined in Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 101 Am. St. Rep. 650; Opitz v. Karel, 118 Wis. 527, 99 Am. St. Rep. 1004; Keystone Mut. Ben. Assn. v. Norris, 115 Pa. 446, 2 Am. St. Rep. 572. An uncle has no insurable interest in the life of his nephew or nieces: Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 115 Am. St. Rep. 189; Prudential Ins. Co. v. Jenkins, 15 Ind. App. 297, 57 Am. St. Rep. 228; but brothers and sisters have an insurable interest in the lives of each other: Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 16 Am. St. Rep. 893.*

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## MOORE v. CITY OF GEORGETOWN.

[127 Ky. 409, 105 S. W. 905.]

**MUNICIPAL CORPORATIONS—Division into Wards.**—It is competent for the legislature to authorize cities of the fourth class to divide the municipality into wards and provide for the election of councilmen therefrom. (p. 351.)

**MUNICIPAL CORPORATION—Division into Wards—Judicial Review.**—The action of city councilmen in dividing the municipality into wards and allotting the number of councilmen to be elected from each ward is not subject to review by the courts upon the theory that the division violates fundamental principles of equality in representative government in giving the residents of one locality more power than the same number in another locality. (p. 353.)

Llewellyn F. Sinclair, for the appellants.

James F. Askew and Hazelrigg, Chenault & Hazelrigg, for the appellees.

**412** CARROLL, J. This litigation involves the validity of an ordinance enacted by the board of council of Georgetown—a city of the fourth class—in January, 1905, dividing the city into four wards. It was assailed by appellants, plaintiffs below, upon the ground that it violated the fundamental principles of representative government, in that the population of the wards was grossly unequal, and the representation from the several wards in the council was not fairly distributed according to population. The lower court dismissed the petition, and the complainants appeal.

The constitution divides the cities and towns of the commonwealth into six classes, providing that “the organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same power and be subject to the same restrictions.” In section 160: “When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city. But other officers of towns or cities shall be elected by the qualified voters therein or appointed by the local authorities thereof as the general assembly may by general law provide.” This is the only section of the constitution **413** that in any way treats of the election of members of the legislative boards, and it will be observed that it is silent as to cities of the fourth or fifth classes and towns of the sixth class; the entire matter in these municipalities being left without limitation or restriction to the control and regulation of the legislative department of the state. The only statutory provision relating to the subject under consideration is found in section 3484 of the Kentucky Statutes of 1903, which is a part of the law governing fourth class cities. There it is provided in part that “the legislative power shall be vested in a mayor, and not less than six nor more than twelve councilmen, as may be provided by ordinance. The members of the council shall be qualified voters in the city, resident of the ward from which they stand for at least six months prior to their elec-

tion, if said city is divided into wards." And, further, in section 3485: "The members of the board of council and all other elective officers of cities of the fourth class shall be elected at the times and for the terms prescribed by the constitution. The members of the board of council of each city shall be elected by the qualified voters of the wards for which they respectively stand, if the city is divided into wards; otherwise they shall be elected by the qualified voters of the city. . . . The board of council or board of trustees, as the case may be, of any city not divided into wards may, not less than sixty days before any November election held for the election of councilmen, divide the city into not exceeding six wards, which shall remain so constituted unless changed or abolished by future board of council." In *Brown v. Holland*, 97 Ky. 249, 17 Ky. Law Rep. 149, 30 S. W. 629, this court had under consideration a question involving the right<sup>414</sup> of the board of council in cities of the fourth class to divide the city into wards, and elect members of the board from the several wards in place of electing them from the city at large; and, after full investigation, it was held competent for the legislature to authorize the division of cities of this class into wards and to provide for the election of councilmen from the respective wards. This ruling, supported as it is by sound reasoning, is in accordance with the legislative intent, and seems conclusive of the right of the council to divide cities of this class into wards and elect councilmen from them.

This leaves to be considered only the question whether or not the action of the council in dividing the city of Georgetown into wards, and allotting the number of councilmen to be elected from each ward, is subject to review by the courts, upon the theory that in the manner of its execution it violated a fundamental principle of equality and representative government. Cases of legislative apportionment that transgressed some constitutional provision have been frequently considered by courts of last resort; the latest being that of *Ragland v. Anderson*, 125 Ky. 141, ante, p. 242, 30 Ky. Law Rep. 1199, 100 S. W. 865, in which this court held the act of 1906, apportioning the state into legislative districts, invalid because in violation of that section of the constitution directing that the state should be divided into senatorial and representative districts "as nearly equal in population as may be." If there was constitutional or legislative expression upon the subject indicating a purpose that equality of apportionment or representation must be observed in the



division of cities of the fourth class into wards, and the election of councilmen therefrom, we would feel obliged to sustain the appellants in their <sup>415</sup> efforts to annul the ordinance assailed; but, in the absence of such direction or adjudication upon the subject, our conclusion is that it was intended both by the constitution and the legislature that the people of these minor municipalities should be left free to exercise a discretion in the division of the city into wards and the election of councilmen therefrom. It is true that fair representation and equal apportionment is a valuable privilege, and one that should be adhered to; but, when the legislative department of the state that created these municipalities and provided an elaborate plan for their government failed to adopt either directly or by implication any scheme to regulate or control them in the selection of their legislative boards, we do not feel that the courts are warranted in interfering with the discretion lodged in the people of these cities and their representatives whose duty it is to divide the city into wards. So far as our examination extends, in every instance in which the judiciary has undertaken to interfere with the legislative department of the state or its municipalities in the power of apportionment and representation, authority direct or by implication has been found in the constitution or the statutes.

In 8 Cyclopaedia, page 777, it is said: "It may be stated as a general principle that statutes will not be held unconstitutional merely because they are unjust and repugnant to the general principles of justice, liberty or right not expressed in constitutional provisions. . . . The validity of statutes deemed to be in violation of the spirit supposed to pervade all constitutions has been considered at much length by the courts in a variety of cases; but an examination of the authorities upon this subject leads to the conclusion that the principle involved is more properly <sup>416</sup> a question of construction of some necessarily implied constitutional restriction resulting more from express constitutional provisions than otherwise. The generally accepted rule is that courts will not declare a statute void merely because in their opinion it is opposed to the spirit supposed to pervade the constitution. The authorities are not in harmony upon this question, but in nearly all of the cases where statutes have been held to be prohibited by the spirit of the constitution or nature and structure of the government the acts in question have also been held to be in violation of some express or implied constitutional restriction." The text is fully supported by

numerous authorities, among them being Cooley's Constitutional Limitations, page 197, and Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759, where the court, through Chief Justice Black, said: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is not valid if it violates the spirit of our institutions or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But this we cannot do. . . . The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours the people have given large powers to the legislature, and relied for the faithful execution of them on the wisdom and honesty <sup>417</sup> of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy to imagine than a thousand tyrannical things which the legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the legislature because they abuse it, and give to the judges the right of controlling it, would not be advancing a single step." These well-considered statements, although directed to the legislative department of the state, are equally applicable to the legislative boards of municipalities. In the case before us, we are asked to assume extrajudicial powers by undertaking to interfere with the council's apportionment of a city into wards and order it how to proceed, in the absence of any direction whatever from the legislative department as to the mode or manner of exercising this political and administrative function. This the courts cannot do without trenching upon the rights and prerogatives that belong to other branches of the government. Without legislative direction or constitutional authority to guide or control us in the disposition of a purely political matter, we would be putting up our judgment against that of those in whom the

exclusive right has been lodged by the power that created the municipality, and be arrogating to ourselves wisdom, honesty and fairness superior to those charged by law with the control of these matters. This we do not feel disposed or authorized to do. The government of these cities in respect to the matter before us has been left <sup>418</sup> to the people acting through their boards, and, if the people of these cities desire to alter the method of selecting councilmen or place limitations upon their power in the division of cities into wards, they must apply to the legislative department of the government, or appeal to the good judgment and sound discretion of the members of their local boards. There are a number of cities of the fourth class in this state, and the conditions in no two of them are exactly alike, and it seems probable that it was the intention in the enactment of a general law for their government to allow the legislative board a large discretion in their governmental affairs. Whilst the division of Georgetown into wards by the council and the allotment of representation is apparently unfair and unequal, we do not feel disposed to adjudge that it exceeded the power granted. Nor can we hold that it violates any fundamental principle of government.

Wherefore the judgment of the lower court is affirmed.

**Chief Justice O'Rear, Dissenting.** Section 6, Bill of Rights, requires that all elections shall be free and equal. A statute providing for an election of officials, that gives to the residents of one locality two or three times as much power as is given to the same number in another locality, is obviously unequal. In my opinion the constitution does not mean that the legislature may make such unjust and insidious distinction, and show such partiality as utterly destroys the element of equality in elections by the people of a municipality for selecting the officers of the city.

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*Whether a Statute Redistricting a state into representative districts makes a division so unequal as to violate a constitutional provision that such division must be in proportion to the population, is not so essentially a political question as to be beyond the jurisdiction of the courts:* Ragland v. Anderson, 125 Ky. 141, ante, p. 242. See, also, Sherill v. O'Brien, 188 N. Y. 185, 117 Am. St. Rep. 841; State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, and note.

# UNIVERSITY OF LOUISVILLE v. HAMMOCK.

[127 Ky. 564, 106 S. W. 219.]

**CORPORATION—Misnomer in Pleading.**—The misnomer of a corporation defendant cannot be objected to for the first time on appeal. The objection should be made in the trial court by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name. The plaintiff may then amend his petition. (p. 356.)

**HOSPITAL—Liability for Injuries Inflicted by Patient.**—If the persons in charge of a hospital, knowing the condition of a patient suffering from delirium tremens, leave him in an insecure apartment in charge of a woman powerless to restrain him, and he escapes from her control and assaults another patient, the jury may find a verdict of negligence. (p. 357.)

**DAMAGES—Personal Injuries to Hospital Patient.**—A verdict of one thousand dollars for injuries sustained by a woman patient in a hospital through an attack upon her by an insane patient, negligently allowed to escape by the hospital authorities, is not excessive if her present illness is thereby greatly aggravated and her health is to some extent permanently impaired. (p. 358.)

**HOSPITAL—When not Charitable Institution Exempt from Liability.**—A hospital conducted by a university as an adjunct of its medical school, which exacts compensation from patients able to pay but treats others free of charge, is not a charitable institution exempt from liability for the negligence of its agents and employés. (p. 359.)

Burnett & Burnett, for the appellants.

Bennett H. Young, for the appellee.

<sup>565</sup> **SETTLE, J.** The appellee, Addie Hammock, recovered a verdict and judgment for one thousand dollars damages in the court below against the appellant, University of Louisville, for <sup>566</sup> injuries to her person alleged to have been received while a patient in its infirmary at the hands of a demented or partially demented patient of the same institution, who, it was charged, had negligently been permitted to escape from his room and keeper, wander into that of appellee, and assault her and maltreat her.

Failing to obtain in the lower court a new trial, appellant asks of this court a reversal of the judgment in question upon three grounds: 1. That it was not sued in its true corporate name; 2. That no negligence was shown, and that the verdict returned by the jury was contrary to law and flagrantly against the evidence; 3. That appellant is a charitable institution and by reason thereof exempt from liability for the torts of its agents or servants.

As to the first proposition, little need be said. Obviously appellant was sued and judgment recovered against it as the "University of Louisville," when its true corporate name was



and is the "President and Trustees of the University of Louisville," but the misnomer cannot be objected to for the first time on appeal. It should have been made in the circuit court by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name of the defendant. When this is done, the plaintiff may amend his petition, and then proceed against the defendant in his true name: Louisville etc. R. R. Co. v. Hall, 12 Bush, 131; Teets v. Snider Heading Mfg. Co., 120 Ky. 653, 27 Ky. Law Rep. 1061, 87 S. W. 803; Pike, Morgan & Co. v. Wathen, 25 Ky. Law Rep. 1264, 78 S. W. 137; 14 Ency. of Pl. & Pr. 295. The record shows that the corporation sued was the same corporation that owned and controlled the hospital in which appellee sustained <sup>567</sup> her injuries; and, as it failed to object in the circuit court to the improper corporate name given it or to disclose its true corporate name and there made defense on the merits, it is estopped to complain that judgment went against it in the name by which it was sued.

In our opinion the second contention of appellant is equally without merit. There was testimony conducing to prove negligence on the part of appellant and its employés in charge of the hospital, and that such negligence was the proximate cause of appellee's injuries. The facts, as disclosed by the evidence, were, in substance, that appellee, a married woman, who was laboring under a serious illness, and greatly prostrated thereby, had placed herself in the hospital at the instance of her physician. She was a pay patient, and had the right to expect of appellant and its employés in charge of the institution careful and skillful nursing and treatment such as her case particularly required. Indeed, the sick leave their homes and enter hospitals because of the superior treatment there promised them. On the day after appellee entered the hospital, its manager received as an inmate thereof a patient known as Dr. Meador, who was at the time afflicted with delirium tremens, a disease resulting from the excessive, habitual use of intoxicating liquors. This patient was placed in a room of the hospital on the floor beneath that occupied by appellee. At 10 P. M. of the same day Meador became so uncontrollable that he overawed the single female nurse in whose charge he had been left, and, escaping from his room, passed through the hall of the building and upstairs, talking in a loud voice and using profane language. Upon reaching the upper floor, he entered the room <sup>568</sup> occupied by appellee, and approaching the bed where she was lying, seized her by the arms, struck and bruised her person,

and dragged her from the bed, to her great fright and injury. Meador was finally captured, removed from the room, and securely tied by two nurses with the assistance of a negro porter, and a little later was returned to and confined in his own room. Whatever may have been his condition at other times, Meador, according to the evidence, was manifestly violent, uncontrollable and delirious, if not actually crazy, when he escaped from his room and entered that of appellee and assaulted her. He was a large man of more than two hundred pounds weight and great physical strength. Howard, the negro porter, admitted that he was physically unable to cope with him without assistance. The fact that physicians had diagnosed Meador's case as delirium tremens before he entered the hospital, and that such was his disease when received there, was known to one of the physicians in charge of the hospital, to its head nurse, Miss Parsons, and two other nurses of the institution, one of whom was Miss Zeigler, from whose custody he escaped just before appellee was assaulted by him. One of the nurses admitted that she was directed by Meador's physician not to make an entry on the hospital chart of his true malady, and this direction she obeyed, thereby concealing the fact that the patient was afflicted with delirium tremens. Whether Meador manifested a disposition to become violent between the time of his admission to the hospital and the time of his breaking away from the nurse does not definitely appear from the evidence, but his disease being known, as it was, to a physician of the institution, its head nurse, and two of her assistants, when Meador was received, <sup>569</sup> and their further knowledge, especially that of the physician, that a person so afflicted might reasonably be expected to become violent, uncontrollable and dangerous at any time, ought to have induced them to take such reasonable precautions with reference to his control or confinement as would have prevented his inflicting injury upon other inmates of the hospital. Yet this powerful man, crazed from the excessive use of spirituous liquors, and by reason of that fact uncontrollable and dangerous, was left in an insecure apartment and in charge of a single woman, who was utterly powerless to restrain him. Under these circumstances, it would seem to a reasonable mind that what happened was to have been expected, if not inevitable. There was therefore some evidence of negligence to go to the jury, and, in the light of that evidence, we do not feel called upon to declare that the verdict finding appellant guilty of negligence was unauthorized. It cannot be denied that the attack made by

Meador upon appellee was disastrous to her. If we accept her version of the matter, and it is not materially contradicted, the only wonder is that, in her physically weak and nervous condition, she was not frightened to death by the cries and violence of the madman. Much of the testimony went to show, not only that her illness was immediately and greatly aggravated, but that her health was, to some extent at least, permanently impaired thereby. In view of these facts, the amount recovered cannot be regarded excessive.

Appellant's third contention, that it is a charitable institution and by reason thereof exempt from liability for the negligence of its servants, is in conflict with more than one decision of this court. The hospital in which appellee received the injuries complained <sup>570</sup> if is an adjunct of the appellant's school of medicine, known as the "University of Louisville," and is maintained principally because of the advantages it affords to the students and professors of that institution. It is, however, also conducted for compensation and profit. In the main, patients received and treated at the hospital are required to compensate those in charge of it for the services rendered. This is certainly true, according to the evidence, as to patients able to pay. It is true some patients unable to pay are received and treated free of charge, but this does not show that appellant conducted a purely public charity; and, to escape liability for the wrongful acts or negligence of its servants, it should have proved that such was the character of the hospital and the use to which it is devoted. The hospital is not maintained by taxation, or controlled by the state, or city of Louisville. Eleemosynary institutions and other institutions of like character devoted to purely charitable uses, whether maintained by government, corporations or individuals, are exempt from such liability as was here imposed upon appellant, on the ground that they are mere instrumentalities brought into being to aid in the performance of governmental or public duty; but such is not the character of the hospital maintained by appellant. Hence its attempt to escape liability for the negligence of its agents resulting in appellee's injuries was properly prevented by the trial court. The question under consideration was decided adversely to the contention here urged by appellant, in the case of *Gray Street Infirmary v. City of Louisville*, 23 Ky. Law Rep. 1274, 65 S. W. 11, 55 L. R. A. 270. In that case the Gray Street Infirmary sought to escape taxation for municipal purposes on the ground that it was an <sup>571</sup> institution of public charity, and therefore not subject to taxation.

But, in rejecting that contention, this court said: "Dr. Grant testifies that the institution would not have been established, except that the incorporators hoped to receive pecuniary advantage from it, either directly or through their connection with the college. We have no doubt from the testimony that the professors in the medical college do a great deal of charitable work in the infirmary, yet the real purpose of establishing the infirmary was to make their college more attractive to students, and to induce attendance by reason of the instruction and clinical experience received in the infirmary. And in this way to increase the profits of the professors operating the college. Certainly such an institution cannot be exempted from taxation on the ground that it is purely an institution of public charity." The same view of the law is expressed in the later case of *Wathen v. City of Louisville*, 27 Ky. Law Rep. 635, 85 S. W. 1195, in the opinion of which it is said: "It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instruction and the operations by the professors in the presence of the students, the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows that a great deal of charity work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit. As it is operated for gain, no part of it is exempt from taxation under section 170 of the constitution. This conclusion is supported by *Gray* <sup>572</sup> *Street Infirmary v. City of Louisville*, 23 Ky. Law Rep. 1274, 65 S. W. 11, 55 L. R. A. 270." We think these two cases control the case at bar, and hence we adhere to the doctrine therein expressed. If, as must be conceded, appellant's hospital is subject to taxation because it is not a charitable institution, it is for the same reason responsible for the torts of its agents and employés. No criticism is made of the instructions, and they were clearly correct, unless the appellant had shown itself entitled to a peremptory instruction, on the ground of the exemption from liability claimed, which we have said it could not do.

Finding no error in the rulings of the lower court, the judgment is affirmed.

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*An Incorporated Eleemosynary Hospital, organized and maintained for no private gain, but for the proper care and medical treatment of the sick, and for that purpose made the manager of a donated*



trust fund, is not liable for injury received by a patient therein, through the negligence of its managers or their employes, and the fact that patients who are able to pay are required to do so does not deprive the corporation of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations: *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427.

A *Hospital Association* formed to provide medical service to employes of a certain railroad company, and maintained by involuntary deductions from the wages of these employes, is not exempt from liability to patients by the mere employment of competent surgeons, but it must go further and competently treat the patients received. Such associations occupy the position of ordinary physicians and surgeons: *Phillipps v. St. Louis etc. R. R. Co.*, 211 Mo. 419, 124 Am. St. Rep. 786. See, also, *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 94 Am. St. Rep. 880, and cases cited in the cross-reference note thereto.

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## HARLAN & CO. v. BENNETT, ROBBINS & THOMAS.

[127 Ky. 572, 106 S. W. 287.]

**ATTORNEY'S LIEN—Time When Attaches.**—The lien of an attorney for services rendered in an action to recover property relates back to and takes effect from the time of the commencement of the services, and is superior to an attachment subsequently levied. (p. 362.)

**ATTORNEY'S LIEN.**—Where the Attorney of a Defendant merely defeats a recovery by the plaintiff he is not entitled to a lien on the property involved in the litigation; it is otherwise, however, if he succeeds in obtaining an affirmative judgment for his client. (p. 362.)

**PARTNERSHIP.**—Each Partner has a Lien on the Firm Assets for his portion thereof after the payment of the partnership debts. (p. 363.)

**ATTORNEY'S LIEN—What Amounts to Recovery of Property.** When, in a suit by partners to settle the partnership and enforce their liens upon the assets, the defendant partner obtains an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the firm and not in himself alone, this is a recovery of property which entitles his attorney to a lien for his fee. (p. 363.)

J. M. Brummal and Deason, Rankin & Elder, for the appellant.

Bennett, Robbins & Thomas, for the appellee.

573 CLAY, C. On May 15, 1904, W. F. Cowles, George S. Cowles and L. W. Cowles, instituted an action in equity against George S. Palmer in the Hickman circuit court, seeking a settlement of the copartnership existing between them, which was conducted under the first name of the Diamond

Cooperage Company. Appellees, Bennett, Robbins & Thomas, were employed by <sup>574</sup> the defendant Palmer as his attorneys to defend for him and assert his claim to the partnership assets. On June 13, 1904, they prepared and filed his answer and counterclaim. In the pleadings which were voluminous, plaintiffs sought to charge Palmer with large sums of money, while he made counter charges against them, and prayed for a settlement of the partnership, and for judgment for such sum as might be found to be due him. A great deal of testimony was taken, and every point involved in the case warmly contested. On October 13, 1905, judgment was rendered fixing the rights of the parties, including the creditors of the firm, and in that judgment a lien for \$300 was decreed in favor of appellees on the money adjudged to Palmer out of the assets of the firm. Pending this litigation, the property of the firm had been sold, and the proceeds were in the custody of the court. On November 18, 1904, appellants sued George S. Palmer for about \$2,000, and had an attachment issued against his property. On the following day this attachment was levied on Palmer's interest in the firm property. Subsequently John R. Kemp, the special commissioner of the court, who under proper orders sold the firm property, was summoned as garnishee. On September 27, 1905, appellants recovered judgment against Palmer for \$1,360.98, and their attachment was sustained. By judgment entered October 11, 1906, the sum adjudged to George S. Palmer out of the partnership assets was fixed at \$1,313.21. Appellants were given all of this fund, except \$339.87, which was held until the issue could be tried between them and appellees. On October 10, 1906, appellants filed an amended petition, making appellees parties to the proceedings. Appellees thereupon filed a demurrer and answer. <sup>575</sup> The case was submitted, and judgment rendered February 14, 1907, adjudging appellees' lien for attorney's fee superior to appellants' attachment lien. The validity of this judgment is now before us.

As appellees filed Palmer's answer and counterclaim several months prior to the time of appellants' attachment, appellees' lien, if they had any, related back and took effect from the time of the commencement of their services, and was superior to the attachment: *Robertson v. Shutt*, 9 Bush, 659. The only question to be determined then is whether or not appellees were entitled to a lien. Section 107 of the Kentucky Statutes of 1903 provides: "Attorneys at law shall have a lien upon all claims or demands, including all claims

for unliquidated damages put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or in the absence of such agreement for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee," etc. It will be observed that the statute gives the attorney a lien where the action is prosecuted to a recovery. Under subsection 34, section 732 of the Civil Code of Practice, the word "action" embraces a demand for a setoff or counterclaim. Therefore the attorney for the plaintiff may not be the only attorney entitled to a lien. There may be instances where the attorney for the defendant has the same right. Of course, if the attorney for the defendant merely succeeds in defeating a recovery by the plaintiff, he is not entitled to a lien upon the property involved in the litigation: *Lytle v. Bach & Miller*, 29 Ky. Law Rep. 424, 93 S. W. 608; *Wilson* <sup>576</sup> v. *House*, 10 Bush, 406. If, however, he succeeds in obtaining an affirmative judgment in favor of his client, we think the rule is otherwise.

In the case of *Damron v. Robertson*, 80 Tenn. 372, the supreme court of Tennessee, where the rule is the same as in this state, that the attorney has no lien except in cases of a recovery, confirms this view. In that case a suit was instituted for the sale and distribution of the property of a decedent, and for the purpose of requiring an accounting of advancements received by the heirs. One of the heirs was a defendant in the action, and was represented by attorneys. The latter succeeded in defeating any charge against their client for advancements, and out of the proceeds of the property of the defendant, the fund being in court, their client was adjudged about \$1,000. The decedent held the defendant's notes for sums more than his distributable share of the estate, and the administrator instituted an action and attached the defendant's share of the fund in court. In the meantime the attorneys who represented the defendant in the suit for division and settlement intervened in the attachment case, and claimed a priority of lien for their services for the defendant. The lower court sustained the attachment lien, and gave the plaintiff in the attachment the fund as against the attorneys. Upon appeal, the supreme court, in reversing the case said: "The fund in controversy was in custodia legis in the original cause, being money derived from the sale of property for division, and for which there was a decree in that cause in

favor of W. R. Robertson. The services were rendered by Lamb & Tillman for him in that cause. Those services gave them a lien without any order of court on the fund, which became fixed by the positive <sup>577</sup> decree in favor of their client in that cause: *Cunningham v. McGrady*, 2 Baxt. (Tenn.) 141. Their services were not merely in defense of their client's title against adverse claim, but resulted in the recovery of a decree in his favor for a definite sum then in the control of the court, although nominally a defendant. In equity the position of a party is of no consequence. Their lien was, of course, superior to the lien of the complainant as a subsequent attaching creditor: *Carrigan v. Leatherwood*, 3 Leg. Rep. 137, 3 Tenn. Cas. 38. The order of this court would not prejudice the lien." Every partner has a lien on the partnership assets for his portion thereof after the payment of the firm debts. The action by the Messrs. Cowles against the defendant Palmer, in which appellees were adjudged a lien for their legal services in behalf of Palmer, was not a suit to recover an indebtedness already ascertained by a partnership settlement. It was a suit to settle the partnership, and to enforce their lien upon the assets. The defendant Palmer not only controverted their claim, but affirmatively asserted his own claim to and lien upon the assets. These assets were not in the possession of any of the partners. They were in custodia legis. By the efforts of appellees, therefore, the defendant Palmer did not succeed merely in defeating the claim of plaintiffs, or in retaining that which was already his and under his control, but in establishing his positive right to and obtaining an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership, and not in himself alone. To this extent we think there was a recovery within the meaning of the statute, and that the court properly allowed appellees a lien for their fee of <sup>578</sup> \$300 which was certainly reasonable in view of the character and result of their labors.

For the reasons given, judgment is affirmed.

Petition for rehearing by appellants overruled.

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*The Lien of an Attorney and its priority over other liens are considered in the notes to Hanna v. Island Coal Co., 51 Am. St. Rep. 251; Andrews v. Morse, 31 Am. Dec. 755.*



## HERTLE v. RIDDELL.

[127 Ky. 623, 106 S. W. 282.]

**CEMETERIES—Rights of Lot Owners.**—While a purchaser of a lot in a cemetery company does not acquire the fee simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the managers of the company, yet he has a property right in his lot which the law recognizes and protects from invasion, whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. (p. 370.)

**CEMETERIES—Remedies of Lot Owner.**—A lot owner in a cemetery may maintain either trespass for damages or injunction to enforce and uphold his rights whenever those remedies may be necessary, and this either against the trespasser or the company itself. (p. 370.)

**CEMETERY—Injunction Against Burial of Dog.**—When a lot owner has buried a dog in a cemetery, an adjoining lot owner may compel the removal of the body by a mandatory injunction against the trustees of the corporation and the offending lot owner. (p. 373.)

O'Neal & O'Neal, for the appellant.

C. B. Seymour, for the appellees.

625 **BARKER, J.** The appellant, Henry Hertle, instituted this action in the chancery branch of the Jefferson circuit court for the purpose of securing a mandatory injunction against Cave Hill Cemetery Company, Alice Riddell, W. G. Hansbrough, and Ada Hansbrough, requiring them to remove from the cemetery lot belonging to Hansbrough the body of a dog which was buried therein, as he alleged, in violation of the laws, rules, and regulations governing the cemetery company, and his rights as a lot owner therein. His petition sets forth that Cave Hill Cemetery Company is a corporation created by and under the laws of the state of Kentucky, with power under its charter, among other things, to ordain and put in execution such by-laws, rules, and regulations for its government and the management of its affairs as it may see proper, not contrary to the laws of the commonwealth of Kentucky or of the United States, and that by its charter it is expressly provided that all lands acquired by the corporation shall be perpetually held and used for the purposes of a "rural cemetery"; that long prior to the actions which are complained of in the petition, and prior to the purchase of lots therein either by the plaintiff or the codefendants of the cemetery company, the corporation adopted rules and regulations for the government of the cemetery and the management of its affairs, and among others it adopted the following, to

wit: "This cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only"—which is still in full force and effect. As a succinct statement of <sup>626</sup> the facts out of which grew this litigation, we copy the following excerpt from the petition: "He says that, for a valuable consideration paid by him to the defendant corporation, the defendant conveyed and transferred to him on its books, and in accordance with its charter, rules, and regulations, lot No. 104, in section 1 of the cemetery, owned by defendant corporation, and known as and called Cave Hill Cemetery, which is in the county of Jefferson, and state of Kentucky, and he has ever since been and now is the exclusive owner of said lot and has the right to bury the remains of his family and other persons in said lot, and to have his own remains after death buried in said lot; that since the purchase of his said lot as aforesaid he has buried the body of his daughter in said lot, and her body is now buried in said lot, and the residue of said lot is held by him as a place for the burial of the remains of other members of his family, and for the interment of his own remains; that he purchased said lot and caused the remains of his daughter to be buried therein long prior to the wrongs and injuries complained of herein, and relying on the charter, rules, and regulations of the defendant that the lands owned and burial lots sold by it would be used exclusively as a rural cemetery and for the exclusive burial of the remains of white persons, and that said lot and all the other lots owned by said defendant corporation would be used exclusively for said purpose. He states that the defendant Alice Riddell is now and was at the time of the wrongs and injuries hereinafter complained of the owner of lot No. 106, in section 1 of said cemetery, which she purchased and held under and subject to the provisions of the charter, rules, and regulations of said defendant corporation; that the said lot of defendant <sup>627</sup> Alice Riddell adjoins and binds on the lot of this plaintiff; that the said defendant Alice Riddell, without the knowledge, consent, or approval of this plaintiff, or of any of the other lot owners in said cemetery, to the great shame, humiliation, and distress of this plaintiff and the other members of his family, permitted and authorized her codefendant W. G. Hansbrough and Ada Hansbrough to inter, and they did inter, in her said lot a dog, and the remains of said dog are now buried in said lot; that said wrongs were done without any authority from said cemetery company, and in violation of the rights of this plaintiff as a lot owner in said cemetery. He says that by said wrongful acts of said

defendants which were made known and came to the knowledge of many of the citizens of Louisville and Jefferson county he and all the members of his family have been caused and will continue to suffer great mental distress, his said lot will be rendered of no value for any purpose, he will be compelled to remove from his said lot the remains of his daughter now buried therein, and will not be able to use said lot for burial or any other purposes; that the defendants in burying and permitting said dog to be buried on said lot committed and have ever since maintained a nuisance, which said nuisance by reason of its close proximity to the lot of this plaintiff caused to him peculiar and special injury and damage. He states that, as soon as he learned of the wrongs and injuries complained of herein, he demanded of the defendants and each of them that the remains of said dog should be removed from said lot, but the defendants refused to remove same, and notified this plaintiff that they intended to keep the remains of said dog perpetually in said lot. He states that the defendant corporation is willing, <sup>628</sup> as he is informed, to abate said nuisance by removing the remains of said dog, but asserts that it cannot do so without the consent of its codefendants, and for that reason refuses to abate said nuisance. He states that the continuance of said nuisance would produce great and irreparable injury to the plaintiff, and its commission has produced great and irreparable injury to the plaintiff; that he has no adequate remedy at law, and the defendants and each of them are doing and suffering to be done all of said acts, all of which are in violation of plaintiff's rights." A general demurrer was filed by the defendants to the petition and sustained by the court; whereupon the appellant (plaintiff below) refused to amend, and his petition was dismissed; and of this ruling he now complains.

The precise question involved here is stated in the briefs of learned counsel to be one of first impression, and their well-known learning and industry is a sufficient guaranty to us that the question has never been adjudicated before. The demurrer admits all of the well-pleaded allegations of the petition, and it therefore only remains to determine (1) what rights appellant as a lot owner in the cemetery possesses; (2) whether or not he can enforce by the processes of the law these rights as against an adjoining lot owner; and (3) whether the action of the defendants are violative of any legal right of the plaintiff. Cave Hill Cemetery is the principal burial place for the white people of the city of Louisville. It may be conceded at the outset that the purchaser

of a lot from the defendant corporation does not become its owner in fee simple; that he has in it only the property right of using it for sepulture purposes, subject to the reasonable rules and regulations governing the <sup>620</sup> corporation; and it may be said that his property rights more nearly resemble that of an easement than a fee simple title. But, whatever these rights are, they are property rights, and when violated the owner is as certainly entitled to all the remedies which the law affords, as if he owned a fee simple. The establishment and the maintenance of great cemeteries for the convenience of cities is an absolute necessity. Man naturally desires to provide a suitable place in which to bury his dead, and his reverence and love for his dead demands the establishment of a place where their bodies may repose in peace and dignity; where they will be safe and secure from trespassers, and where he may beautify their graves and mark their last resting place with suitable monuments to preserve their memory from oblivion.

It is a matter of common knowledge that in the principal cemeteries of large cities enormous sums of money are expended in adorning the grounds, in keeping the graves fresh and beautiful, and in erecting monuments upon which to record the virtues of the dead. A lot, therefore, in a cemetery, by whatever title it is held or denominated, is a valuable property, even when measured in money, and we will now examine some of the authorities bearing upon the subject, in order to ascertain what other jurisdictions and the text-writers have held with reference to the rights of lot owners in cemeteries to invoke the process of the law to restrain or remedy the invasion of their property rights. In the case of Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769, it was held that a purchaser of a lot in a cemetery, while he has the exclusive right to its use for the purpose of sepulture, holds it subject to the reasonable regulations and by-laws of the corporations, and that he <sup>630</sup> cannot exercise that absolute dominion over it, or with regard to it, as can the owner in fee simple in regard to his property. In the case of Wright v. Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621, the owners of a lot in the defendant corporation were held entitled to an injunction against the corporation restraining it from preventing them from burying a member of their family upon their lot. In Hollman v. City of Platteville, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119, the owners of a lot in a public cemetery were held entitled to maintain an action of trespass against the city, which



owned the fee simple title, for invading the lot and removing the dead who were buried there. To the same effect is *Bessemer Land & Imp. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 South. 565. In *Gowen v. Bessey*, 94 Me. 114, 46 Atl. 792, the owner of a lot in a cemetery, while not owning the fee simple, had such property rights and possession as entitled him to maintain an action of trespass against a wrongdoer. In the case of *Wormley v. Wormley*, 207 Ill. 411, 69 N. E. 865, 3 L. R. A., N. S., 481, it was said that it is well settled that a court of equity will enjoin the owner of land dedicated to cemetery purposes from defacing or meddling with graves on the land, at the suit of any party having deceased relatives or friends buried therein. In the case of *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, a judgment in damages against the superintendent of a cemetery for wrongfully removing the body of a child of the lot owner was upheld. In the case of *Mt. Moriah Cemetery Assn. v. Commonwealth*, 81 Pa. 235, 22 Am. Rep. 743, the supreme court of Pennsylvania held that, where a lot was sold to a colored man for burial purposes, the corporation could not <sup>631</sup> afterward change its by-laws and rules so as to exclude him and his family from sepulture therein, and mandamus was upheld against the corporation requiring it to permit the burial of the family of the owners of the lot. The rights of the owners of lots in cemeteries are thus defined in 6 *Cyclopedia*, title "Cemeteries," section 8, page 720: "Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial ground or the graves therein. An action of trespass *quare clausum fregit* may be maintained for breaking and entering a burial lot. One who is in the rightful possession of a cemetery lot, or who holds title to the usufructuary interest therein, may maintain an action against one who wrongfully trespasses upon it." In the case of *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316, it was held that where the plat of the cemetery at the time the owner purchased his lot showed an avenue or walkway leading up to the lot, and which was an easement subservient thereto, the owner of the lot is entitled to an injunction restraining the closing or discontinuing of the easement by the cemetery company. In *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 7 L. ed. 521, it was held by the supreme court of the United States that the owners of burial lots, to which they had title by prescription, were entitled to the equitable remedy of injunction against the owners of the fee in the land to restrain them from removing the ashes of the dead. The court, in its opin-

ion, speaking through Mr. Justice Story, said: "The next question is as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that <sup>632</sup> possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of mere private trespass, but a public nuisance, going to the irreparable injury to the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them; the sepulchers of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." In *People v. St. Patrick's Cathedral*, 21 Hun (N. Y.), 184, it was held that one who purchases a lot from a distinctively Roman Catholic cemetery takes it with the tacit understanding either that he is a Roman Catholic, and, as such, eligible to burial, or at least that he applies on behalf of those who are in communion with the church. And in *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903, it was held that where land was conveyed as a burial place for members of the Catholic Church, and is taken in charge by officers of that denomination and consecrated according to its laws, <sup>633</sup> a lot owner has no right to inter therein a person not recognized by the church authorities as a Catholic. In the case of *McGough v. Lancaster Burial Board*, 21 Q. B. Div. 323, it was held that a lot owner had no right to erect a glass shade over the grave on his lot, which was contrary to the rules of the board. In the case of *Clark v. Rahway Cemetery Co.*, 69 N. J. Eq. 636, 61 Atl. 261, in the court of chancery of New Jersey, it was held that a lot owner in a cemetery where the

ground was dedicated for burial purposes only could maintain an injunction against the trustees, requiring them to keep the grounds in good order and repair, and to maintain the whole as a cemetery. In the opinion it is said: "Now, what is the object of this cemetery company? That is stated in its certificate: 'The object and purpose of the corporation is to maintain and use the property acquired from the church and any property it may hereafter acquire . . . for cemetery purposes.' What are these purposes? Manifestly the decent care of the departed. The company itself is not only to use the property for burial purposes, but also to maintain it for those purposes. . . . It would seem plain that under the joint operation of the certificate of incorporation, of the by-laws, and of the deed itself the purchaser is not the isolated owner of a fee simple absolute, of a lot over which he has entire control as such, but a person who has acquired a limited interest in a lot which is part of one connected whole; that whole being conducted, maintained, and managed by trustees for the benefit of himself and those similarly situated. His interest is in some degree that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice. Here the direct tendency of <sup>634</sup> the acts complained of is to imperil the lots remaining undisposed of, to depreciate the value of the cemetery lots as a whole, to prevent needed improvements, and to render access to complainant's lot more difficult."

From the foregoing authorities, we deduce these principles, which we think are sound: (1) That while a purchaser of a lot in a cemetery company such as the one at bar does not acquire the fee simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the managers of the company, yet he has a property right in his lot which the law recognizes and protects from invasion, whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. (2) That the lot owner's remedy is commensurate with his rights, and he may maintain either trespass for damages or injunction, to enforce and uphold his rights whenever those remedies may be necessary, and this either against the trespasser or the company itself. The question, then, recurs: Did the act of the adjoining lot owners in burying on their lot the body of their dead dog violate the property rights of the plaintiff? And, if so, is the wrong such a one as equity will remedy by a mandatory injunction? The answers to these questions must depend upon the contracts which arose

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between the parties when the lots were purchased. Into the contract of purchase of a lot in a cemetery must be read the charter and by-laws of the company, and neither the owner nor the corporation can violate the fundamental purpose for which the corporation was organized and the property dedicated. One who purchases a lot in a Catholic cemetery may not afterward violate the rule of the church by giving sepulture to a member of the Masonic order, although the <sup>635</sup> contract of purchase is silent on the subject: *People v. St. Patrick's Cathedral*, 21 Hun, 184; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903. Nor may a cemetery company sell a lot to a negro and afterward adopt a by-law which forbids its use for burial purposes to the negro race: *Mt. Moriah Cemetery Co. v. Commonwealth*, 81 Pa. 235, 22 Am. Rep. 743. When, therefore, one contemplates the purchase of a lot upon which to bury his family, in order that he may certainly obtain what he desires, he must look to the charter and by-laws of the corporation, and having done this, they become a part of his contract of purchase. When the plaintiff and the defendants purchased the lots they now own in Cave Hill Cemetery, its charter dedicated it as a cemetery, and its by-laws contained the guaranty that "this cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only." With these provisions in their contracts, with what grace may the defendants demand the right to turn their lot into a place for the burial of dogs? Or why shall the plaintiff be not heard to complain of this gross violation of the charter and by-laws of the cemetery company? The appellees and the chancellor answer that it was a small dog, that it was well buried, and its presence under these conditions does not create a nuisance. If the question be whether its burial creates a physical nuisance, this view may be correct. But is there not much more involved in the question than a mere physical nuisance? A member of the negro race well buried is, from the standpoint of physical nuisance, no more so than the body of one of the Caucasian race; yet no one will deny that, if the privilege of burial in it were extended to the negro race, the value of Cave Hill as a cemetery for white people would be at once entirely destroyed. A lot which is now <sup>636</sup> worth in money as much as five hundred dollars, would not, after such a change in the by-laws, be worth fifty dollars. Property which in the aggregate may now be worth millions would then be rendered practically worthless. It does not aid the question to say this is an unreasoning prejudice. For the purposes of the argument, this



may be admitted to be true. It is none the less true, however, that the money value of this cemetery property is based upon the confidence of the white citizens of Louisville that their prejudices in this regard will be safeguarded both by the corporation and the law. If this is true in regard to members of another race, is it not true to a greater degree in regard to the bodies of the lower animals? If the body of a dog may find sepulture on the lot of its owner in Cave Hill Cemetery, why might not the owner of a horse or bull, or donkey, also bury his favorite on his lot therein, if his fancy should take this freakish direction? Where would, or could, the line be drawn, if not at the body of a dog? We believe that the average man would consider it an outrage on his rights as a lot owner in a cemetery if the owner of the adjoining lot should inter the carcass of a dog beside the lot which holds the graves of his family. It would be useless to tell him that, when the bodies were resolved back into their original elements, chemically there is no difference between them. We do not reason about the dignity of our dead either according to the laws of logic or of chemistry. Sorrow, bending over the graves of her loved ones, smiles through her tears and accepts the assurance of Faith that they are not dead, but sleeping. It is for this reason that we beautify the grounds in which they repose, guard their graves from vandalism, and protect their dignity from desecration. This may be only sentimentality; <sup>637</sup> but, if these sentiments are outraged, our pain is none the less real. The burial place of the dead has among all nations and in all times been deemed sacred, and our Anglo-Saxon forefathers called it "God's Acre." It is protected by stringent laws from violation, and its willful desecration is universally regarded as exceptionally wicked. Man does not regard the last resting place of his dead as simply a place where they may be thrust from sight and forgotten. To him their ashes are sacred; and the memory of their virtues constitutes a foundation both for inspiration and courage. It was in this spirit that a great patriot, when our country was in direst peril, appealed to the mystic chords of memory stretching from every battle-field and patriot's grave to every living heart and hearthstone in the land to swell the chorus of the Union when touched by the better angels of our nature. The sentiments and prejudices of man are a part of him. He does not often control them. As a rule they control him. He has a right to protect his lawful sentiments and prejudices from violation or outrage by contracts based upon legal consideration, and, when

they are thus safeguarded, no reason is perceived why these contracts may not be enforced as any other contracts may be.

When the appellant purchased his lot in Cave Hill Cemetery by a large outlay of money, it was to secure a place of sepulture for himself and family in a cemetery dedicated to the burial of white people only, and, while some may criticise this spirit of exclusiveness, surely none can successfully deny his right to that for which he paid. On the other hand, the adjoining lot owners purchased their lot subject to the charter and by-laws of the cemetery company, and they have no right to put it to any use which violates the charter <sup>638</sup> and by-laws of the cemetery company. Each is entitled to what he purchased—no more, no less. The appellant not only has the right to the actual use of his lot for the purpose for which it was sold to him, but he has also in common with all the other lot owners the right to have the cemetery maintained as a whole for the purposes for which it was dedicated, and is entitled to an injunction against the trustees of the corporation and the adjoining lot owners to prevent these rights from being violated: *Clark v. Rahway Cemetery Co.*, 69 N. J. Eq. 636, 61 Atl. 261; *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566, 7 L. ed. 521.

For these reasons, the judgment is reversed, with directions to overrule the demurrer to the petition, and for further procedure consistent with this opinion.

Petition for rehearing by appellant overruled.

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*The Owner of a Lot in a Cemetery* does not own the fee so that he may maintain ejectment, but only an easement or license of burial: *Stewart v. Garrett*, 119 Ga. 386, 100 Am. St. Rep. 179; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897. His interest therein, however, is sufficient to maintain an action for damages for trespass or interference with the grave or headstone: *Jacobus v. Congregation etc. of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141; note to *Keyes v. Konkel*, 75 Am. St. Rep. 430.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MASSACHUSETTS.**

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**BEERS v. ISAAC PROUTY COMPANY.**

[200 Mass. 19, 85 N. E. 864.]

**MASTER AND SERVANT—Liability of the Former to the Latter for Employing Incompetent Fellow-servants.**—One who employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, is liable to any other employé, who, being in the exercise of due care, is injured as the proximate result of some act of the incompetent servant growing out of his want of capacity. (p. 376.)

**MASTER AND SERVANT, Right of the Latter to Assume that Due Care has been Exercised in the Selection of His Coemployés.**—An employé has the right to assume that the fellow-servants employed to work with him will not be lacking in those attributes which will make them ordinarily safe coworkers. He may act on the theory that he will in the performance of his duties be free from the danger of the want of capacity of his fellow laborers to perform their duties. (pp. 376, 377.)

**MASTER AND SERVANT—Employment of Colaborers Ignorant of the English Language.**—One at work for his employer upon somewhat complicated machinery requiring the labor of two or more men, and in the natural and proper operation of which it is necessary for the one to communicate with the other through the medium of speech, may recover for injuries received because of the inability of the assistant furnished to him to understand the English language, such inability not being known to the person injured, or, at least, such inability may justify the jury in finding that the master was guilty of employing an incompetent fellow-servant. (p. 378.)

Action to recover for personal injuries suffered by the plaintiff when in the employment of the defendant through the incompetency of a fellow-servant. The incompetency relied upon was the inability of such servant to understand English. The plaintiff requested the court to rule as follows: “(1) The fact that a fellow-servant sent to work with another fellow-servant upon a machine, in the natural and proper operation

of which the labor of two men is required at the same time, and in the natural and proper operation of which it is necessary for the two men to talk with each other, cannot speak or understand the language spoken by the other fellow-servant, is some evidence of incompetency on the part of the fellow-servant so sent. (2) If a fellow-servant of the plaintiff is so inexperienced or so uninstructed that in working under the circumstances set forth in the first request he is not fit for the position, and he mismanages the machine in use by them so as to cause an injury to the plaintiff, this is some evidence of incompetency, and, other necessary elements being present, plaintiff may recover."

The trial judge refused to rule as requested, and, on the contrary, declared that, "If the jury finds that St. Hillaire was competent to operate this machine, and knew the operation of the various levers, the plaintiff cannot recover," and that "the mere fact that St. Hillaire did not speak English did not make him incompetent within the meaning of the law."

The jury found for the defendant and the plaintiff alleged exceptions.

M. M. Taylor, for the plaintiff.

C. C. Milton, for the defendant.

<sup>20</sup> RUGG, J. The plaintiff was at work, as an employé of the defendant, upon a somewhat complicated machine for the manufacture of paper or pasteboard boxes. In its ordinary and economical operation the labor of two men was required. A common occurrence was for the paper or pasteboard to clog in process of manufacture, rendering it necessary to stop the machine and clean off the paper and paste, which had stuck to it. The work of the plaintiff was "feeder," and he was the superior of the two men and in authority in running the machine. The other person working upon the machine was called "catcher." It was the ordinary course of employment for both men to work in cleaning when necessary. The plaintiff had been at work upon the machine for several weeks. About half an hour before the accident occurred, one St. Hillaire was for the first time sent by the boss of the defendant to work upon the machine as catcher. The plaintiff knew St. Hillaire only casually, and was not aware of the fact that he could not speak or understand the English language. After they had thus been at work together less than an hour, the machine, having become clogged with the <sup>21</sup> pasteboard and



paste, was stopped by St. Hillaire, and both men began cleaning. Then St. Hillaire started the machine a bit, whereby the plaintiff's fingers were caught just hard enough so that they could not be pulled out, although "it was not exactly painful as they were held there." Thereafter the plaintiff in English, which was the only language he knew, directed St. Hillaire to put off the power.\* Instead of following this direction, St. Hillaire started the power up, and the plaintiff's fingers were cut off. It might have been inferred that it was necessary, in the natural and proper operation of the machine, for the two men at work upon it to communicate with each other through the medium of speech. The question raised is whether, under these circumstances, the defendant might have been found to have furnished an incompetent fellow-servant from the fact that it put a man at work on the machine who could not speak the English language, or the language of the man in charge of the machine. The charge of the trial judge must have left the clear impression upon the minds of the jury that mere inability to speak the English language on the part of St. Hillaire could not be found to be sufficient evidence of incompetency.

The duty of the employer is to exercise ordinary prudence in the selection of his servants, in order to ascertain that they are competent to perform the work to which they are to be assigned. If he employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, then he is liable to any other employé, himself in the exercise of due care, who receives injury as a proximate result of some act of the incompetent servant growing out of his want of capacity. The employé has a right to rely upon the assumption that in this respect the master will perform his duty, and that the fellow-servants employed to work with him will not be lacking in the possession of those usual attributes which would make them ordinarily safe coworkers. He may with propriety act on the theory that <sup>22</sup> he will, in the performance of his own duties, be free from the danger of want of capacity in his fellow laborers to perform their duties.

What constitutes incompetency of an employé varies with the nature of the duties he is called upon to perform, and

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\*The plaintiff testified, "If at the time my fingers were caught as I have stated, and before they were cut off, the power had been thrown off by this belt on the side of the machine you can back the machine up, that is, lower the block down, you could do this by pulling on that belt with your hands so as to reverse it, that would loosen it enough to let my fingers out."

their relation to other human beings. Where mere manual labor is required, and there is no occasion for the exercise of discretion and no expectation of co-operation with other laborers, it may be that servants of divers tongues may with propriety be put to work in the same company. Color blindness or extraordinary nearsightedness might render one incompetent to act as a locomotive engineer, while these same deficiencies might not impair the usefulness of a watchmaker. Deafness might make one useless as a telegraph operator or on a telephone exchange, but be no serious difficulty in a boiler maker. Ignorance respecting the duties one is called upon to perform would generally be incapacity. It is of no consequence whether that ignorance consists in a want of knowledge of mechanical processes or linguistic acquirements, provided the knowledge of the subject matter is essential in the performance of the required duty. Ignorance of the English language in an experimental chemist working by himself for a steel manufacturer might not render him incompetent, but it could not be contended that one unfamiliar with that language would be a suitable teacher for the public schools.

The plaintiff was the superior artisan, and had been at work upon the machine which caused his injury for a considerable period of time. He had a right to assume that the defendant would not send an incompetent workman to assist him. From the photograph used in argument and the description given by witnesses, it is apparent that the box machine, upon which these two men were at work, was of considerable size, complicated in its design and intricate in its mechanism. In its ordinary use, frequent stopping, cleaning and starting were necessary, and co-operation between the workmen was required. There was evidence sufficient to justify a conclusion by the jury that it was necessary for the plaintiff to give directions by word of mouth from time to time to the catcher. Under these circumstances the jury should have been permitted to find <sup>23</sup> that the placing a man upon this machine, who was unable by reason of ignorance of the English language to understand and act upon directions received from the plaintiff, was in and of itself sufficient evidence of the employment of an incompetent servant. It was as if a man absolutely deaf had been sent. This want of knowledge resulting in an inability to obey orders was as much incompetency as nervousness or lack of judgment on the part of a stationary engineer: *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90; or weakness, infirmity and excitability in an elevator man: *Ledwidge v. Hathaway*, 170 Mass. 348, 49 N. E. 656.

Nor can it be said that the plaintiff was not injured by this error. It is not open to argument that the defendant did not, or might not in the exercise of reasonable care, know of the inability of St. Hillaire to speak the English language, and that English was the vernacular of the plaintiff. The very act of hiring must have furnished this information. There was also ground for the view that the plaintiff's injury resulted directly from the inability of St. Hillaire to understand his orders. St. Hillaire was the one whose position for work at the machine made him naturally the one to put the power on and off. His posture was not such as to give him necessarily the knowledge that the plaintiff's fingers were caught, and he testified that he did not know they were caught, until he saw they were cut off. That he threw the power on instead of off may have been found to be the direct result of his inability to understand the direction given him in English by the plaintiff.

Exception sustained.

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*It is the Duty of an Employer* to exercise reasonable care to select competent employes. If he fails to discharge this duty and employs men incompetent for the work, or retains them in the service after notice of their incompetency, other employes cannot be held to have assumed the risk incident thereto: *Jenson v. Great Northern Ry. Co.*, 72 Minn. 175, 71 Am. St. Rep. 475; *Williams v. Kimberly and Clark Co.*, 131 Wis. 303, 120 Am. St. Rep. 1049; *Norfolk and Western R. R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Hughes v. Baltimore etc. R. R.*, 164 Pa. 178, 44 Am. St. Rep. 597.

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### BANAGHAN v. MALANEY.

[200 Mass. 46, 85 N. E. 839.]

**SPECIFIC PERFORMANCE, When may be Refused.**—The right to specific performance is not absolute, but rests in the sound discretion of the court, and may be refused to anyone who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for its rescission. (p. 381.)

**SPECIFIC PERFORMANCE may be Refused Where the Defendant was an Aged, Inexperienced and Ignorant Woman**, as against a plaintiff whose agent in procuring the contract, being the superior in mental ability to the defendant, persuaded her to refrain from consulting advisers on whom she was disposed to rely, and wrought upon a racial prejudice to persuade her to make the agreement at once, upon the terms offered, and failed to disclose to her the circumstances which led him to believe that a higher price could be obtained. (p. 381.)

**SPECIFIC PERFORMANCE, Failure to Assess Damages Where Such Performance is Refused.**—Where the court refusing to decree specific performance of a valid contract might retain the bill for the purpose of giving relief in damages, it is not bound to do so, but may dismiss the suit, leaving the plaintiff wholly to his remedy at law. (pp. 381, 382.)

Suit for the specific performance of a contract to sell or convey real property. The findings of fact by the trial judge are as follows:

“I find that the plaintiff and defendant entered into the contract alleged in the bill; that the defendant was competent to make the contract, was the owner of the premises dealt with, was not induced by any fraud or misrepresentation to sign the contract, and, at law, is bound thereby.

“William Banaghan, a real estate broker and dealer, brother and agent of the plaintiff, suspecting a desire on the part of the New York, New Haven and Hartford Railroad Company to acquire the defendant's real estate and other parcels in the neighborhood for the purpose of connecting the tracks of its New England and Providence divisions, visited the defendant on Saturday, July 13, 1907, and, without disclosing this suspicion, persuaded the defendant to agree to sell to the plaintiff, and agreed on behalf of the plaintiff to buy the defendant's real estate. The defendant, who was unable to read and write, signed the agreement [to convey] by her mark. The price stated was the fair market value of the premises, possibly a little higher price, apart from any demand arising from the plans of the railroad company. . . . No one but William Banaghan and the defendant were present during the negotiations and at the execution of the agreement, which was written out by Banaghan in her presence and read over to her before she signed it by her mark.

“The defendant was an old woman of no experience in dealing in real estate and unsettled and unstable in her dealing. Her business affairs for many years had generally been conducted after consultation with James S. Brown, treasurer of the Worcester Five Cents Savings Bank, which held the first mortgage on the premises, or with one Sprague, an old friend, once her employer; and she had been warned by Brown never to sell her property without first consulting him. . . . In the course of negotiations with Banaghan the defendant told him of her understanding with Brown and her desire to confer with him. Indeed, at first, she refused to sell. Banaghan, however, urged her to deal with him on the spot, and the fact that both Banaghan and she were Irish undoubtedly helped bring about the contract.



"This trade was concluded about noon. Banaghan paid down twenty-five dollars in bills and went away, leaving no copy of the agreement with her. . . . About 4 o'clock in the afternoon of the same day, one Moore, employed by the railroad company to secure options on the lands it wanted, called upon the defendant for that purpose. On his opening negotiations the defendant told Moore she had sold to Banaghan that day for nineteen hundred dollars. Moore asked if she had signed any paper, and on being told she had, asked to see it. She told him she had no copy; and, in answer to the question, said further that the paper was not witnessed. Moore thereupon told her she was not bound by the agreement to sell, and offered her two thousand two hundred dollars to sell to him. She refused. He then offered her two thousand four hundred dollars, of which fifty dollars was to be paid down, and to protect her against any claims of Banaghan under the agreement with him. She thereupon took the fifty dollars, and signed an agreement to convey to Moore. . . .

"Moore told the defendant to return to Banaghan the twenty-five dollars he had given her; and on July 15, 1907, she [attempted to do so, but he refused to accept the money, and] the plaintiff immediately filed this bill. . . .

"On August 8, 1907, a conservator of defendant's property was appointed by the probate court on her petition, who was made a party to this bill, appeared by counsel, and, in person, attended at the hearing before me.

"I do not find any disposition on the part of the defendant's counsel, the conservator or her advisers to assist the plaintiff; while the defense to the bill has been carried on chiefly by the counsel for Moore, really in the interest of the railroad company.

"The plaintiff's agent and the defendant were not of equal mental ability; the defendant was aged, inexperienced, wavering; the agent did not discuss his conjectures as to the railroad's plans; he did persuade her to act without first consulting her friends and advisers, and played upon her racial prejudices in plaintiff's behalf; and although I am convinced that, in the absence of the action by Moore and knowledge of the railroad company's intentions, the defendant and her advisers would have made the conveyance to the plaintiff and have been properly satisfied with the price agreed on, in view of these facts I think the plaintiff is not in equity entitled to the specific performance prayed for, but should

be left to his actions at law for damages against the defendant and the railroad company if any he has."

The bill was dismissed, and the plaintiff appealed.

B. W. Potter and P. Potter, for the plaintiff.

E. Brown and C. A. McDonough, for the defendant.

<sup>49</sup> SHELTON, J. The judge had a right, upon his findings, to refuse to give the plaintiff a decree for specific performance of his agreement with the defendant. It is true that the agreement was good and sufficient upon its face; the defendant was legally competent to make it; and it was not obtained by such fraud or misrepresentation as would give the defendant a right to avoid it. But this is not enough to entitle the plaintiff as a matter of right to enforce specific performance. His right to this remedy is not an absolute one. It rests in the sound discretion of the court. It may be refused to one who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for the rescission of the agreement: *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Western R. R. v. Babcock*, 6 Met. 346. This rule has been recognized in the later decisions of this court: *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Thaxter v. Sprague*, 159 Mass. 397, 34 N. E. 531. And see the cases collected in 26 *Am. & Eng. Ency. of Law*, 2d ed., 62-67.

The defendant was an aged, inexperienced and ignorant woman. The mental ability of the plaintiff's agent was superior to hers; he persuaded her to refrain from consulting the adviser upon whom she was disposed to rely, and wrought upon her racial prejudices to persuade her to make the agreement at once upon the terms which he offered. After having thus kept her from obtaining the independent advice which she desired, he did not disclose to her the circumstances which led him to believe that a higher price could be obtained for the property. He was not of course under any fiduciary obligations to her; but this conduct on his part does not entitle him to favorable consideration in a court of equity. He took an inequitable advantage of the defendant.

The plaintiff further contends that his bill, instead of being dismissed, should have been retained for the purpose of giving him relief in damages. Undoubtedly this might have been done. It was done in *Rosenberg v. Heffernan*, 197 Mass. 151, 83 N. E. 316. Presumably it would have been done here, if the plaintiff had so requested. But the court was

not bound to adopt this course; it might leave the plaintiff wholly to his remedy at law, as was done in *Curran v. Holyoke Water Power Co.*, 116 Mass. 90. In <sup>50</sup> *Milkman v. Ordway*, 106 Mass. 232, relied on by the plaintiff, as in *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340, *Lexington Print Works v. Canton*, 171 Mass. 414, 50 N. E. 931, and similar cases, the plaintiff had lost his right to purely equitable relief without fault on his part. The rule of those cases is not applicable here. The plaintiff has not asked for leave to change his bill by amendment into an action at law for damages, as in *Merrill v. Beckwith*, 168 Mass. 72, 46 N. E. 440.

Decree affirmed.

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**WHEN SPECIFIC PERFORMANCE OF A VALID CONTRACT  
WILL BE REFUSED, THE REFUSAL NOT BEING BECAUSE  
THE PROPERTY IS OF ANY PARTICULAR CLASS.**

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**I. Scope of Note.**

In this note we shall not consider cases in which the refusal to decree specific performance is based on the plaintiff having an adequate remedy at law; nor where the refusal is based on defendant's inability to perform the contract. The specific performance of options was considered in the note attached to *Mier v. Hadden*, 118 Am. St. Rep. 592. The refusal to decree specific performance owing to the court's inability to enforce its decree was the subject of the note attached to *Standard etc. Co. v. Siegel-Cooper Co.*, 68 Am. St. Rep. 753.

**II. General Basis of the Doctrine of Specific Performance.**

Specific performance may be defined as the actual accomplishment of a contract by the party bound to fulfill it. It is the performance of a contract in the precise terms agreed upon. The main ground of the jurisdiction of courts of equity in specific performance is their capacity to afford relief not attainable at law. At law the plaintiff is required to show precision on his part in complying with all the requirements of the agreement, whereas in equity the relief is sometimes granted notwithstanding defects or failure to perform at the day. Inasmuch as courts of equity regard the substance of the agreement and the object and intention of the parties, they will not permit terms which are not essential to be set up as a reason for refusing specific performance: *Connaway v. Wright's Admr.*, 5 Del. Ch. 472.

"It rests upon the ground that there are many cases in which a compensation in damages will be no adequate remuneration for a violation of contract, and that a failure to perform it is a breach of moral and equitable duty; and a court of chancery, addressing itself to the conscience of the offending party, requires a strict performance of what he cannot, without manifest wrong or fraud, refuse": *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447. A court of equity will never lend its aid to accomplish by indirect means what the law or its clearly defined policy forbids to be done directly. And this rule applies to the specific performance of contracts: *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. The doctrine of specific performance appears to be founded on the maxim that he who seeks equity must do equity: *Marks v. Gates*, 154 Fed. 481. In *Hexter v. Pearce*, [1900] 1 Ch. Div. 341, Mr. Justice Farwell said: "To my mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages in-



stead. The right to sue on a contract is the same in law and in equity, but the remedies differ, and a court of equity will grant the equitable remedy in all cases, so far as I have been able to discover, unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it. I think the case *Knight Bruce, L. J.*, had in his mind would fall within the second category. I am not aware that the court has ever taken into consideration the comparative convenience or inconvenience of the plaintiffs and defendants apart from the considerations I have just mentioned. Whether the contract is a convenient or an inconvenient one is for the parties to consider when they enter into it."

The specific performance of a contract is an appeal to the extraordinary power of a court of equity and will not be exercised unless the contract is just and reasonable in all its parts. The jurisdiction is not compulsory: *Gould v. Womack*, 2 Ala. 83.

### III. Discretionary Character of the Right to Obtain Specific Performance.

Specific performance is not a matter of right, but of grace: *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 46 Atl. 340, 50 L. R. A. 501; *Alexander v. Wunderlich*, 118 Pa. 610, 12 Atl. 580.

Whether a decree for specific performance will be granted or refused rests in the sound discretion of the court: *Blackwilder v. Loveless*, 21 Ala. 371; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756; *Fish v. Leser*, 69 Ill. 394; *Bates Mach. Co. v. Bates*, 87 Ill. App. 225; *Maltby v. Thews*, 171 Ill. 264, 49 N. E. 486; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271; *Auter v. Miller*, 18 Iowa, 405; *Ormsby v. Graham*, 123 Iowa. 202, 98 N. W. 724; *Ratterman v. Campbell*, 26 Ky. Law Rep. 173, 80 S. W. 1155; *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300; *Shriver v. Seiss*, 49 Md. 384; *Whalen v. Baltimore etc. R. Co.*, 108 Md. 11, 69 Atl. 390, 17 L. R. A., N. S., 130; *Chicago etc. R. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22; *Hester v. Hooker*, 7 Smedes & M. 768; *Clement v. Reid*, 9 Smedes & M. 535; *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Gottfried v. Bray*, 208 Mo. 652, 106 S. W. 639; *Sherman v. Wright*, 49 N. Y. 227; *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824; *Shakespeare v. Caldwell Land etc. Co.*, 144 N. C. 516, 57 S. E. 213; *Friend v. Lamb*, 152 Pa. 529, 34 Am. St. Rep. 672, 25 Atl. 577; *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565; *Engberry v. Rousseau*, 117 Wis. 52, 93 N. W. 824; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955.

The discretion of the court to grant or refuse specific performance must be exercised upon a consideration of all the circumstances of the case with a view to subserving the ends of justice: *Hudson v.*

Layton, 5 Har. 74, 48 Am. Dec. 167; Godwin v. Collins, 3 Del. Ch. 189; Knott v. Giles, 27 App. D. C. 581; Vincent v. Larson, 1 Idaho, 241; Chicago etc. R. Co. v. Reno, 113 Ill. 39; Sutton v. Miller, 219 Ill. 462, 76 N. E. 838; Casstevens v. Casstevens, 227 Ill. 547, 118 Am. St. Rep. 291, 81 N. E. 709; India Tea Co. v. Peterson, 108 Ill. App. 16; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Sweeney v. O'Hara, 43 Iowa, 34; Reid v. Mix, 63 Kan. 745, 66 Pac. 1021, 55 L. R. A. 706; Waters v. Howard, 1 Md. Ch. 112; Shriver v. Seiss, 49 Md. 384; Somerville v. Coppage, 101 Md. 519, 61 Atl. 318; Curran v. Holyoke W. P. Co., 116 Mass. 90; Thaxter v. Sprague, 159 Mass. 397, 34 N. E. 541; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Daniel v. Frazer, 40 Miss. 507; Fish v. Lightner, 44 Mo. 268; Pickering v. Pickering, 38 N. H. 400; Smith v. McVeigh, 11 N. J. Eq. 239; Peters v. Delaplaine, 49 N. Y. 362; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Winne v. Winne, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; Leigh v. Crump, 36 N. C. 299; Herren v. Rich, 95 N. C. 500; Hunter v. McDevitt, 12 N. D. 505, 97 N. W. 869; Pennock v. Freeman, 1 Watts, 401; Humbard's Heirs v. Humbard's Heirs, 3 Head, 100; McComas v. Easley, 21 Gratt. 23; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; Menasha v. Wisconsin Central R. Co., 65 Wis. 502, 27 N. W. 169; King v. Hamilton, 4 Pet. 311, 7 L. ed. 869. The right to the relief resting in the sound discretion of the court may be refused to anyone who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is not sufficient ground for rescission of the contract: Banaghan v. Malaney, 200 Mass. 46, ante, p. 378, 85 N. E. 839, 19 L. R. A., N. S., 871. Specific performance may not be refused through mere whim or caprice; there must be some substantial element which moves the conscience of the chancellor, and makes it appear to him to be unjust to so decree. Each case must be determined on its own state of facts and circumstances: Godwin v. Springer, 233 Ill. 229, 84 N. E. 234. The court will never compel specific performance when, looking at all the circumstances, on both sides, it is apparent that injustice will be done: Clarke v. Rochester etc. R. Co., 18 Barb. 350.

The discretion to grant or refuse specific performance is not an arbitrary or capricious one, but a judicial discretion to be exercised in accordance with the settled rules and principles of equity and with regard to the facts and circumstances of the case: Quinn v. Roath, 37 Conn. 16; Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118, 13 N. E. 210; Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414; Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A., N. S., 221; Launtz v. Vogt, 133 Ill. App. 255; Ash v. Daggy, 6 Ind. 259; Turner v. Clay, 3 Bibb, 52; Edelen v. W. B. Samuels & Co., 31 Ky. Law Rep. 731, 103 S. W. 360; Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; Griffith v. Frederick Co. Bank, 6 Gill & J. 424; Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 67 Atl. 138, 12 L. R. A.,

N. S., 236; *Geo. Gunther, Jr., B. Co. v. Brywezynoki*, 107 Md. 696, 69 Atl. 514; *Aston v. Robinson*, 49 Miss. 348; *Paris v. Haley*, 61 Mo. 453; *Stevens v. Trafton*, 36 Mont. 520, 93 Pac. 810; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207; *Hocter-Johnston Co. v. Billings*, 65 Neb. 214, 91 N. W. 183; *Eckstein v. Dowing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626; *King v. Morford*, 1 N. J. Eq. 274; *St. John v. Benedict*, 6 Johns. Ch. 111; *Seymour v. Delaney*, 3 Cow. 445, 15 Am. Dec. 270; *Tillery v. Land*, 136 N. C. 537, 48 S. E. 824; *Dalzell v. Crawford*, 1 Pars. Eq. Cas. 37; *Howard v. Moore*, 4 Sneed (36 Tenn.), 317; *Givens v. Clem*, 107 Va. 435, 59 S. E. 413; *Lowry v. Buffington*, 6 W. Va. 249; *Heflin v. Heflin*, 64 W. Va. 29, 59 S. E. 745; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. 133; *Washington Irr. Co. v. Krutz*, 119 Fed. 279, 56 C. C. A. 1; *Jones v. Byrne*, 149 Fed. 457; *Marthinson v. King*, 150 Fed. 48; *Marks v. Gates*, 154 Fed. 481; *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. Rep. 109, 32 L. ed. 500.

The general rules above stated are elucidated by the observations of the court in many of the cases wherein the subject is discussed in detail. Thus in *Cox v. Burgess* (Ky.), 96 S. W. 577, this court said: "While equity operates on fixed rules, as well defined as are the rules of law, it exercises a judicial discretion which may be likened to the civil conscience, and which will vary in the relief afforded according to the peculiar facts and circumstances of the particular case. This is not, as was formerly charged against the chancellor's exercise of prerogatives which were at variance with the rules of law, according to the individual conception of the judge in the case as to what was right between man and man. Or, as it was anciently put (Table Talk, tit. Equity): 'Equity is a roguish thing. For law we have a measure, and know what we trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard for the measure we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing, as the chancellor's conscience.'

"Equity is now also the law. The case must fit itself to the law of equity. Equity will not change itself to fit the facts of the case. So, while the rule is that equity will withhold its sanction from and refuse to execute a contract which is founded upon fraud, imposition, mistake, undue advantage or gross misapprehension, or where, from a change of circumstances, or otherwise, it would be unconscientious to enforce it (2 Story's Equity, section 750a), yet those broad terms have each been defined by the courts until they also have come to have a fixed legal meaning in their application by courts of equity. It was never intended to substitute the judgment or business sagacity of the chancellor for that of the contracting party, and to relieve one of his bad bargain, although fairly entered into. Nor was it intended to deprive one party of the gain which had accrued to him by the changing circumstances of the future which his foresight

had anticipated, or which fortune had thrown in his way. No more was it intended that the chancellor should act as guardian for him who overestimates to himself the value of a dollar at present as compared to several dollars in the indefinite future, relieving such of the consequences of their errors of judgment, or sheltering them behind the chancellor's grace from the performance of what they have in a fair trade been paid to do. Even though the consideration had been inadequate, if we had a way of truly measuring the consideration, that of itself is not enough to justify the chancellor's refusal to enforce the contract."

Mr. Justice Harlan in *Nickerson v. Nickerson*, 127 U. S. 668, 8 Sup. Ct. Rep. 1355, 32 L. ed. 314, said: "Whether specific performance shall be decreed in any case depends upon the circumstances of that case, and rests in the discretion of the court: *King v. Hamilton*, 29 U. S. (4 Pet.) 328, 7 L. ed. 875; *Willard v. Tayloe*, 75 U. S. (8 Wall.) 564, 19 L. ed. 503; *Waters v. Howard*, 1 Md. Ch. 112; *Duvall v. Meyers*, 2 Md. Ch. 401. 'Not, indeed,' Mr. Justice Story says, 'of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles; but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties': 1 Story's *Equity Jurisprudence*, sec. 742. One of these rules is, that in cases of this character relief should not be granted after an unreasonable delay, or unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms."

The discretion is not an arbitrary one of the judge, but one guided by the principles and rules which have theretofore been adopted and applied by chancellors in similar cases: *Rudisill v. Whitener*, 146 N. C. 403, 59 S. E. 995, 15 L. R. A., N. S., 81. Specific performance should be refused where the granting of it would violate familiar principles of equity jurisprudence: *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668. But it has been observed that a court of equity, in the exercise of its extraordinary jurisdiction in such case, although not exempt from the general rules and principles of equity, acts with more freedom than when exercising its ordinary powers: *Tyson v. Watts*, 1 Md. Ch. 13. The relief, however, will be granted only where, upon all the facts, it is equitable that it should be done: *Bradford v. Smith*, 123 Iowa, 41, 98 N. W. 377; *Fowler v. Marshall*, 29 Kan. 665.

In the oft cited case of *Willard v. Tayloe*, 8 Wall: 557, 19 L. ed. 501, Mr. Justice Field, after a discussion of the English cases bearing on the subject, said: "The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be



determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice, and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis v. Hone*, 2 Schoales & L. 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."

But sometimes the right of specific performance is a matter of right and not mere favor. Thus, the court in *Baltimore etc. R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523, said: "It is said, however, that the specific performance of the contract rests in the sound discretion of the court, and will not be decreed, where it appears that the specific matter insisted upon possesses no value to the plaintiff, or rests only in the realm of fancy, speculation or conjecture, or where the performance would result in hardship or injustice to the defendant; that the crossing in question, on account of being constructed of wood, is a menace to the safety of the employes and other persons using the road; also that, while complainant is entitled to one passageway, he ought not to have three. It is undoubtedly the law that the specific performance of the contract is within the sound discretion of the court, and will not be enforced as a matter of course, or where it will impose unreasonable or unjust hardship upon one of the parties without corresponding benefits to the other. However, where all the necessary elements, conditions and incidents are present, relief by way of specific performance should be granted as a matter of right, and not as a mere favor."

The nature of this discretion was also explained in a very clear way by Mr. Justice Lamm in *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651. He said: "In a sense specific performance does rest in the discretion of the chancellor. But discretion does not mean caprice. A discretion measured by a capriciously elastic yardstick would present a false measure of equitable right. This discretion is spoken of in the books as a sound discretion—sound, meaning judicial. The right doctrine is elegantly put by Wagner, J., thus: 'A bill

for the specific performance of a contract is not granted as a matter of right by the court to which it is addressed, but from a just and reasonable discretion. But this discretion is not to be exercised in an arbitrary or capricious manner, but is to be governed by sound legal rules and principles. If, upon a whole view of the facts and circumstances, the court shall be of the opinion that the contract is fair, just and equitable, it will use its extraordinary authority and decree specific performance; but if, on the contrary, it appears inequitable and unjust, the remedy will be denied, and the party left to his action at law': *Ivory v. Murphy*, 36 Mo. 542. Courts of justice sit to enforce the law. Now, the law may be said to be a general rule of action—a rule of civil conduct prescribed by the supreme power in a state. A contract is but a rule of action binding upon the parties thereto; i. e., contract is but a law unto the parties thereto. Therefore, courts sit to enforce contracts—not to abrogate them: *Evans v. Evans*, 196 Mo. 23, 93 S. W. 969; *Kilpatrick v. Wiley*, 197 Mo. 172, 95 S. W. 213. If, for instance, the bargain in this instance was overkeen and unjust, or if the party against whom specific performance was sought was laboring under some disability and had been overreached, then, or in similar cases, there would be something for the discretion of the chancellor to take hold of—something binding his conscience. But, absent any earmarks of unfairness, overreaching or overkeenness, as here, and present a fair, just real estate contract, as here, to deny specific performance is to wound and vex the soul of equity itself."

But there are occasions when the court has no right to exercise its judicial discretion. Thus in *Abbott v. Moldestad*, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227, the court said: "We are of the opinion that, in the entire absence of any fact which renders it inequitable to enforce specific performance, the right thereto does not rest wholly in the judicial discretion of the trial court. If the facts are fairly in controversy, which would render its enforcement inequitable, or rank injustice so appears on the face of the contract, or by evidence independent of it, as to make enforcement of the contract inequitable, the court need not interpose its equitable powers to enforce it.

"The relief demanded in an action for the specific performance of a contract lies in the discretion of the court, only so far as it must necessarily judge whether, under the circumstances, the agreement is or is not an inequitable one. When that fact is determined, judicial discretion ceases': *Fry on Specific Performance*, 3d Am. ed., 11, note 1, and authorities cited."

In the exercise of its judicial discretion the court will not look to facts and circumstances which are entirely independent of the contract which is sought to be specifically enforced: *Pulliam v. Owen*, 25 Ala. 492. Thus, it is no defense to specific performance of an agreement to sell an undivided interest in land that the vendee may sell the interest to some undesirable person: *Moayon v. Moayon*, 114 Ky. 855, 102 Am. St. Rep. 303, 72 S. W. 33, 60 L. R. A. 415. But

the court may avail itself of collateral incidents connected with and shedding light on the contract to be specifically enforced: *Marthinson v. King*, 150 Fed. 48.

#### IV. Sufficiency of Evidence to Rescind or Cancel the Contract is not the Test to Defeat Specific Performance.

Much difficulty is, undoubtedly, often experienced in determining whether specific performance should be granted or refused by confounding a suit for specific performance with a suit to rescind the contract. The rule, however, is well settled that specific performance may be refused even though the case presented falls short of making such a showing as would constitute ground for the cancellation of the contract in question: *Andrews v. Andrews*, 28 Ala. 432; *Frisby v. Ballance*, 5 Ill. 287, 39 Am. Dec. 409; *Maltby v. Thews*, 171 Ill. 264, 49 N. E. 486; *Geo. Gunther, Jr., etc. Co. v. Brywezynski*, 107 Md. 696, 69 Atl. 514; *Banaghan v. Malaney*, 200 Mass. 46, ante, p. 378, 85 N. E. 839, 19 L. R. A., N. S., 871; *Gottfried v. Bray*, 208 Mo. 652, 106 S. W. 639; *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513; *Leigh v. Crump*, 36 N. C. 299; *Primer v. Sharp*, 23 N. J. Eq. 274; *Rudisill v. Whitener*, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. 81; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; *Marks v. Gates*, 154 Fed. 481; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. ed. 65; *Jackson v. Ashton*, 11 Pet. 229, 9 L. ed. 698. The reason assigned for this distinction is that in the case of cancellation the decree is conclusive while by the decree refusing specific performance the court merely closes the door of equity and remits the applicant to his remedy at law: *Knott v. Giles* 27 App. D. C. 581.

Besides, as was said by the court in *Gottfried v. Bray*, 208 Mo. 652, 106 S. W. 639: "Specific performance is not decreed as a matter of course. The fact that the plaintiff is able to establish a contract valid at law is not alone sufficient to entitle him to a decree. It has often been said by this court that a decree for specific performance rests in the sound, not arbitrary, discretion of the court, and it is well established that a court of chancery often refuses specific performance of a contract which it would not set aside: *Mortlock v. Buller*, 10 Ves. 308; *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *Jackson v. Ashton*, 11 Pet. (U. S.) 248, 9 L. ed. 698. The underlying considerations are stated by Kerr in his work on Fraud and Mistake, American edition, 357, 358, as follows: 'Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. . . . Where a party calls for specific performance, he must, as to every part of the transaction, be free from every imputation of fraud or deceit,' and 'must show that his conduct has been clear, honorable and fair': *Kelly v. Central P. R. R. Co.*, 74 Cal. 563, 5 Am. St. Rep. 470, 16 Pac. 390; *Chicago B. & Q. Ry. Co. v. Reno*, 113 Ill. 43, 44; *Pinner v. Sharp*, 23 N. J. Eq. 274."

The distinction was also stated by the court in *Riggins v. Trickey* (Tex. Civ.), 102 S. W. 918, the court saying: "Appellant invokes the test of whether the facts would entitle appellee to a rescission of the contract; but that is not the test, but the issue is: Has appellant shown himself entitled to a specific performance of the contract under the well-established rules of equity? Has appellant shown a perfectly fair contract, free from misrepresentation, fraud or misapprehension, that does not evidence an unconscionable or hard bargain, and that is not in its performance oppressive upon appellee? Has he come doing equity at the same time that he is seeking equity, and has he come into court with clean hands? It cannot be said that a contract is fair where it has been induced by false representations, and it cannot be said that it would not be unconscionable and unjust to force appellee, who was induced by such false representations to sign the contract, to give up property worth \$20,000 for property worth, with its encumbrances, perhaps one-fourth of that sum."

#### **V. Distinction Between Sufficiency of the Showing to Obtain Specific Performance and Resistance to It.**

"There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law. Thus, a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice, or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree where the plaintiff will not always be allowed relief upon the same evidence. A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought, ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance": *Woollums v. Horsley*, 93 Ky. 582, 20 S. W. 781.

The same rule was also announced in *Casey v. Holmes*, 10 Ala. 776; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 371; *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447; *Riggins v. Trickey* (Tex. Civ.), 102 S. W. 918.

#### **VI. Necessity for the Contract to be Fair and Equitable in All of Its Parts.**

**a. The General Rule with Illustrations.**—One of the fundamental rules respecting the specific performance of contracts is that specific



performance will not be decreed where the contract is not fair and equitable and its specific enforcement will produce injustice or work a hardship under all the circumstances. In other words, in order for a contract to be specifically enforced by a court of equity, it must, in addition to being a valid contract, be fair and just in all of its terms. It must not be an unconscionable bargain. The unconscionable character of the contract and the hardship of its enforcement may be shown by facts and circumstances extraneous to the contract itself: *Ellis v. Burden*, 1 Ala. 458; *Andrews v. Andrews*, 28 Ala. 432; *Herzog v. Atchison etc. R. Co.*, 153 Cal. 496, 95 Pac. 898, 17 L. R. A., N. S., 428; *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Lear v. Chouteau*, 23 Ill. 37; *Stone v. Pratt*, 25 Ill. 25; *Dreyer v. Goldy*, 62 Ill. App. 347; *Hamilton v. Ryan*, 103 Ill. App. 212; *Silberschmidt v. Silberschmidt*, 112 Ill. App. 58; *Cumberledge v. Brooks*, 235 Ill. 249, 85 N. E. 197; *Modisett v. Johnson*, 2 Blackf. 431; *Lucas v. Barrett*, 1 G. Greene, 510; *Hopwood v. McCausland*, 120 Iowa, 218, 94 N. W. 469; *Eastland v. Vanarsdel*, 3 Bibb, 274; *Duvall v. Waggenger*, 2 B. Mon. 183; *Furaday Coal etc. Co. v. Owens*, 26 Ky. Law Rep. 243, 80 S. W. 1171; *Snell v. Mitchell*, 65 Me. 48; *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300; *Carberry v. Tannehill*, 1 Har. & J. 224; *Tyson v. Watts*, 1 Md. Ch. 13; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Maryland Tel. etc. Co. v. Chas. Simons' Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314; *Old Colony R. Corporation v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Curran v. Holyoke W. P. Co.*, 116 Mass. 90; *Eames v. Eames*, 16 Mich. 348; *Pingle v. Conner*, 66 Mich. 187, 33 N. W. 385; *Booth v. Murdock*, 132 Mich. 88, 94 N. W. 177; *Rathbone v. Groh*, 137 Mich. 373, 100 N. E. 588; *Daniel v. Frazer*, 40 Miss. 507; *Aiple-Heimmelman Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Crane v. Decamp*, 21 N. J. Eq. 414; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Coe v. New Jersey M. Ry. Co.*, 31 N. J. Eq. 105; *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513; *Margraf v. Muir*, 57 N. Y. 155; *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Phalen v. United States Trust Co.*, 186 N. Y. 178, 78 N. E. 943, 7 L. R. A., N. S., 734; *Leigh v. Crump*, 36 N. C. 299; *Cannaday v. Shepard*, 55 N. C. 224; *Lloyd v. Wheatly*, 55 N. C. 267; *Huntington v. Rogers*, 9 Ohio St. 511; *Davidson v. Little*, 22 Pa. 245, 60 Am. Dec. 81; *Appeal of Weise*, 72 Pa. 351; *Friend v. Lamb*, 152 Pa. 529, 34 Am. St. Rep. 672, 25 Atl. 577; *Maguire v. Heraty*, 163 Pa. 381, 43 Am. St. Rep. 800, 30 Atl. 151; *Latta v. Hax*, 219 Pa. 483, 68 Atl. 1016; *Cabeen v. Gordon*, 1 Hill Eq. 51; *McCarty v. Kyle*, 4 Cold. (44 Tenn.) 348; *Whitman v. Wene*, 1 Tenn. Ch. 634; *Anthony v. Leftwich's Representatives*, 3 Rand. 238; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. 133; *Newton v. Wooley*, 105 Fed. 541; *Federal Oil Co. v. Western Oil Co.*, 57 C. C. A. 428, 121 Fed. 674; *Mechanics' Bank v. Lynn*, 1 Pet. 376, 7 L. ed. 185; *King v. Hamilton*, 4 Pet. 311, 7 L. ed. 869; *Willard*

v. Tayloe, 8 Wall. 557, 19 L. ed. 501; Mississippi etc. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367.

But where no fraud or mistake is alleged, the mere fact that the defendant made a bad trade or bargain is not sufficient to defeat the application for specific performance: *Morrison v. Peay*, 21 Ark. 110; *Union Coal Min. Co. v. McAdam*, 38 Iowa, 663; *Schmidt v. Louisville etc. R. Co.*, 101 Ky. 441, 41 S. W. 1015, 38 L. R. A. 809; *Cox v. Burgess* (Ky.), 96 S. W. 579; *Rodman v. Robinson*, 134 N. C. 503, 101 Am. St. Rep. 877, 47 S. E. 19, 65 L. R. A. 682. In *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141, the vendor made a bad trade, but the plaintiff had practiced no fraud, took no unfair advantage of vendor in the transaction and suppressed no information in regard to the land which the vendor could not have acquired by reasonable diligence. The court said: "Without at least some of these elements, we are unable to see why a specific performance should not have been granted. There must be something more than the fact that a party had made a bad trade to relieve him from his obligation to perform it. The simple fact that the defendant sold a tract of land worth fifteen hundred dollars for one thousand dollars will not do so, and this is all the defendant can complain of, as he sold it to another for fifteen hundred dollars, after coming to this county, seeing the land, and knowing all about the railroads. The defendant was raised on this land, and knew every foot of it. There had been no minerals found upon it, to change its intrinsic value, of which the plaintiffs knew and the defendant did not. Nothing had happened to the land but what the defendant knew. The only thing alleged by the defendant is that two railroads had been built, one from Raleigh to the land, and another from Apex to a point near the land, and sawmills had been erected near the land, that enhanced its value. These roads are public enterprises, open and notorious, and of equal knowledge to all persons. The sawmills were the result of the construction of the roads, and it would hardly seem probable that the defendant, who owned the tract of land only worth three dollars per acre a few years ago, would not have been quickened to find out something of the cause, when he had a dozen applications from different parties to buy it at a price above ten dollars per acre. But defendant testified that he had heard rumors of a railroad contemplated to the property. . . . Had heard rumors that railroad was completed, but gave it no credence. . . . It is a well-settled rule that any knowledge of a fact the truth of which may be ascertained by proper inquiry puts the party on notice, and deprives him of his equity."

The contract must not only be fair, equal and just in its terms, but the situation of the parties must be such that specific performance will not be harsh or oppressive: *India Tea Co. v. Peterson*, 108 Ill. App. 16. The contract, in addition to being valid, must appear to be free from suspicion as to its bona fides. The circumstances attending it must be such as commend it favorably to the court. The conduct of the parties in the procurement of the contract is regarded by the

court. The party seeking specific performance must make out a complete equity: *Geo. Gunther, Jr., etc. Co. v. Brywezynski*, 107 Md. 696, 69 Atl. 514. Any fact showing the contract to be unfair, unjust and against good conscience will justify the court in refusing to specifically enforce it: *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558. Where the circumstances under which the contract was executed render it doubtful whether the act was understood by the vendor, the court is justified in refusing specific performance: *Cuff v. Dorland*, 55 Barb. 481. So, also, where a contract for the sale of land was made during war times, when fictitious prices prevailed in the absence of specie currency, the court may consider the circumstances and refuse specific performance: *Hudson v. King*, 2 Heisk. (49 Tenn.) 560. The defendant may show in order to defeat specific performance that the contract will operate in a different manner than was contemplated by the parties at the time that it was executed: *Western R. Corp. v. Babcock*, 6 Met. 346. And where land and buildings, the latter being more valuable than the land, were sold for twenty-five thousand dollars, the sum of twenty thousand dollars of the purchase price being deferred for ten years with a low rate of interest, no provision being made for insurance in favor of the vendor, and the vendor was intoxicated at the time when the contract was executed, specific performance will be refused: *Moetzel v. Koch*, 122 Iowa, 196, 97 N. W. 1079. Likewise where property worth twenty thousand dollars is sold under a contract signed only by vendor, which ties it up for an indefinite period, with no counter agreement on the part of the vendee to give notes or any obligation to secure the performance of the contract, it is not so fairly obtained or equal in its terms as to be specifically enforced: *Taylor v. Merrill*, 55 Ill. 52. And where the plaintiff will obtain valuable land from a corporation, by a payment made in stock of such corporation, the stock having but little value and the officers of the corporation supposing that the sale was for cash, the right to make payment in stock being by virtue of a resolution which had been forgotten, the contract will not be specifically enforced: *Kelley v. York Cliffs Imp. Co.*, 94 Me. 374, 47 Atl. 898. A contract requiring one party to use his skill and machinery in the manufacture of a certain article and sell it only to the other party, who agrees to purchase only to the extent of the market demand, is not such a fair contract as will be specifically enforced: *Bickford v. Davis*, 11 Fed. 549. Nor will a contract by which one agrees to assent to any division of land held in common which "the majority of interest shall decide just and equitable" be enforced so as to set off to any owner a certain portion of the land without his consent: *Heukners v. Remington*, 7 R. I. 154. And where one of three persons owning land in severalty, who had joined the other two in a contract for its sale, sold his land to a third person who did not buy it in order to defeat the original contract, the other two cannot specifically enforce the original contract: *Gaither v. O'Doherty* (Ky.), 12 S. W. 306. A contract for the sale of one hundred acres of land, more or less, but which tract actually embraces one hundred and ninety-two acres, will not be

specifically enforced where the vendor, who claims that it was intended to sell only one hundred acres, offers to convey one hundred and fifteen acres for the price named in the contract or the whole on being paid for the surplus: *Fannin v. Bellomy*, 5 Bush, 663. Specific performance will not be decreed of a contract for a lease giving plaintiff the right to mine iron ore twenty-five feet below defendant's workings, where it is shown that the mine could not be worked profitably on account of the danger of caves injuring both the operations of plaintiff and defendant and that the lease would probably result in trouble and litigation: *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 26 N. E. 261. A contract between an attorney and his client, by which the latter agrees to give the former a fee six times as large as his services were reasonably worth will not be specifically enforced: *Rose v. Mynott*, 7 Yerg. 30. Nor will specific performance be decreed where it would subject not only the defendant but the public to inconvenience and loss: *Richmond v. Dubuque etc. R. Co.*, 33 Iowa, 422. Thus a contract between a railroad company and a city by which the former agrees to locate its terminus, principal offices and machine shops in said city and continue them there, notwithstanding its own interests and those of the public should thereafter demand their removal, will not be specifically enforced: *Texas etc. Ry. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846, 34 L. ed. 385.

And where a house was sold at auction as an "eligible freehold property for investment," let on a quarterly tenancy, the fact that it was used as a house of ill-fame is sufficient ground for refusing specific performance at the suit of the vendor, even though the fact of such use was unknown to both vendor and vendee at the time of the sale: *Hope v. Walter*, [1900] 1 Ch. 257. Specific performance of an option contract will not be decreed where the actual result of the agreement would be inequality resulting from ignorance or inexperience, or from its hasty execution even though the plaintiff was free from any intention to take an unfair advantage: *Starcher v. Duty*, 61 W. Va. 373, 123 Am. St. Rep. 990, 56 S. E. 524, 9 L. R. A., N. S., 913. Specific performance of an agreement to give a lot to a church has been refused where the carving out of the lot would impair the value of the adjoining land: *Church of the Advent v. Farrow*, 7 Rich. Eq. 378. And where the enforcement of the contract will result in the breach of a trust, specific performance will be refused: *Sherman v. Wright*, 49 N. Y. 227; *Givens v. Clem*, 107 Va. 435, 59 S. E. 413.

b. **Effect Where the Consideration is Inadequate.**—Mere inadequacy of consideration is not of itself sufficient ground for refusing specific performance: *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; *Young v. Frost*, 5 Gill, 287; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Russell v. Stimson*, 3 Hayw. 1. But inadequacy of consideration, when accompanied by any other circumstances of unfairness, overreaching or oppression or other evidence of fraud, will be sufficient to bar specific performance: *Goodlett v. Hannsell*, 66 Ala. 151; *Christian v. Ransome*, 46 Ga. 138; *Shepherd v. Bevin*, 9 Gill, 32; *Lee v. Kirby*, 104 Mass. 420; *Harrison v. Town*, 17 Mo. 237; *Powers v. Hale*, 25 N. H. 145;



Worth v. Watts (N. J. Ch.), 70 Atl. 357; Wingart v. Fry, Wright, 105; Booten v. Scheffer, 21 Gratt. 474. Where, however, the inadequacy of consideration is so gross as of itself to amount to proof of fraud, it will be regarded as sufficient to defeat specific performance: Cox v. Burgess (Ky.), 96 S. W. 577; Western R. Corp. v. Babcock, 6 Met. 346; Burtch v. Hogge, Harr. 31; Bean v. Valle, 2 Mo. 126; Rodman v. Zelle, 1 N. J. Eq. 320; Ready v. Noakes, 29 N. J. Eq. 497; Osgood v. Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513; Seymour v. Delaney, 3 Cow. 445, 15 Am. Dec. 270; White v. Thompson, 21 N. C. 493; Fripp v. Fripp, Rice Ch. 84; Crotty v. Effler, 60 W. Va. 238, 54 S. E. 345; Garnett v. Macon, 2 Brock. 185; White v. Damon, 7 Ves. 34, 6 R. R. 71; Coles v. Trecothick, 9 Ves. 234. Excess of price over the value of property, which is the subject of an executory contract, even though considerable, is not of itself sufficient to defeat specific performance but may be so where it is combined with other circumstances showing unfairness, misrepresentation or concealment: Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120. Inadequacy of consideration may be a sufficient ground for refusing specific performance, even where it would not be sufficient ground for rescinding the contract: Gasque v. Small, 2 Strob. Eq. 72.

"Men often sell their property at a serious reduction in prices, induced to do so by the necessities of their business, or the dullness of the market, and the advantage gained by the purchaser, when the sale is freely made, and without fraud or deception, is rightfully his, and cannot be challenged on that account": Miles v. Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261. In Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A., N. S., 221, Mr. Chief Justice Savage said: "The consideration was that agreed upon between the parties, as shown by the contract and the allegations of the bill. In the absence of an answer showing that appellee was overreached, or some inequitable advantage taken of her through which the named consideration was fixed, the law presumes that the consideration fixed by the parties was an adequate and reasonable consideration. Furthermore, mere inadequacy of consideration, if agreed upon by the parties without fraud, would not be sufficient to defeat a decree for specific performance. The owner of the property has the right to sell it, or contract to sell it, for such price as he sees fit and is satisfied to fix; and if he does sell or agree to sell for a valuable consideration, although it may be inadequate, and no advantage was taken of him or the consideration fixed through fraud or misrepresentation, he cannot, when he finds that the property is worth more than he agreed to take or sell for, rescind the sale or refuse to perform."

So, also, in Seymour v. Delaney, 3 Cow. 445, 15 Am. Dec. 270, the court said: "If the contract be free from obligation, it is the duty of the court to decree performance; but if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, on either ground, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a

court of law. If it is asked what degree of inadequacy is necessary to constitute the bargain a hard one, it might be asked in answer, What degree of inadequacy is necessary to constitute fraud, to shock the conscience and produce an exclamation? The truth is, that neither the one nor the other admits of a definite answer. It must be determined by the judgment of the court, and as there is certainly a difficulty in ascertaining the precise point, there is much less danger in stopping short of it, than in going beyond it. To me it seems a solecism in language to say that a party who has obtained an inequitable bargain shall be received in a court of equity to demand its performance."

The effect of gross inadequacy of consideration on the right to specific performance was also ably considered in *Cox v. Burgess* (Ky.), 96 S. W. 577, the court saying: "Gross inadequacy of consideration is a ground for withholding the relief. But it must be such after all as amounts in law to a fraud. It must be as Lord Thurlow puts it in *Gwyne v. Heaton*, 1 Brown Ch. 1, 9: 'An inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.' The contract should be viewed as of the time and under the circumstances when it was made. For the law is clear that increases, gains, rises in value, and other advantages happening to the property after the contract is entered into, belong to the purchaser, who also assumes the risks of depreciation in value, losses from fire, and the other elements, or other accidental causes not resulting from the fault of the seller: *Pomeroy's Equity Jurisprudence*, sec. 1406. . . . Appellant was not unadvised of his rights; he was not imposed on by misrepresentation or deceit of appellee; he was not put in bodily fear; his mind was not overreached by appellee; he acted upon his own judgment, and was perfectly free and independent in the matter. He got what he bargained for. That subsequent events show that the bargain was not a good one for him does not alter the law which upholds every contract understandingly entered into by competent parties for a valuable consideration, and not illegal or immoral."

Hence a court of equity will decree specific performance, even though the consideration be inadequate, where the vendor, after the contract declared himself satisfied, or where he has refused to rescind the contract with full knowledge of the facts: *Woodruff v. Hargrave*, 1 Wright, 555; *Galloway v. Barr*, 12 Ohio, 354. Nor will a decree of specific performance be refused on account of the inferior value of the land which plaintiff agreed to convey on an exchange of land, where both parties fixed their own estimate of the value of their own land, and no fraud appears in the transaction, and the difference in value does not appear to be unconscionable: *Park v. Johnson*, 4 Allen, 259. But in a contract to exchange lands where a building seventy by twenty-three feet costing not to exceed seventeen thousand dollars was represented by an agent in the negotiations as being eighty-four by twenty-four and one-half feet and costing twenty-five thousand dollars, specific performance was refused on the ground of such

representations constituting fraud, imposition and mistake: *Race v. Weston*, 86 Ill. 91.

Specific performance is refused in cases of the nature of "grubstake contracts," where the consideration or amount furnished in connection with the terms and conditions of the contract show it to be inequitable and harsh.

The case of *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, illustrates the rule in this respect. In that case the plaintiffs furnished the defendant with \$50 "as a grubstake to enable him to go to Alaska, or the Northwest Territory, Canada, to prospect for gold and other precious metals, and to locate and acquire mines and mining claims." The defendant on his part agreed to give them an undivided one-half of any mines or claims located or acquired by him, together with a like amount of all minerals extracted after deducting the expenses of mining the same. The plaintiffs were also, upon being notified of the location or acquisition of claims deemed to be valuable, to assist in working the same and furnish one-half of the labor and expense thereof. Defendant notified them of the location of certain claims, but before plaintiffs arrived on the ground defendant had disposed of some of the claims, and refused to allow them to assist in working the claims or to convey any part to them or account for the proceeds. The claims were worth over \$400,000 and the gold extracted amounted to over \$350,000. The court held the contract to be unjust and unfair and the consideration to be inadequate, and refused specific performance, saying: "To be sure, the expense of going to Alaska or the Northwest Territory does not appear from the complaint, but the court, we think, could take judicial cognizance that \$50 was not an adequate consideration in equity to entitle plaintiffs and defendant Clark to one-half the fruits of so toilsome and expensive a journey, to say nothing about the expense of procuring the property in question after his arrival in the mining country."

The case of *Marks v. Gates*, 154 Fed. 481, was of a similar character, and the court also refused to decree specific performance, saying: "The contract in the present case had, at the time when it was made, no reference to any property then owned by the contracting parties, or even to property then in existence. It did not obligate the appellee, Gates, ever to go to Alaska or to acquire property there. It bound him during his lifetime to transfer to the appellant a one-fifth interest in all property of every description that he might acquire in Alaska by whatever means, whether by location, purchase, devise, gift or inheritance—property of which neither party could know even approximately the value. It was a bargain made in the dark. The complaint is silent as to the means whereby the property therein described was obtained by Gates. It alleges that its value is more than \$750,000. For aught that appears in the complaint to the contrary, the appellee, Gates, purchased this property and paid therefor its full value. The appellant, for the payment of \$1,000 in cash and the cancellation of a debt of \$11,225, which may or may not have been valid or collectible, now comes into a court of equity and asks the

court to decree that the appellee, Gates, transfer to him property of the value of more than \$150,000. If he now has the right to such relief, it follows that he may hereafter sustain suits to acquire a like interest in all property of every nature and description which Gates may at any time obtain in Alaska, and that such right will end only with the life of Gates. Courts of equity have often decreed specific performance where the consideration was inadequate, and it may be said in general that mere inadequacy of consideration is not of itself ground for withholding specific performance unless it is so gross as to render the contract unconscionable. But where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have. In *King v. Hamilton*, supra [4 Pet. 311, 7 L. ed. 869], specific performance of a contract for the sale of a patented grant of land within the Virginia Military District was denied in a case where the patent specified, and the parties understood, that the grant contained 1,533 $\frac{1}{3}$  acres, and it subsequently appeared from a survey that it contained 876 acres in excess of that quantity. In *Day v. Newman*, 10 Ves. Jr. 300, Lord Alvanley refused to enforce the specific performance of an agreement for the sale for £20,000 of an estate worth only £10,000. There was no actual fraud in the case, but the inadequacy was so great that the court would not enforce it. In *Earl of Chesterfield v. Jansen*, 2 Ves. Sr. 125, Lord Harwicke declared unconscionable a contract whereby an expectant heir, in consideration of £5,000, obligated himself to pay £10,000 out of his grandmother's estate if he survived her, but was to pay nothing if she survived him. In *Mississippi & Missouri R. R. Co. v. Cranwell*, 91 U. S. 643, 23 L. ed. 367, Mr. Justice Bradley said: 'He comes into court with a very bad grace when he asks to use its extraordinary power to put him into possession of \$30,000 worth of stock for which he paid only \$50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law.' "

A court of equity will not enforce an agreement allowing a party to take sand and gravel in unlimited quantities, where such agreement has been assigned, since to do so would be inequitable. The owner of the land might have been willing to allow the original party to take such sand and gravel while he would not have allowed the assignee, which was in the business of selling such material: *Beach Gravel etc. Co. v. Simmons*, 62 Ill. App. 646. So, also, the court has refused to enforce an agreement on the part of the husband to convey to his wife ten acres of land worth \$7,000 in consideration of her joining him in a mortgage for \$2,000 on land owned by him: *Carpenter v. Carpenter*, 56 Hun, 647, 10 N. Y. Supp. 486; and where in a land trade defendant's land was worth \$25,000 and plaintiff's was



worth but a very little above the encumbrance upon it, which defendant agreed to assume, the agreement will not be enforced since the contract is so one-sided as to be an unconscionable bargain: *Koeh v. Streuter*, 232 Ill. 594, 83 N. E. 1072. Where plaintiff acquired no legal rights, by a mining location made upon lands held by defendant through a conveyance from a railroad company to which the land had been patented, an agreement between plaintiff and defendant in settlement of the rights of the parties without litigation is not based on a sufficient consideration to support its specific performance: *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58. Specific performance of a contract for the sale of land, made by a trustee, will not be decreed. Where the purchase price is not clearly shown to be equal to or greater than the value of the property: *Jones v. Holladay*, 2 App. D. C. 279. A contract for the sale of land worth \$1,600 for \$550 will not be enforced against the vendor since such enforcement would not be either just, equitable or reasonable: *Phelan v. Neary* (S. D.), 117 N. W. 142. But specific performance will not be refused on the ground of inadequacy of price of a contract for the sale of land worth \$3,000 for \$2,375: *Ketcham v. Owen*, 55 N. J. Eq. 344, 36 Atl. 1095. An inadequacy of \$3,000 on a sale of an unfinished tenement worth \$29,000 is not so gross as to preclude specific performance: *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602. Nor will specific performance be refused where a one hundred and forty acre tract of land worth \$35 an acre is sold for \$32 an acre: *Townsend v. Blanchard*, 117 Iowa, 36, 90 N. W. 519. Nor will a contract selling one hundred and fifty-seven acres of land worth from \$4,500 to \$5,000 for \$3,825 be deemed so unconscionable as to preclude specific performance: *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938. Specific performance will not be refused on the ground of inadequacy of consideration, even though the property was purchased at a low price, where the purchaser had agreed to give the children of the vendor the benefit of it on being repaid the purchase money and interest: *Sarter v. Gordon*, 2 Hill Eq. 121.

#### VII. Necessity for Beneficial Results to Occur to Plaintiff from the Specific Performance.

Specific performance will be refused where the performance will be onerous and the advantage to the plaintiff would be but slight. In other words, the benefits to the plaintiff from the specific performance should substantially correspond with the burdens imposed on the defendant by the decree compelling the performance. In such cases the party will be left to his remedy at law. This rule is frequently applied in suits to enforce agreements on the part of railroads to construct grade crossings, cattle-guards and other structures along its right of way, including railway stations and the like: *Herzog v. Atchison etc. R. Co.*, 153 Cal. 496, 95 Pac. 898, 17 L. R. A., N. S., 423; *Goding v. Bangor etc. R. Co.*, 94 Me. 542, 48 Atl. 114; *Society for Establishing Useful Manufactures v. Butler*, 12 N. J. Eq. 498; *Columbia College Trustees v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 305;

Murdfeldt v. New York etc. R. Co., 102 N. Y. 703, 7 N. E. 404; Conger v. New York etc. R. Co., 120 N. Y. 29, 23 N. E. 983; Johnson v. Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200; Wilson v. Northampton etc. Ry. Co., L. R. 9 Ch. App. 279.

**VIII. Necessity for the Negotiations of the Contract to have been Free from Fraud, Misrepresentations, Concealment or Undue Advantage.**

**a. Effect of Fraud or Misrepresentations.**

1. **Necessity for the Fraud or Misrepresentations to be in Respect to Material Matters.**—Inasmuch as a contract, which is not fair and equitable in all its parts, will not be specifically enforced, it naturally follows that a court of equity will not require specific performance of a contract which has been procured through the fraud or false representations of the party seeking specific performance: Webster v. Gibson, 7 Cal. App. 160, 93 Pac. 1040; Wilson v. McLaughlin, 11 Colo. 465, 18 Pac. 739; Mitchell v. King, 77 Ill. 462; Cowan v. Curran, 216 Ill. 598, 75 N. E. 322; Louisville etc. Ry. Co. v. Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Flynn v. Finch, 137 Iowa, 378, 114 N. W. 1058; Sargent v. Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063; Boynton v. Hazelboom, 14 Allen, 107, 92 Am. Dec. 738; Coryell v. Hotchkiss, 131 Mich. 308, 91 N. W. 162; Seymour v. Delancy, 3 Cow. 445, 15 Am. Dec. 270; Plummer v. Keppler, 26 N. J. Eq. 481; Whitaker v. Bond, 63 N. C. 290; Fuller v. Perkins, 7 Ohio, 196; Orne v. Kittanning Coal Co., 114 Pa. 172, 6 Atl. 358; Cape Fear Lumber Co. v. Matheson, 69 S. C. 87, 48 S. E. 111; Ratliff v. Vandikes, 89 Va. 307, 15 S. E. 864; Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593; Wells v. Millett, 23 Wis. 64; Davis v. Read, 37 Fed. 478. But in order to constitute a misrepresentation which will defeat a decree for specific performance, the misrepresentation must be so material to the contract that if the statement be false, the contract will become one which would be unconscionable for the party who made the statement to enforce. In other words, the representation must have operated to the prejudice of the defendant: Scott v. Shiner, 27 N. J. Eq. 185; Wuesthoff v. Seymour, 22 N. J. Eq. 66.

Specific performance will not be decreed where the contract for the sale of land appears to have been fraudulently made by the agent of the defendant through collusion with the plaintiff: Hunter v. Griffin, 19 Ill. 251. A false representation by the civil engineer of a railroad company that a track could not be laid from defendant's quarry to a certain competing railroad is a statement of a fact and not a mere expression of an opinion and will defeat a contract entered into, relying on its truth: Louisville etc. Ry. Co. v. Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703. So, also, where a right of way agreement is procured upon the strength that the railway company would change the location of its road from that indicated by its preliminary survey so as to run it along a certain slough, and it does not appear that it ever intended to change the location, specific per-

formance will not be decreed: *Grand Tower etc. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920. And a person who by false pretenses obtains a contract held as an escrow cannot specifically enforce it: *Booth v. Hartley*, 3 W. Va. 478. Likewise, where by falsely pretending to be a person to whom defendant's agent had sold a piece of property, defendant delivers a deed to the property under an escrow, specific performance will be withheld: *Mitchell v. King*, 77 Ill. 462. And where an order for stock in a corporation is obtained by one who is a director in a railroad company on the strength of false representation that he has power or influence in controlling the action of the railroad company in establishing or promoting new lines or branches, the order will not be specifically enforced: *Sargent v. Kansas Midland R. Co.*, 48 Kan. 672, 29 Pac. 1063. And where an agreement was entered into on the faith of a forged instrument, a court of equity will refuse specific performance: *Orne v. Kittanning Coal Co.*, 114 Pa. 172, 6 Atl. 358. An agreement to divide land with a bystander at an auction sale if he would refrain from bidding on the land will not be specifically enforced, since it is a fraud on the vendor: *Whitaker v. Bond*, 63 N. C. 290. And where a sale of lands is induced by misrepresenting the vendee's means of payment, he cannot obtain specific performance: *Fuller v. Perkins*, 7 Ohio, 196; *Elfelt v. Hart*, 1 McCrary, 11, 1 Fed. 264.

There will be no specific performance against a purchaser at an auction sale of a ground rent where the statement in the advertisement of the sale and by the auctioneer that the rent was well secured is false: *Crane v. Judik*, 86 Md. 63, 38 Atl. 129, 131. A sale of a farm induced by the vendor's false representation that the neighborhood is not unhealthy cannot be specifically enforced: *Appeal of Holmes*, 77 Pa. 50. So, also, where the character and condition of a farm which is sold by an auction sale not held on the premises is misrepresented in the advertisement of the sale, the sale will not be enforced against the vendee: *Hutcheon v. Johnson*, 33 Barb. 392. An agreement to exchange land for certain tenements, which are represented as bringing in a certain rental, will not be enforced where the rentals are misstated although not fraudulently done: *Boynton v. Hazelboom*, 14 Allen, 107, 92 Am. Dec. 738. And specific performance of land trade has been refused where plaintiff represented that there were twenty-one acres in his tract whereas there were only twenty acres: *Flynn v. Finch*, 137 Iowa, 378, 114 N. W. 1058. Likewise where a tract of land was verbally represented as containing nine acres whereas it contained but six acres, specific performance was refused although the tract was not sold by the acre: *Miller v. Chetwood*, 2 N. J. Eq. 199. But where a tract of one hundred and forty-five acres was sold as containing one hundred and seventy-three acres more or less, and the vendor informed the purchaser that he did not know the acreage but had heard his brother state that the old plot called for one hundred and seventy-three acres, the representation was held insufficient to defeat specific performance: *Stull v. Hurtt*, 9 Gill, 446. A representation to a purchaser of land that an alley on

the premises was only a private right of way in a few persons, whereas it was a public one, is not such a misrepresentation as will defeat specific performance: *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

Where a vendor represented that certain store fixtures went with the property, whereas in fact they belong to another, specific performance will not be decreed: *Smith v. Sturgess*, 65 How. Pr. 360. So, also, where upon a foreclosure sale a house was represented to be "forty-two or forty-four feet deep," whereas it was but thirty-six feet, specific performance will not be decreed against the purchaser: *Laight v. Pell*, 1 Edw. Ch. 577. Where the sole inducement for the purchase of the land was vendor's representation that there was an abundance of iron ore on the land, whereas in fact the iron deposit was not worth the working, specific performance was not decreed even though the vendee had agreed to take the risk of the ore on himself. The vendor showed the purchaser an opening which had partly filled up when assuring him of the great quantity of ore to be found on the property: *Fisher v. Worrall*, 5 Watts & S. 478. A similar refusal to decree specific performance was in a case where the vendee purchased land on vendor's representations that the land contained a vein of clay twenty feet deep, suitable for making brick, whereas in fact the vein was only three feet deep: *Holly v. Anness*, 41 S. C. 349, 19 S. E. 646.

Specific performance will be refused where a covenant of warranty of title was broken when made: *Slack v. McLagan*, 15 Ill. 242. But where vendor pointed out the boundaries of the lot, but intentionally omitted a part from the deed, specific performance will be granted to convey the whole lot: *Winans v. Huyek*, 71 Iowa, 459, 32 N. W. 422. Specific performance of a contract to exchange lands for a barge and steamboat interest will be refused, where false representations were made as to the quality and capacity of the barge and the condition of encumbrances on the steamboat: *Wells v. Millett*, 23 Wis. 64.

"Statements of value made by the owner of property are held," said the court in *Riggins v. Trickey* (Tex. Civ.), 102 S. W. 918, "as a general rule, to be merely expressions of opinion, and not binding on those who make them. There is some diversity of opinion upon the effect of representations concerning value, but it is safe to say that the rule that representations of value will not be considered by courts is not without its exceptions. For instance, in case such representations are made by a person holding a position of trust or confidence, or by one party to a sale who assumes to have special knowledge of the value of the property, in regard to which value the other, being known to be ignorant, trusts entirely to the good faith of the former, it is proper to consider such representations in the same way that representations as to facts are treated: *Newton v. Gauss*, 7 Tex. Civ. 90, 26 S. W. 81; *Miller v. Barber*, 66 N. Y. 558. The matter is thus stated by Mr. Pomeroy: 'Wherever a party states a matter, which might otherwise be merely an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact



material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact, within the meaning of the general rule, and may be a fraudulent misrepresentation. The statements which most frequently come within this branch of the rule are those concerning value." Thus where a real estate agent wrote to his nonresident principal that certain property could be sold for \$27,000 and that that sum was several thousand dollars more than it was worth, whereas in fact it was sold for \$35,000 very shortly thereafter, specific performance of a contract for its sale at \$32,000 was refused: *Merritt v. Wassenich*, 49 Fed. 785. And where a drunkard exchanged his farm for a saloon which was overvalued to the extent of \$7,000, specific performance was refused on the ground that the bargain was unconscionable: *Milligan v. Albertz*, 103 Wis. 140, 78 N. W. 1093.

If a vendee fraudulently misrepresents to the vendor the value of wild lands which he knows that the vendor has not seen for many years, specific performance will be refused: *Kelley v. Sheldon*, 8 Wis. 258.

**2. Necessity for the Representations to have been Relied upon.**—Misrepresentations in order to constitute a defense to a suit for specific performance must have been relied on by the plaintiff: *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345. In other words, the misrepresentations must be shown to have operated to the prejudice of the defendant: *Scott v. Shiner*, 27 N. J. Eq. 185; *Cleavenger v. Sturm*, 59 W. Va. 658, 53 S. E. 593; *McIver v. Kyger*, 3 Wheat. 53, 4 L. ed. 332.

**3. Effect of Investigation or Opportunity to do so on Part of Defendant.**—"The domain of law differs from that of morals. The one aims to prevent and redress actual wrong; the other to regulate those sentiments of the mind which prompt to outward action. Like concentric circles of unequal circumference, they embrace ground common to both; but there are sound moral maxims which fall beyond the sphere of jurisprudence. Every false statement is an immoral act, but not every false representation will invalidate a contract. An agreement is seldom made in which each party does not hope for some advantage to himself and do something to obtain it. The seller extols, and the buyer depreciates, the value of the commodity. For everything untruly said or done by either, sound morals will hold him to account; but the law allows the avarice of mankind thus to play in its orbit, until, by falsehood, damage has been done. The weight of modern authority preponderates in favor of the principle that an intention to deceive, and a false statement even on a material point, will not overthrow the bargain unless the statement was the means which produced it. This is especially true where the statement embodies the result of an opinion, and where the means of knowledge are equally accessible to both parties.

"Better illustration of these principles than the present case is not required. The complainant was the owner of a mill, but not a miller.

Of the respondents, one was practically acquainted with the business, and the other was purchasing for him. By the complainant's permission, on two occasions, in open daylight, when the machinery was in motion, they examined its condition. They examined, drew their conclusions, embodied their terms in a written instrument, and in that instrument said nothing of repairs. Possibly he intended to cheat them, and said enough to diminish their vigilance. On this point, the testimony, if admissible, is not satisfactory; but the weight of the evidence favors the conclusion that the contract was produced not by these representations, but by personal examinations which they were the more competent to make. Against this conclusion, a clause of warranty in the agreement would have guarded": *Phipps v. Buckman*, 30 Pa. 401.

In *Homan v. Stewart*, 103 Ala. 644, 16 South. 35, which was an exchange of property, both of the parties examined the property of the other. The parties traded at arm's-length; they were each engaged in a speculative venture. The court granted specific performance. So, also, in *Jobbins v. Gray*, 34 Ill. App. 208, specific performance was granted to the vendor of a contract to purchase land and a water power connected with it. The vendor had never seen the property and informed the vendee at the time of the purchase that he knew nothing about it. The vendee's agent was familiar with the land, river, dam and the millrace. The dam was defective and caused an overflow of water on lands not owned by vendor, but the court declared that the vendee had relied on his own investigations.

Where in a purchase of land valuable for coal deposits, the vendor pointed out the boundaries of portions which had been sold, the vendee's opportunity of knowing whether or not a certain number of acres remained unsold were as good as that of the vendor, and hence he is not in a position to claim misrepresentations on the part of the vendor in that respect: *Cleavenger v. Sturm*, 59 W. Va. 658, 53 S. E. 593. But where in a land trade, the defendant, though making certain inquiries in regard to the land, relied upon the representations of the plaintiff in respect to its quality and tillability, specific performance will be refused: *Brown v. Smith* (Iowa), 89 N. W. 1097.

The court in *Leicester Piano Co. v. Front Royal & R. Imp. Co.*, 55 Fed. 190, 5 C. C. A. 60, in applying the rule of caveat emptor to suits to enforce specific performance, said: "Under this rule, where a purchaser of real or personal property asks a court of equity to rescind a contract, or withhold the equity of specific performance, on the ground of misrepresentations on the part of the vendor, he must establish his allegations by clear and irrefragable evidence; and if it appears that he had resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries and judgment, or if the means of investigation and verification were at hand readily accessible, and his attention was drawn to them, or reasonable suspicion might have been excited by the attendant circumstances, relief will be denied. . . . A plaintiff always has a remedy at law for the breach of a binding contract, and can obtain such pecuniary

compensation as a jury may think he is justly entitled to. If he seeks the extraordinary relief of specific enforcement, he must come into a court of equity with clean hands, and show that the contract was the result of honest and candid dealings on his part, and that the contract is certain, fair, and just in all its terms. It must be such a contract as would not be obnoxious to the sense of natural justice and sound morality, under the circumstances of the parties. If a plaintiff possesses peculiar and superior knowledge on the subject matter of the contract, and knows, or has good reason to believe, that he is relied on by the other party for full and correct information, he must impart such information, or refer the inquirer to ready and accessible sources of information, and do nothing to retard or mislead investigation."

4. **Misrepresentations Innocently Made.**—Specific performance will be refused where the plaintiff has made misrepresentations on a matter of substance to the contract, regardless of the fact that he believed the representations to be true. It is not essential that such misrepresentations be made with an intent to deceive: *Best v. Stow*, 2 Sand. Ch. 298; *Riggins v. Trickey* (Tex. Civ.), 102 S. W. 918. In *Powers v. Mayo*, 97 Mass. 180, specific performance was allowed in a case where certain shares of corporate stock were taken in an exchange as at par value although they were not worth more than ten cents a share. The stock had been represented in good faith as worth par value. An element of estoppel existed, however, by reason of the party making no effort to rescind the contract after learning of the failure of consideration.

5. **False Impressions by Way of Deduction.**—It is immaterial by what means deception is practiced, whether by signs, words, silence or acts, provided that a false and injurious impression is actually produced upon the other party of such nature and character that but for it he would not have entered into the contract. If the plaintiff, in a suit to obtain specific performance, has been guilty of creating such a false representation, relief will be denied him: *Hallinger v. Zimmerman*, 58 N. J. Eq. 217, 42 Atl. 726; *Rudisill v. Whitener*, 146 N. C. 403, 59 S. E. 995, 15 L. R. A., N. S., 81. The same rule obtains where the false representations were created in pursuance of a conspiracy between the plaintiff and others who made certain false statements in regard to the value of the land and its situation to relatives of the vendee with a view that said statements would be conveyed to said vendee: *Nichols v. Colgan*, 130 Ind. 341, 30 N. E. 301. And specific performance will be refused where the false representation was caused by a false representation on the part of a third person, who was present at the negotiations, that he would purchase the land if vendor would sell the timber to his companion: *Ratliff v. Vandikes*, 89 Va. 307, 15 S. E. 864. But a false impression in regard to the subject matter of the contract taken up spontaneously not from any deceptive evidence, but merely from the suggestion of the person's own mind, will not be sufficient to defeat specific performance: *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111.

In other words, a person's notions or suppositions not founded upon some tangible basis are not a sufficient basis upon which to defeat specific performance: *Western R. Corp. v. Babcock*, 6 Met. 346.

6. **Misrepresentations as to the Legal Effect of the Contract.**—Specific performance will not be decreed of a contract which was procured under misrepresentations as to its legal effect: *Broadwell v. Broadwell*, 6 Ill. 599; *Chandler v. Pomeroy*, 46 Fed. 533. But where some of the parties were merely mistaken as to the legal effect of some of the minor provisions of the contract, it is not sufficient reason for denying specific performance: *Wilson v. McLaughlin*, 11 Colo. 465, 18 Pac. 739.

7. **Declarations or Opinions as to Future Events or Happenings as Inducements to the Contract.**—Where a contract for the purchase of land was induced by the vendee representing that he represented a party of rich capitalists who would make larger expenditures upon the property which would increase the value of the balance of vendor's land, the vendee cannot compel specific performance, even though, when reduced to writing, the contract required expenditures much less in amount than those mentioned in the negotiations: *Carskaddon v. Kennedy*, 40 N. J. Eq. 259. So, also, where land was purchased at a very high price because of representations on the part of the vendor that certain improvements were to be made in the immediate vicinity, and a map showing such proposed improvements was shown the vendee at the time of making the contract of purchase, the vendor cannot, upon his failure to make the proposed improvements, enforce the contract for more than the value of the land without the improvements, even though at the time of the sale he intended to make the improvements: *Rogers v. Salmon*, 8 Paige, 559, 35 Am. Dec. 725.

b. **Effect of Concealment of Facts Affecting the Price to be Asked or the Desire to Sell.**—In *Trigg v. Ready*, 5 Humph. 529, 42 Am. Dec. 447, the court said: "Mr. Story, in commenting upon the legal principle, that if one has actual knowledge of an event or fact from private sources, not then known to the other party from whom he purchases, and which knowledge would materially enhance the value of the thing purchased, or change the intention of the party to the sale, the contract of the sale will nevertheless be valid, observes: 'There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not and cannot undertake directly to enforce. But when the act of a court of chancery is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway. And a purchase made with such reservation of superior knowledge would be of too sharp a character to be aided and enforced by a court of chancery. It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted



to suppress it, and still call for a special performance': Story's Equity Jurisprudence, sec. 206; 2 Kent's Commentaries, 2d ed., sec. 49, pp. 490, 491; Parker v. Grant, 1 Johns. Ch. 630; Ellard v. Llandaff, 1 Ball. & B. 241.

"From this view of the subject, it is obvious that a complainant, to be entitled to a specific performance or execution of his contract, must come with his hands perfectly clean, and his conscience entirely void of offense—that if his contract has been obtained for an inadequate consideration; that if it has been made by the defendant in ignorance of his right, either as to the law or the facts; that if it has been made in ignorance of facts changing the nature of the thing sold, which were known to the opposite party, and by him withheld, whether they were of such a character as he was bound by law to disclose or not—in all these cases a specific performance will be refused, and the party left to his remedy at law if he has any. These principles are, as we think, conclusive against the complainant's right to relief in the present case."

Hence, applying the rule that in order to obtain specific performance, the contract must be fair and reasonable, such performance has been refused where the vendee concealed the fact of his having discovered a salt spring upon the land, which made the property much more valuable, and pretended that the purchase was being made on account of the timber: Bowman v. Irons, 2 Bibb, 78, 4 Am. Dec. 686. In another case where a man of large experience in business purchased all the oils, gases and minerals in land for forty cents an acre from an inexperienced mountaineer, the land becoming worth fifteen dollars an acre within two years thereafter, specific performance was refused. The vendee had been buying mineral rights of that character in the neighborhood and had knowledge of the probability of the building of a railroad in the locality in the near future: Wollums v. Horsley, 93 Ky. 582, 20 S. W. 781.

"Whenever there is a concealment or misrepresentation of material facts, whether designedly or not, or a material breach of contract by the other party, whereby the reasonable expectations and intentions of the party sought to be bound have been frustrated, or his remedies impaired, equity will not enforce the contract against him": Barksdale v. Payne, Riley Eq. 174. Specific performance will not be decreed against one who purchased at auction a hotel, without being informed of the existence of a party-wall: Hendricks v. Stark, 37 N. Y. 106, 93 Am. Dec. 549. And where a partner selling his interest in the partnership conceals from the purchaser a large number of debts not disclosed by the regular books of account of the firm, specific enforcement will be refused: Hetfield v. Willey, 105 Ill. 286. So, also, where the secretary of a corporation buys stock from one of the stockholders and during the negotiations endeavors to convince the vendor that the stock is not worth par, while he, from his official position, knows that it is worth much more, specific performance will be refused: Diamond State Iron Co. v. Todd, 6 Del. Ch. 163, 14 Atl. 27.

The principal case furnishes an illustration of the above rule in respect to concealment. In that case the plaintiff, though under no fiduciary relation toward the defendant, did not disclose to her the facts which led him to believe that a higher price could be obtained for the property, and the court refused specific performance. But other facts and circumstances showing the taking of an undue advantage of the vendor are also disclosed by the case: *Banaghan v. Malaney*, 200 Mass. 46, ante, p. 378, 85 N. E. 839, 19 L. R. A., N. S., 871. In *McManus v. Boston*, 171 Mass. 152, 50 N. E. 607, the plaintiff purchased land for \$5,700 in anticipation of it being acquired by the city of Boston for school purposes. He sold it to the city for \$9,500 without disclosing what the land had cost him. The court said: "If the price was so exorbitant as to make the contract unconscionable, a court of equity would not decree specific performance. We should not, however, refuse to grant that relief merely because the vendor, ascertaining that a certain parcel of land would be needed for a public purpose, had had the address to purchase it at much less than its fair value, and then to sell it to the city at a fair price, through a board charged with the duty of taking it for the city by purchase or otherwise. If the price was exorbitant, the contract might well, under the circumstances, be found to be unconscionable, and one which a court of equity would not specifically enforce."

Where the plaintiff desiring to purchase land for the location of a blacksmith shop was informed during the negotiations that the land would not be sold to be used for objectionable purposes, and he thereupon concealed his purpose of purchasing the land and discussed the erection of dwelling-houses on the land, showing sketches of how such houses could be built, specific performance will be refused of an unconditional contract of sale: *Brown v. Pitcairn*, 148 Pa. 387, 33 Am. St. Rep. 834, 24 Atl. 52.

**c. Taking of Undue Advantage of the Other Party to the Contract.**

1. **Abuse of Fiduciary Relations.**—Where a son, by the use of undue influence on his aged and feeble parent, procures a contract for the sale or conveyance of land by such parent, specific performance will be refused: *Sands v. Sands*, 112 Ill. 225; *Appeal of Brady*, 66 Pa. 277. And where the agent of the vendor also acted as the agent of the vendee without the knowledge of the vendor, the contract will not be enforceable against the vendor: *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1. So, also, where a real estate agent employed to purchase land did not disclose his agency to the vendor and at the same time acted as the agent of the vendor, the contract will not be enforceable, even though the price be a fair one and the vendee was ignorant of the double agency of the real estate agent: *Marsh v. Buchan*, 46 N. J. Eq. 595, 22 Atl. 128. Likewise, where one who represents the owner of a mine in making a sale of it makes a secret agreement with the purchasers for an interest in the property, the agreement will not be enforced: *Jacobs v. George*, 3 Ariz. 3, 20 Pac. 183.

**2. Misapprehension, Haste, Surprise or Unfair Advantage not Amounting to Legal Duress.**—Where it is manifest that owing to the suddenness and haste with which the agreement was signed, and owing to the surprise, inadvertence and confusion of the vendor, it did not express the intentions of the parties. Specific performance will not be decreed: *Godwin v. Collins*, 4 Houst. 28; *Mathews v. Terwilliger*, 3 Barb. 50. So, also, where the contract was obtained under unfair advantage not amounting to legal duress, a court of equity will not specifically enforce the contract: *Edwards v. Handley*, *Hardin* (3 Ky.) 602, 3 Am. Dec. 745; *Miller v. Miller*, 68 Pa. 486. And where the contract was procured by the use of "sharp practice" not amounting to actual fraud, specific performance will also be withheld: *Engberry v. Rousseau*, 117 Wis. 52, 93 N. W. 824.

**3. Inducing Contract by Means of Extortion or Illegal Promises.** Where a debtor, after having executed a mortgage, refuses to acknowledge it so as to admit it to registration, and by such refusal exacts a certain agreement from the creditor, he will not be granted the aid of a court of equity in enforcing specific performance: *Rice v. Rawlings*, *Meigs* (19 Tenn.), 496. Likewise where a compromise agreement was extorted by plaintiff's threat to prosecute defendant's son for a criminal offense unless the agreement was signed, specific performance will be refused: *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44. And where the ratification of an agreement made with a county was procured by promises of private advantages to the voters in case of its ratification, a court of equity will refuse to aid the plaintiff by a decree of specific performance: *Palo Alto Co. v. Harrison*, 68 Iowa, 81, 26 N. W. 16.

**4. Effect of Intoxication, Ignorance, Old Age or Infirmary of Mind or Body on Part of One of the Parties.**—Where a contract has been procured by unfairness, overreaching or overkeenness on the plaintiff's part, specific performance will be denied him: *Louisville etc. Ry. Co. v. Bodenschatz-Bedford S. Co.*, 141 Ind. 251, 39 N. E. 703; *Ruse v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; *Kirkpatrick v. Pearce*, 202 Mo. 471, 101 S. W. 651. Thus, where the defendant was intoxicated when the contract was executed, it will not be specifically enforced: *Leonard v. Crane*, 147 Ill. 52, 35 N. E. 474; *Smith v. Shepherd*, 36 Iowa, 253; *Byrne v. Long* (Ky.), 15 S. W. 778; *Wingart v. Fry*, *Wright*, 105.

Specific performance will be refused where the defendant was an aged, inexperienced and ignorant woman and plaintiff's agent who procured the contract, being her superior in mental ability, persuaded her to refrain from consulting advisers on whom she was disposed to rely, and wrought upon a racial prejudice to persuade her to sign the contract at once upon the terms offered, and failed to disclose to her the circumstances which led him to believe that a higher price could be obtained: *Banaghan v. Malaney*, 200 Mass. 46, ante, p. 378, 85 N. E. 839, 19 L. R. A., N. S., 871. So, also, where the consideration was two-thirds of the value of land and the vendors were ignorant foreigners, and the contract was procured by a real estate

agent, whom they supposed was acting for them, but was in fact acting for the vendee, and who concealed important facts affecting the value of the property from them, specific performance will be refused: *Fish v. Leser*, 69 Ill. 394. And where the purchaser was a real estate man, who was an alert trader, while the vendor was old and uneducated, and the consideration was considerable less than the value of the property, specific enforcement will be refused even though nearly all of the purchase money has been paid, upon the repayment of the money paid with interest: *Wolford v. Steele*, 27 Ky. Law Rep. 88, 84 S. W. 327. And specific performance will be refused where the defendant was a widow in feeble health living in a neighboring state and the plaintiff procured a real estate agent to call on defendant's son in law, who conducted the negotiations for her, and informed him that the property to be exchanged for her property was all rented and that he had a purchaser for one of the houses, all of which was not true: *Lennon v. Stiles* (Sup.), 4 N. Y. Supp. 487. And where a real estate agent, who had importuned an illiterate and feeble old woman for authority to sell her farm, induced her to sign a power of sale under the idea that she was signing a memorandum that she had finally declined to sell, the contract of sale made by the agent will not be enforced: *McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1. Where the defendants, who were husband and wife, were ignorant, illiterate colored people and signed the contract for the sale of their homestead under a misapprehension, it will not be specifically enforced: *Bird v. Logan*, 35 Kan. 228, 10 Pac. 564.

Where a woman not possessed of capital or business experience purchases seventy acres of land for \$50,000, making a cash payment of \$5,000, and executing a mortgage on her separate estate for \$12,000 in addition to a mortgage upon the land purchased, the transaction will be regarded as so rash and improvident that specific performance will not be decreed: *Friend v. Lamb*, 152 Pa. 529, 34 Am. St. Rep. 672, 25 Atl. 577. Likewise, where a young man who has merely become of age, sells land, the value of which he does not know, to one who does know its value and who has importuned him to sell it, a court of equity will refuse specific performance: *Clitherall v. Ogilvie*, 1 Desaus. 250; the same rule is enforced where such a young man purchases property under similar circumstances: *Gasque v. Small*, 2 Strob. Eq. 72. And where the vendor was an illiterate man, who sold timber for much less than it was worth, and the vendee concealed information that one who had an option on the timber had abandoned it, the existence of the option accounting for the inadequate price, the court will not specifically enforce the contract: *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332. Specific performance has also been refused where the vendor was very old and infirm in body and mind and the circumstances show that a hard bargain had been driven: *Woolums v. Horsley*, 93 Ky. 582, 20 S. W. 781; *Ratterman v. Campbell*, 26 Ky. Law Rep. 173, 80 S. W. 1155. But where no fraud was practiced on defendant and he understood the bargain and



declined performance after he had received a better offer, specific performance will not be refused because he was mentally depressed at the time of the transaction: *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602.

**IX. Effect of Subsequent Changes in the Circumstances or Situation of the Parties or Subject Matter.**

a. **Changes of Circumstances in General.**—In a general way, it may be said that specific performance will not be refused because one of the parties has had the foresight to anticipate the changing circumstances of the future: *Cox v. Burgess* (Ky.), 96 S. W. 577. The situation of the parties at the time of the contract is a controlling test of whether specific performance should be granted or refused: *Thiebaud v. Union Furniture Co.*, 143 Ind. 340, 42 N. E. 741. A contract should be judged as of the time when it was made. If it was fair and just, then the fact that it has become a hard one by the force of subsequent circumstances or changing events offers no reason for refusing specific performance unless the subsequent events have made the performance so onerous that the enforcement would impose great hardship with but little or no corresponding benefit to the plaintiff: *Prospect Park etc. R. Co. v. Coney Island etc. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610. This rule is applicable in suits to enforce covenants restraining the use of land or providing for the opening of streets: *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741; *Hart v. Brown*, 6 Misc. Rep. 238, 27 N. Y. Supp. 74; *Morgan v. Scott*, 26 Pa. 51. Sometimes a court of equity will refuse specific performance where unexpected events happen which are inconsistent with the intentions of the parties: *Keim v. Lindley* (N. J. Ch.), 30 Atl. 1063; *Quick v. Stuyvesant*, 2 Paige, 84; *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621. This rule has been applied in contracts for the support of the vendor or for the support of the wife of the vendee, where the death of some of the parties has altered the situation of the parties in such a manner that the original intention of the parties cannot be properly followed: *Marston v. Humphrey*, 24 Me. 513; *Waters v. Howard*, 8 Gill, 262. Specific performance has been refused of a contract to contribute land and money to a manufacturing company made during a time of great speculative activity, where after part performance a collapse occurs in the real estate venture which was the basis of the contract and the completion of the contract would be unlikely to benefit either party: *Leicester Piano Co. v. Front Royal etc. Imp. Co.*, 55 Fed. 190, 5 C. C. A. 60.

b. **Subsequent Insolvency of One of the Parties.**—Specific performance of a contract to deliver chattels cannot be maintained solely on the ground that the seller is insolvent, but the fact of insolvency, when combined with other causes for equitable interposition, may become a potent, and even a controlling, factor in determining the fact of jurisdiction: *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 76 Pac. 13, 946, 65 L. R. A. 783. Thus, in a case where land

which was in litigation was sold for \$22.50 an acre, but the vendee failed to meet the payments because of being insolvent, and some years afterward, when the land was worth from \$80 to \$100 an acre, offered to perform, specific performance was refused: *Brashier v. Gratz*, 6 Wheat. 528, 5 L. ed. 322. It has, however, been declared that in a bill by the vendee for the specific performance of a contract of sale, that his insolvency is not an objection since a conveyance will be decreed only on payment of the purchase money: *Sarter v. Gordon*, 2 Hill Eq. 121. Where a contract required one railroad company to advance money to pay the interest on the bonded indebtedness of another, in case the net earnings of the latter should prove insufficient, and that such advances should be a lien on the future earnings of the borrowing company, specific performance will not be decreed where the borrowing company becomes totally insolvent: *Bradford etc. R. Co. v. New York etc. R. Co.*, 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116. Specific performance will be refused of a contract under which two persons purchase property upon deferred payments, where it is shown that the plaintiff is insolvent and could not, if required to do so, meet his proportions of the future payments, the court saying: "Equity uses a sound discretion in enforcing the specific performance of contracts; and it could not, consistently with the principles which regulate its action in this branch of its jurisdiction, require one party to perform, when it was uncertain whether the other could fulfill the terms of the contract on his part": *Sims v. McEwen's Admr.*, 27 Ala. 184.

But the insolvency of the plaintiff in a suit to enforce an exchange of lands is no ground for refusing specific performance where he offers to have a responsible person join with him in the conveyance and warranty on his part: *Tyree v. Williams*, 3 Bibb, 365, 6 Am. Dec. 663. Nor is the insolvency of a lessee ground for resisting specific performance where he offers abundant security for the rent: *McFarlane v. Williams*, 107 Ill. 33. And where the contract for the sale of land provides for the giving of a mortgage for part of the purchase price, the insolvency of the vendee is no excuse for disallowing enforcement where he offers to pay the whole price in cash if desired: *Hughes v. Young*, 31 N. J. Eq. 60. The insolvency of the plaintiff cannot be urged against decreeing specific performance where the contract was made with knowledge of such insolvency: *Brush-Swan Electric Light Co. v. Brush Electric Light Co.*, 43 Fed. 225.

c. **Subsequent Increase or Decrease in Value of the Subject Matter.**—The inadequacy of price which will defeat specific performance must be an inadequacy existing at the time the contract was made: *Hale v. Wilkinson*, 21 Gratt. 75. It is no ground for refusing specific performance of a contract for the sale of land that the land has become more valuable since the time of the contract where the sale was made at a fair price: *Low v. Treadwell*, 12 Me. 441; *Falls v. Carpenter*, 21 N. C. 237, 28 Am. Dec. 592; *Cady v. Gale*, 5 W. Va. 547; *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303; *Willard v.*

Taylor, 8 Wall. 557, 19 L. ed. 501. This condition of affairs often happens where the land becomes very valuable by reason of the discovery of minerals or oil thereon. Specific performance will, nevertheless, be decreed: *Cox v. Burgess* (Ky.), 96 S. W. 577; *Meehan v. Nelson*, 137 Fed. 731, 70 C. C. A. 165. But where the vendee has practically abandoned his contract of purchase, and a long time has elapsed since the making of the contract, the court will not allow him to have specific performance: *Anderson v. Luther Min. Co.*, 70 Minn. 23, 72 N. W. 820; *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2. Specific performance will not be decreed under an agreement for the conveyance of land at a price to be fixed by an arbitrator named in the agreement after a delay of six months in making the award where the land is rapidly increasing in value: *Chicago etc. R. Co. v. Stewart*, 19 Fed. 5. And where a telegraph company authorized the plaintiff to put up a wire on its polls between New York and Philadelphia upon condition that at the end of a certain period it shall belong to the telegraph company, who would lease it to the plaintiff at a yearly rental of \$600, the fact that by reason of the growth of the two cities and the absence of competing lines, the value of the wire has increased far beyond the rental is no ground for refusing to specifically enforce the contract: *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. Rep. 900, 36 L. ed. 776.

The fact that an apparently valuable mine has turned out to be worthless, thereby involving a serious hardship upon the purchaser, is no ground, however, for refusing specific performance of a contract for its lease: *Haywood v. Cope*, 25 Beav. 140; *Jefferys v. Fairs* (1876), 4 Ch. Div. 448.

### SHERLAG v. KELLEY.

[200 Mass. 232, 86 N. E. 293.]

**DEATH of Human Being, Action for.**—Except where a different rule has been introduced by statute, no action can be sustained by one person for causing the death of another. The decisions except, as a ground for recovery, all elements of damage which arise solely from the death, and, as to such damage, are equally applicable to actions of contract and to actions of tort. (p. 416.)

**HUSBAND AND WIFE, Action of the Former to Recover for the Death of the Latter.**—A husband cannot maintain an action of contract to recover damages for causing the death of his wife, nor for loss of consortium, companionship or services resulting from her death. (p. 417.)

**DEATH of Human Being, Statutory Remedy for, Exclusiveness of.**—A statute giving a cause of action for the death of a human being through neglect is exclusive, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. (p. 417.)

**HUSBAND AND WIFE, His Right to Recover for Injuries Though Her Death Resulted.**—If, through the breach of a contract, there is an injury to a wife causing damage to her husband, he may recover therefor, although from such injury she subsequently dies. A declaration seeking such recovery may be treated as if the allegations of death and the consequences of death were omitted. (p. 417.)

**A HUSBAND may Recover of a Physician for a Breach of His Contract** to attend and care for the plaintiff's wife in childbirth, though her death also resulted, if the recovery is limited to the damages incident to additional expenses of care, nursing and treatment. (p. 417.)

**DAMAGES, Presumption of.**—For every breach of a promise made on good consideration the law awards some damage. (p. 417.)

**PLEADING—Breach of Contract, How may be Alleged.**—It is a general rule of pleading that the breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach. (p. 418.)

**DAMAGES, When Sufficiently Alleged.**—A general averment of damages in the ad damnum clause is sufficient where there are previous averments showing a liability, and special damages are not claimed. It is not material whether the action is in contract or tort. (p. 418.)

Action of contract to recover five thousand dollars claimed to be the damage due to the plaintiff. The complaint, so far as material, was as follows: "And the plaintiff says that on or about April 4, 1903, the defendant was and still is a physician practicing his profession in Fall River in said county; that on or about said date the defendant held himself out as possessing the knowledge, skill and ability usual among physicians, and that believing the defendant to have such knowledge, skill and ability, he, the plaintiff, employed and paid him to attend his, the plaintiff's, wife in childbirth, and to give her the proper and necessary medical care, attention and services incident thereto, which the defendant promised and agreed to render; yet the defendant, not regarding his promise in that behalf, did not render such care, attention and service, but wholly failed and neglected to do so, and so unskillfully, negligently and carelessly attended her, the plaintiff's wife, and so failed to give her due and proper medical care, treatment and attention that she died, so that the plaintiff wholly lost and was utterly deprived of all benefit of her services, care, comfort and society."

The defendant demurred to the complaint on the following grounds:

"1. For that no action of contract by the husband lies to recover damages for the alleged causing of the death of his wife.



"2. For that no action of contract lies by the husband to recover damages for loss of consortium, companionship or services of his wife by reason of her death.

"3. For that the plaintiff cannot recover in an action of contract for alleged injury to his wife resulting in her death as stated in his declaration."

The demurrer was sustained and judgment given for the defendant, and the plaintiff appealed.

F. A. Pease, for the plaintiff.

H. A. Dubuque, for the defendant.

**234** KNOWLTON, C. J. The question intended to be raised by the defendant's demurrer to the declaration, and the question principally discussed at the argument is whether, under an action of contract brought upon the implied agreement of a physician with a husband to render necessary and proper medical care and service to his wife in her illness, a recovery can be had for the husband's loss of her society, care and comfort, resulting from her death caused by the defendant's failure to perform his contract.

For many years it has been held in this commonwealth that, without statutory provision, no recovery can be had for the death of a person, however wrongfully caused by another. This has been decided in cases where the plaintiff was in such relations to the deceased person that, by reason of the death, he was deprived of valuable legal rights, as in the case of a husband suing for loss of the services and consortium of his wife whose death was caused by the defendant's negligence (*Carey v. Berkshire R. R.*, 1 Cush. 475, 48 Am. Dec. 616), and in a similar case, where the action was brought by a father for loss of services of his minor son: *Skinner v. Housatonic R. R.*, 1 Cush. 475, 48 Am. Dec. 616. So it was held that a promise to pay an annuity to a widow, on account of the death of her husband through the defendant's negligence, and upon her agreement to forbear to sue, could not be enforced, although she was deprived of her husband's support and of his consortium: *Palfrey v. Portland etc. R. R.*, 4 Allen, 55; see *Nolin v. Pearson*, 191 Mass. 283, 114 Am. St. Rep. 605, 77 N. E. 890, 4 L. R. A., N. S., 643. It was recognized that in some countries, under different systems of jurisprudence, the law was different: *Carey v. Berkshire R. R.*, 1 Cush. 475, 48 Am. Dec. 616. But, except as changed by statute, this doctrine is firmly established in the law of this commonwealth: *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456; *Richardson v. New York Cent. R. R.*, 98 Mass. 85; *Wor-*

cester etc. Street Ry. v. Travelers' Ins. Co., 180 Mass. 263, 91 Am. St. Rep. 275, 62 N. E. 364, 57 L. R. A. 629. The decisions exclude, as a ground of recovery, all elements of damage which arise solely from death, and as to such damage they are as applicable to actions of contract as to actions of tort.

The whole subject is now covered by statutes, of which some apply only to deaths caused by certain corporations or classes of <sup>235</sup> persons, as railroad and street railway corporations, common carriers and employers of labor, and one is general (Rev. Laws, c. 171, sec. 2, amended by Stats. 1907, c. 375), applying to all other corporations and persons. This last statute covers death by negligence, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. The remedy given by it is exclusive of any other in the cases to which it applies; and if the present plaintiff had brought his action seasonably, he would have been entitled to a recovery under it. So far as the plaintiff claims damages growing out of the death of his wife, we are of opinion that the first and second grounds of demurrer are a bar to his recovery.

The third ground of demurrer is as follows: "For that the plaintiff cannot recover in an action of contract for alleged injury to his wife, resulting in her death, as stated in the declaration." If, through a breach of the defendant's contract, there was an injury to the plaintiff's wife that caused him damage, he can recover for it in an action of contract, notwithstanding that it finally resulted in her death. If he was caused additional expenses for her nursing, care and treatment by the defendant's failure to perform his contract he is entitled to damages. The fact that his wife subsequently died from the same cause is immaterial. As to this part of the case the declaration may be considered as if the allegation of death and the consequences of the death were omitted.

The demurrer does not distinctly raise the question whether the declaration is insufficient to permit a recovery of nominal damages or of actual general damages, if any were suffered previous to her death. If the question were raised, we should be obliged to answer it adversely to the defendant. The implied contract is set out, and the defendant's failure to perform it. In *Hagan v. Riley*, 13 Gray, 515, Chief Justice Shaw says, "For every breach of a promise made on good consideration the law awards some damage."

The breach is sufficiently alleged. It is a general rule in pleading that a breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach: *Marston* <sup>236</sup> v. *Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Fisk v. Hicks*, 31 N. H. 535; *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 151; *Karthauss v. Owings*, 2 Gill & J. (Md.) 430; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 961; *Westbrook v. Schmaus*, 51 Kan. 558, 33 Pac. 306.

The only averment of damages is general, in the *ad damnum*: Where there are previous averments that show a liability this is enough, unless special damages are claimed. The forms of pleading previously used in this commonwealth are authorized by the Revised Laws, chapter 173, section 130. In the Public Statutes, chapter 167, section 94, under the forms of declarations in actions of tort, is this language: "The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed." In the form of declaration for breach of promise of marriage, there is no reference to the subject of damages, but the claim is left to the *ad damnum*. This is also true of some of the other forms in actions of contract in the same section. The principle is recognized in many cases: *Baldwin v. Western R. R.*, 4 Gray, 333; *Prentiss v. Barnes*, 6 Allen, 410; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Postlewaite v. Wise*, 17 W. Va. 1; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Louisville etc. R. R. v. Smith*, 58 Ind. 575; *Laraway v. Perkins*, 10 N. Y. 371; *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *McCarty v. Beach*, 10 Cal. 461; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Packard v. Slack*, 32 Vt. 9; *Wilson v. Clarke*, 20 Minn. 367; *Hadley v. Prather*, 64 Ind. 137. The declaration is sufficient to entitle the plaintiff to recover nominal damages, and general damages if any resulted to the husband from a breach of such a contract as is set out. There being no other averments than the statement of the contract and an allegation of a breach of it, it does not appear whether there will be a claim of general damage to the plaintiff in his wife's lifetime, and we need not consider whether further averments would be necessary to entitle him to anything more than nominal damages.

Because the declaration states a cause of action in the plaintiff, without reference to the averments of the death of his wife and the damages resulting from it, the judgment is reversed and the demurrer is overruled.

So ordered.

*A Husband may Recover for Loss of Time and for Funeral Expenses* directly resulting from negligent acts causing the death of his wife, notwithstanding there is no statute purporting to give him that right: *Philby v. Northern Pac. Ry. Co.*, 46 Wash. 173, 123 Am. St. Rep. 928.

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## BOWDEN v. BROWN.

[200 Mass. 269, 86 N. E. 351.]

**CHARITY, Public, What Constitutes.**—A gift to a designated town toward the erection of buildings for the sick and poor, those without homes, constitutes a public charity. (p. 420.)

**CY PRES—Charitable Purposes, Refusal of a Gift for—Right of Residuaries.**—If a will is made declaring that the remainder of the testatrix's estate shall be given to the town of M. toward the erection of a building for the sick and poor, and specifies persons in whose hands the gift is to be left, and the town refuses to accept the legacy, and it appears that the fund is not sufficient to carry out the testatrix's purposes and that it is impossible to do what she had in mind, the doctrine of cy pres does not apply, the charity fails altogether, and the property goes to the next of kin. (p. 420.)

Suit by the trustees under the will of Sarah E. Goodwin for instructions respecting the disposition to be made by them of certain property remaining in their hands. The probate court decreed that the money should be invested and held for the purposes specified in the will and not paid to the next of kin. The case coming on before Hammond, J., he, by request, reserved it for the consideration of the full court.

F. M. Ives, for the next of kin.

D. Malone, attorney general, and F. T. Field, assistant attorney general, for the attorney general.

**270 KNOWLTON, C. J.** Sarah E. Goodwin, late of Marblehead, deceased, after giving certain legacies in her will, provided as follows: "The remainder shall . . . be given to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. I leave this in the hands of William E. Bowden, Mary G. Brown and William Reynolds of Marblehead." This gift constitutes a public charity: *Richardson v. Mullery*, 200 Mass. 247, 86 N. E. 319, and cases cited. But by the terms of the will, it is to go to a designated donee, to be used for a specified purpose, for the benefit of a certain class of sick and poor. The donee, the town of Marblehead, at a meeting of the voters, has declined to accept the legacy. It was given "toward the erection of a building" by the town. The action of the town is



equivalent to a refusal to erect such a building. It appears that the charity cannot be administered in the way stated in the will. It therefore must fail altogether, unless it <sup>271</sup> can be administered under the doctrine of *cy pres*. The question arises whether the purpose of the testatrix was to give her property for this specific charity, or whether her charitable purpose was general, so that the court is authorized to apply the money to some other charity, similar to that mentioned in the will, under a scheme to be devised for that purpose. It is manifest that the amount of the property, which is only about eight thousand dollars, is insufficient for the erection and maintenance of such a building as the testatrix contemplated. She expected that the building would be erected and maintained by the town, with such aid as would be derived from the use of her gift. The trust was not for the erection of a building by trustees under her will, entirely from the proceeds of her property. It being impossible to do that which the testatrix had in mind, can we discover a purpose to do something else of a similar character? We think not. There is nothing to indicate that she intended to make provision generally for the sick and poor of the town, or particularly for those without homes, unless they could be provided with a home in a building to be erected for their use. General provision for the sick and poor would seem to include a charity much broader than anything in her contemplation. The case seems to fall within the class where no intent to use the gift for other charitable purposes can be discovered, if it is impossible to execute the particular charity for which provision is made. In such cases the charity fails altogether. Many cases of this kind are found in the books: See *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401, 47 N. E. 422, 38 L. R. A. 629; *Bullard v. Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; *Gill v. Attorney General*, 197 Mass. 232, 83 N. E. 676; *In re White's Trusts*, 33 Ch. Div. 449; *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444, note; 4 Ves. Jr. 421; *Brown v. Condit*, 4 Robbins, 440; *Catt v. Catt*, 118 App. Div. (N. Y.) 742.

We are of opinion that the gift fails and that the residuary estate must go to the next of kin.

So ordered.

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*Charitable Uses and Trusts* are considered in the note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 248. They are defined in the recent case of *Estate of Lennon*, 152 Cal. 327, 125 Am. St. Rep. 58. An orphans' home for the friendless poor of all denominations is a charity: *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169. See, also, *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117. A gift for

the sole purpose of educating and maintaining destitute boys, without compensation, creates a public charity. And a bequest in trust for the benefit of the poor, to be given to such objects as the trustee shall deem worthy, is a charitable bequest: *Grant v. Saunders*, 121 Iowa, 80, 100 Am. St. Rep. 310.

*The Application of the Doctrine of Cy Pres* to charitable gifts is considered in the recent cases of *Codman v. Brigham*, 187 Mass. 309, 105 Am. St. Rep. 394; *Gladding v. Saint Matthew's Church*, 25 R. I. 628, 105 Am. St. Rep. 904.

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### GALLIGAN v. McDONALD.

[200 Mass. 299, 86 N. E. 304.]

**WILLS, INTERPRETATION OF**—**Estate Remaining at the Death of a Devisee.**—A will devising property to the testator's son, with a provision that the property remaining at the latter's death shall go to other persons, refers to the property not disposed of by the son in his lifetime. (p. 423.)

**WILLS, INTERPRETATION OF**—**Limitation Which does not Cut Down an Estate for Life.**—A devise of all property by the testator to his son, with a provision that what remains at the latter's death shall go to other specified persons, does not cut down the son's interest to an estate for life pure and simple, nor a life estate with a power of disposal. (p. 423.)

**WILLS, Devises with Repugnant Limitations.**—If a will devises property to the testator's son and provides that what remains at his death shall be taken by the testator's brother and sister, the son takes an absolute estate in fee. The limitation over is void, and the son can give a good title, and hence may maintain a suit for specific performance of a contract to purchase of him property thus acquired from his father. (p. 423.)

A. M. Alger, for the plaintiff.

J. B. Tracy and R. P. Coughlin, for the defendants.

300 **MORTON, J.** This case comes here on a reservation and report by a judge of the superior court on the bill and answers. The question at issue relates to the construction of the fifth clause of the will of one Edward A. Galligan of Taunton. The clause is as follows: "Fifth. I devise to my son Harry W. Galligan, all the real estate of which I may die possessed and he shall hold the same to him and to his heirs forever, provided however, that in case my said son shall die having no issue him surviving, or such issue shall de cease during minority, then and in either of such cases, my will is that my brother James H. Galligan and my sister Ann Galligan shall have and take all my real estate remaining at the death of my son, share and share alike, to them and to their heirs forever." In addition to the averments contained

in the bill and admitted by the answers, it is agreed that the testator died seised of several distinct parcels of land with the buildings thereon, including the one which is the subject of this suit.

The plaintiff contends that the word "remaining" is not to be construed in the technical sense of a remainder, but as meaning such part of the real estate devised to him as shall not have been disposed of by him at his death; that the limitation over must <sup>301</sup> take effect, if at all, as an executory devise; that it cannot take effect as such because an absolute power of disposal is impliedly given him, and the limitation over is, therefore, void, and he takes an estate in fee simple absolute. The defendants contend that the proviso applies to all of the real estate devised to the plaintiff; that the effect of the devise is to vest in the plaintiff a qualified fee determinable upon the contingency of his dying without issue surviving him, or upon the death of such issue, if any, during minority; and that the limitation over is, therefore, a valid executory devise. It is manifest that, according as the plaintiff's or defendants' contention is sustained, the plaintiff can or cannot give "a good and clear title," as he has agreed to do, to the real estate in question.

We are unable to distinguish this case from *Kelley v. Meins*, 135 Mass. 231, and *Ide v. Ide*, 5 Mass. 500. In *Kelley v. Meins* there was first a devise to the son by the testatrix of all of her estate, real and personal, "To have and to hold the same to him . . . his heirs, executors, administrators and assigns, forever." Then it was provided by a second codicil that the son should not come into possession till he reached the age of twenty-five, and by the first codicil that if he "shall die without leaving living issue, then any portion of my said estate and property which may remain shall be equally divided among my sisters and nieces and their female heirs and assigns." The son arrived at the age of twenty-five and died shortly after, intestate and without issue, and the trustee under the mother's will having in the meantime conveyed to him certain real estate which had come to him by the foreclosure of the mortgage and which the court treated as if the testatrix had been seised of it at her death. Thereupon the sisters and nieces of the testatrix brought a writ of entry against the heirs at law of the son to recover the premises which had been thus conveyed by the trustee to him. It was held that by the portion which should remain was meant the portion which should remain at the death of the son, and that the construction to be given to the will and the

first codicil was that the son should have during his life the absolute power of disposition of all the property given to him; that this power of disposal was inconsistent with an executory devise, and that the limitation over was, therefore, void.

<sup>302</sup> In *Ide v. Ide*, 5 Mass. 500, the devise was to a son and "his heirs and assigns forever," with a limitation over if the son should die and leave no lawful heirs of "what estate he shall leave, to be equally divided between my son J. and my grandson N. to them and their heirs forever." It was held that the limitation over was only of such estate as the son should leave at his death; that by necessary implication the testator intended that the son should have the power to dispose of any or all of the estate devised; and that that was inconsistent with the limitation over and the limitation was, therefore, void and the son took an absolute estate: See, also, *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24; *Gifford v. Choate*, 100 Mass. 343; *Damrell v. Hartt*, 137 Mass. 218; *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. 42; *Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131; *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25.

"In the case at bar there is," as was said in *Ide v. Ide*, 5 Mass. 500, "first an express fee simple devised" to the son, the plaintiff. This would give the plaintiff the absolute right to dispose of the property devised to him if it stood alone. Then follows the provision relied on by the defendant, "that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then and in either of such cases, my will is that my brother James H. Galligan and by sister Ann Galligan shall have and take all my real estate remaining at the death of my son," etc. By "estate remaining at the death" of the son is meant estate that shall not have been disposed of by the son during his life. It is upon such estate, if any, that the proviso is to take effect, and not upon all of the real estate devised. By necessary implication the son is to have the power to dispose of any or all of the estate devised to him. Such a power is inconsistent with an executory devise and the limitation over cannot therefore take effect as an executory devise.

Neither do we think that the effect of the limitation over is to cut down the son's estate to a life estate pure and simple, or to a life estate with a power of disposal, though the latter construction would not help the defendant: *Damrell v. Hartt*, 137 Mass. 218; *Hale v. Marsh*, 100 Mass. 468; *Lyon v. Marsh*, 116 Mass. 232.



If by "estate remaining" were meant a remainder, in the technical sense of the word, applicable to all of the real estate devised to the son, then the limitation over could and should <sup>303</sup> take effect as an executory devise contingent upon the son's dying without issue or the issue dying during minority, and the son would take a qualified fee determinable on the happening of either one of those events; or, taking the whole devise together, perhaps it might be construed in such case as vesting in the son an estate for life with remainder to the brother and sister: *Whitcomb v. Taylor*, 122 Mass. 243; *Schmaunz v. Göss*, 132 Mass. 141; *Hooper v. Bradbury*, 133 Mass. 303; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699. But as already observed we think that by "estate remaining" is meant what the son shall not have disposed of during his life, and not a remainder in the technical sense of that word.

The only objection that is made to the maintenance of the bill is that the plaintiff cannot give a good and clear title as he has agreed to do and that the defendant cannot and should not therefore be compelled to specifically perform the contract. For reasons stated above we are of opinion that the plaintiff can give "a good and clear title," and it follows that he is entitled to a decree in his favor.

Decree for the plaintiff.

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*The First Taker in a Will is Presumed to be the Favorite of the Testator*, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147; *Allen v. Hirlinger*, 219 Pa. 56, 123 Am. St. Rep. 617. A will bequeathing and devising to his wife all of the testator's property, "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers, then the residue still hers shall go to my, not her, nearest heirs," must fall, and fail of effect: *Moran v. Moran*, 143 Mich. 322, 114 Am. St. Rep. 648. Where a will provides, "All the rest, residue, and remainder of my estate, either real, personal, or mixed, I give to my dear husband, Henry P. Wood, he to have the full use and benefit thereof unconditionally. After him, should any remain, I give the same to my sister, Clara N. Crombe, one-half, and to my sisters Hannah N. Partelo and Phoebe B. Partelo, the balance, share and share alike," the first sentence gives the husband the rest of the estate in fee simple absolute, and the second sentence is void for repugnancy: *Wood*, for an Opinion, 28 R. I. 290, 125 Am. St. Rep. 738.

## COMMONWEALTH v. BUCKLEY.

[200 Mass. 346, 86 N. E. 910.]

**JURY TRIAL**—Instruction as to Meaning of Words, When Unnecessary.—The words "obscene," "indecent," "impure," and "manifestly" may be assumed to be understood in their common meaning by the ordinary juror, and hence not be defined in the instructions. (pp. 429, 430.)

**OBSCENE LANGUAGE**, Definition of.—Obscenity means offensive to morality or chastity, indecent, nasty. (pp. 428, 430.)

**IMPURE LANGUAGE** is that Which Manifestly Tends to Incite in the Minds of people susceptible to such influence obscene, impure and indecent thoughts. (pp. 428, 430.)

**OBSCENE PUBLICATIONS**, Right of the Jury to Consider Books Offending in the Same Manner.—In a prosecution for selling a book containing obscene, indecent and impure language, it is proper to refuse to instruct the jury that they may consider other works or literature widely read in the community and the subjects discussed in them, and, on the other hand, to instruct that it is entirely immaterial whether other books are as bad or worse than the publication complained of. (p. 431.)

**OBSCENE PUBLICATIONS**—Purpose of the Author.—In a prosecution for selling a book containing obscene, indecent and impure language, it is proper to refuse to instruct the jury to consider the apparent purpose and intent of the story as a whole, and, on the other hand, to instruct them that the defendant is being tried only with regard to such parts of the books as the prosecution complains of, and that it makes no difference what the object in writing the book was or what its whole tone is, if the parts complained of are in the opinion of the jury obscene, indecent and impure and manifestly tend to corrupt the morals of youth. (pp. 427, 431.)

**OBSCENE PUBLICATION**, What may be Found to be.—Under an indictment for selling a publication containing certain obscene, indecent and impure language, and manifestly tending to the corruption of youth, the jury may find the defendant guilty, if the publication contains descriptions of seductive actions and highly wrought sexual passion, and discloses much of the details of the way to an adulterous bed. (p. 431.)

Indictment under section 20, chapter 212, Revised Laws of Massachusetts, charging the defendant with selling a certain printed book entitled "Three Weeks," containing in certain pages obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, as set forth in specifications filed by the prosecution. The whole book was offered and received in evidence at the trial, and its sale was admitted. No other evidence was offered by either party.

The defendant asked the court to instruct the jury as follows:

1. Upon all the evidence the jury should return a verdict of not guilty.

2. Upon all the evidence the language of the parts of the book referred to in the indictment have not been shown to be obscene.

3. The language of the parts of the book described in the indictment is not indecent.

4. The language of the specified parts of the book in evidence is not impure.

5. The portions of the book referred to in the indictment do not manifestly tend to the corruption of the morals of youth.

6. The word "manifestly" as used in Revised Laws, chapter 212, section 20, means that the language complained of must be such as obviously, clearly and incontrovertibly would corrupt the morals of youth.

7. The jury must be convinced beyond any reasonable doubt that the book is either obscene, indecent or impure, or manifestly tends to corrupt the morals of youth. If they are not so convinced they should return a verdict of not guilty.

8. The jury should treat the book as a whole, and determine whether the book as a whole is obscene, indecent or impure, or manifestly tends to the corruption of youth.

9. Language is not obscene unless it is calculated to deprave the morals of the ordinary reader or leads to impure purposes.

10. It is not sufficient that the jury be satisfied that the book might seem obscene, indecent and impure to some persons. It is necessary that they be satisfied that it is obscene, indecent and impure to the minds of the ordinary reader into whose hands it would be likely to fall.

12. Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals.

13. Manifestly means that which is clear and requires no proof; that which is notorious.

14. The word "manifestly" as used in the indictment means clear and requiring no proof, incontrovertible, admitting no dispute.

15. The parts of the book referred to in the indictment do not "manifestly tend to corrupt the morals of youth" unless it is so apparent to the jury that it has that tendency as to require no explanation or proof.

16. If the jury believe that there might well be an honest difference of opinion among reasonable men as to whether or not the language of the parts of the book referred to in the indictment tends to corrupt the morals of the youth, they cannot find that such language "manifestly" has that tendency.

17. It is not enough that the jury find that the parts of the book referred to are indelicate or offensive to good taste, or

do not agree with the sentiments of a majority of the people upon the question of morals.

18. The parts of the book referred to in the indictment are not within the provisions of Revised Laws, chapter 212, section 20, merely because the jury may believe that they may be indelicate or offensive to the sentiments of a portion or even the whole of the community.

19. The jury cannot find that the parts of the book referred to in the indictment violate the provisions of Revised Laws, chapter 212, section 20, merely because they in language or ideas do not accord with the standard of morals of a majority or the whole of the people.

21. The jury have a right to consider the whole of the contents of the book in determining whether the parts specifically pointed out in the indictment come within the provisions of Revised Laws, chapter 212, section 20.

22. The jury have a right to consider the apparent intent and purpose of the story as a whole in determining whether the parts referred to come within the description of the indictment.

23. Whether the language referred to is such as is described in the indictment should be determined by consideration of the contents of the entire book.

25. The jury have a right to consider whether the production as a whole is put forward as legitimate literature, and whether the story offers a fairly typical study of life. If they so find, then, even though it may contain episodes which, although within the description of the indictment, taken by themselves are subsidiary to the larger purpose of the book, their verdict should be not guilty.

26. In determining whether the parts of the book referred to in the indictment come within the provisions of Revised Laws, chapter 212, section 20, and their probable influence and effect upon the mind and morals of those into whose hands the book may fall, the jury have a right to take into consideration other works of literature, religious, historical, or fiction widely read in the community, the language thereof, and the subjects discussed and the scenes and incidents described therein.

The judge refused all these requests for instructions, and, on the contrary, instructed the jury as follows:

“This defendant is charged with selling a certain printed book which contains, in the language of the indictment, certain obscene, indecent and impure language, manifestly tending to the corruption of the morals of youth. That is the charge



upon which he is tried. The issue is very simple. It is for you to determine whether in your opinion this language is obscene, impure or indecent, and manifestly tends to the corruption of youth. The allegation in the indictment that the language is so bad that it ought not to be set out, is not to be considered by you at all, because you have the language itself, and it is from that you must form your conclusions. The language of the pleader is not to be considered by you at all.

“Now, what does the statute mean? This statute was intended to protect public morals, particularly the morals of that part of the public who, by reason of tender age or any other reason, have minds open, susceptible to influences of this sort. You are to determine from the language used, and from such other parts as are necessary to explain that language, whether that is obscene and impure, and whether it manifestly tends to the corruption of youth.

“Now, language to be obscene—perhaps you know as well without my trying to explain it as you will afterward—but obscenity means offensive to morality, to chastity, indecent, nasty. Impure explains itself. Language is offensive, impure and indecent when it manifestly tends to incite in the minds of people susceptible to such influences obscene thoughts, impure thoughts, indecent thoughts. Is it language which has a tendency in your opinion to incite impure thoughts in the minds of people into whose hands it may come? Does it corrupt their morals? Does it excite their sexual passions? Now, the fact is not whether it tends to excite those feelings in your minds or not, but whether it has a tendency, a manifest tendency, to excite those feelings in the minds of youths into whose hands it might come. . . . Does it have that tendency? Does it have a manifest tendency? Are you able by taking the language and reading it to say that it manifestly tends to corrupt the morals of youth? If you cannot say that, it makes no difference what anybody else thinks about it, and you must return a verdict of not guilty. If you have reasonable doubt about it you must return a verdict of not guilty.

“It is entirely immaterial whether other books are as bad or worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; and it makes no difference whether you think there are other books in circulation worse than this or not; you are only trying this one. It makes no difference what the object in writing this book was, or what its whole tone is, if these pages that are complained

of, the language that is set out in the bill of particulars, is in your mind obscene, impure, indecent, and manifestly tending to the corruption of youth, then you must find a verdict of guilty. It is for you to say. You are to use your own experience and your judgment, acting under the responsibility of your oaths, and return such a verdict as you think you ought to. If you have any doubt, reasonable doubt, as to the effect of this language upon the minds of youth, or anybody else into whose hands it may come, then you must give the defendant the benefit of that doubt."

Verdict of guilty, and the sentence was stayed on a certificate of reasonable doubt. The defendant alleged exceptions

F. H. Chase and H. A. Guiler, for the defendant.

I. Isaacs, assistant district attorney, for the commonwealth.

<sup>351</sup> HAMMOND, J. This is an indictment under Revised Laws, chapter 212, section 20, charging the defendant with selling "a certain printed book" which contained "certain obscene, indecent and impure language, and manifestly tending to the corruption of the morals of youth." The case is before us upon the defendant's exceptions to the overruling of the motion to quash the indictment and to the refusal of the judge to give certain rulings requested at the trial. It is stated in the defendants' brief that the questions raised in the motion to quash, so far as now relied upon, are covered in his request for rulings. We therefore shall consider that motion no further, but shall pass at once to the questions of law which <sup>352</sup> arise out of the refusal to give the rulings requested at the trial.

There were twenty-six requests, none of which was given in the language asked for, although the law contained in some of them, so far as material to the case, was adopted by the judge in his charge. It seems best to treat the question in a topical way rather than to speak of the requests individually. This is substantially the way in which the questions are discussed upon the defendant's brief.

The defendant strongly contends that the judge should have defined at greater length than he did the terms "obscene," "indecent," "impure" and "manifestly." While it is true, perhaps, that by illustration or the use of synonyms the judge might have explained more fully the meaning of these terms, still it is to be remembered that they are not technical terms. They are common words and may be assumed to be understood

in their common meaning by an ordinary jury. So far as the judge undertook to define we see no error, and we cannot say as matter of law that his failure to define more at length was erroneous in law or prejudicial to the defendant.

It is strongly contended by the defendant that the language complained of is neither obscene nor indecent nor impure, and that it does not manifestly tend to the corruption of the morals of youth; and in support of his contention the following language is used in his brief:

"The language of those parts of the book specified in the indictment is neither impure nor indecent within the meaning of the statute. No word, sentence or paragraph can be pointed out which can be described by either of these terms. If the statute is to be construed to cover all language which conveys or suggests thoughts of sexual relations, or even illicit intercourse, it will certainly include a great part of what is considered good and decent literature. Indecent and impure language cannot be such as is widely read and openly discussed. The very terms themselves import that matters thus described cannot be openly read or decently discussed; yet it is submitted that the book in question can be widely and openly read and discussed without causing general corruption of morals or denoting general depravity.

353 "The language referred to does not manifestly tend to the corruption of youth. It is not sufficient, under this clause of the statute that the language be such as might tend to corrupt the thoughts of the young. It must obviously and incontrovertibly have that tendency. If there is any room for doubt upon that point the statute does not apply. The language of this book is not such that it can properly be said 'manifestly' to tend to corrupt or deprave."

But we think that the case was properly submitted to the jury. It could not be ruled as matter of law that the jury could not find the book within the prohibition of the statute. In prosecutions like this, considerations similar to those thus urged in this case are frequently, if not usually, presented in behalf of the defendant, and they are entitled to consideration. But after all there is a practical side. Doubtless an artist, when looking in his studio upon the model before him, in the figure of a perfectly formed young woman standing completely nude, may be so much under the influence of the aesthetic principles of his profession, and so intent in his wish to copy with perfect exactness the living picture, as not to have one obscene, indecent or impure thought or the slightest

sexual desire, but on the contrary he may be perfectly absorbed in the purest feeling of admiration and wonder at the artistic beauty of the creation before him. But it by no means follows that if he should open wide the doors of his studio and fill it with people from the crowded streets, they would be moved by the same lofty and pure feelings. And in passing upon the question whether such an exhibition was obscene or tended to corrupt the morals of youth, a jury would not be justified in considering only the feeling of the artist. They should consider that not every person is so much absorbed in the artistic features, and that the exhibition of such a model may rather arouse in many spectators passions of a merely animal nature.

And so a reader may be so interested in the development of the character of a woman—no matter how wanton—as a merely psychic study, as to read such a book as this without a single impure or unworthy thought. And it may be that the author of this book was in full sympathy with such a state of mind when she wrote it and sent it forth to the reading <sup>354</sup> public. It may be also that the literary style of the book is such that many a reader finds that to be the most attractive feature; and the thinly veiled allusions to an intense desire for sexual intercourse and to the arts of seduction leading to it and exciting it may be unheeded by him. But such an author cannot expect that the reading public as a whole will so read her production. Descriptions of seductive actions and of highly wrought sexual passion, even when sanctified by what the author has called “love,” are very likely to be seen in another light tending toward the obscene and impure. And an author who has disclosed so much of the details of the way to the adulterous bed as the author of this book has and who has kept the curtains raised in the way that she has kept them, can find no fault if the jury say that not the spiritual but the animal, not the pure but the impure, is what the general reader will find as the most conspicuous thought suggested to him as he reads.

The twenty-sixth request was properly refused; and the language of the charge sufficiently and accurately stated the law on the subject matter of this request. Although the twenty-first, twenty-second and twenty-third rulings were not given in their precise language, yet their subject was sufficiently treated in the charge. We see no error in the manner in which the court dealt with any of the requests.

Exceptions overruled.



*Prosecutions for the Offense of Publishing or Distributing Obscene Literature* are discussed in the cases of *State v. Zurhorst*, 75 Ohio St. 323, 116 Am. St. Rep. 724; *State v. McKee*, 73 Conn. 18, 84 Am. St. Rep. 124; *State v. Doty*, 103 Iowa, 699, 64 Am. St. Rep. 205; *People v. Ketchum*, 103 Mich. 443, 50 Am. St. Rep. 383.

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## BOWLER v. PACIFIC MILLS.

[200 Mass. 364, 86 N. E. 767.]

**PRIVATE WAYS, Rights of the Public Therein.**—A private way, however extensively used by the public, does not give them therein any rights beyond those of licensees. (p. 433.)

**PRIVATE WAYS, Duty of Land Owner to Persons Using.**—The measure of duty of a land owner to persons using a private way over his lands, no matter how long or extensive has been the use, is to refrain from doing them intentional injury and from wantonly or recklessly exposing them to danger. (p. 433.)

**PRIVATE WAYS, Liability of Property Owner to Person Injured in.**—If a land owner constructs a private way or street over his lands, keeping up notices showing that it is not public, and maintains a business on adjacent property of such a character that he cannot exclude the public from such way without interfering with his own use thereof, he does not thereby invite the public to use the way, and is not liable to a person who, being therein, is injured by a private freight train belonging to such land owner, if the latter has not done the former any intentional injury, nor wantonly nor recklessly exposed him to danger. (p. 433.)

Action to recover for personal injuries received by the plaintiff while on the private way of the defendant from a private freight train operated by him. This private way was commonly known as Canal street. The defendant owned a mill, chemical works, storehouses and dwellings along Canal street, and also constructed and maintained a private railway upon it. The trial judge ruled that the plaintiff was not entitled to recover, directed a verdict for the defendant, and reported the case for the determination of the supreme court.

W. J. Bradley and A. X. Dooley, for the plaintiff.

J. P. Sweeney, for the defendant.

<sup>365</sup> **KNOWLTON, C. J.** The question principally argued in this case is whether the plaintiff was traveling on Canal street by invitation of the defendant, or merely as a licensee. The street was laid out and constructed by the defendant, over its own land, for its own purposes, and it has been very largely used by its employés and others, in connection with the business carried on in its mills. The testimony was uncon-

tradicted that it would be impracticable to exclude the public from the street without interfering with the covenant use of it by the defendant and others in the defendant's business. Notices have been posted and maintained at different places where other streets open into it, indicating that it is a private way. Upon the authorities, it must be held that the very extensive use of the <sup>366</sup> street by the public has been only permissive, and that members of the public, while on the street, have only the rights of licensees: *Moffat v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Harebine v. Abbott*, 177 Mass. 59, 58 N. E. 284; *Weldon v. Prescott*, 187 Mass. 415, 105 Am. St. Rep. 413, 73 N. E. 536; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Redigan v. Boston etc. R. R.*, 155 Mass. 44, 34 Am. St. Rep. 520, 28 N. E. 1133, 14 L. R. A. 276; *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459. In *Sweeny v. Old Colony etc. R. R.*, 10 Allen, 368, 87 Am. Dec. 644, there was, in addition to the construction of the crossing, an invitation by the signal of the flagman. The grounds of distinction between *Murphy v. Boston etc. R. R.*, 133 Mass. 121, *Hanks v. Boston etc. R. R.*, 147 Mass. 495, 18 N. E. 218, and *Sweeny v. Old Colony etc. R. R.*, 10 Allen, 368, 87 Am. Dec. 644, and cases like the present, are pointed out in the three cases first above cited. It is that in these last cases there was an implied representation that the place was a public street which might be used with safety, and an inducement to use it as such, which inducement, like an express invitation, creates a duty to provide for the safety of the users. In the present case the public were informed by the notices along the street that this was a private way.

The measure of the defendant's duty to the plaintiff was to refrain from doing him an intentional injury and from wantonly or recklessly exposing him to danger. It might use the street and carry on its business and conduct its operations as it chose, so long as it did not transgress in this particular.

It is not contended that the injury to the plaintiff was inflicted intentionally or wantonly, and there is no evidence of a breach of duty on the part of the defendant.

Judgment on the verdict.

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*The Use of Private Ways* is discussed in the note to *Bakeman v. Talbot*, 88 Am. Dec. 279-282. And the rights and obligations of parties to private ways are considered in the note to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318-330. One using a private way for his own business on the property of another is a mere licensee, and cannot recover for injuries suffered from falling into a hole or excavation filled with hot water: *Weldon v. Prescott*, 187 Mass. 415, 105 Am. St. Rep. 413. But a woman passing over a private way to reach a house

thereon occupied by her dressmaker has the same right as an abutter on such way to recover for injuries due to an accumulation on the highway resulting from the manner in which another abutter has constructed and maintained his house so as to create a nuisance on such highway by the accumulation of ice thereon: *Cavanagh v. Block*, 192 Mass. 63, 116 Am. St. Rep. 220.

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## ELECTRIC WELDING COMPANY v. PRINCE.

[200 Mass. 386, 86 N. E. 947.]

**THE LAW of a Foreign Country is not Judicially Noticed**, but must be proved like any other fact in the case. (p. 436.)

**FOREIGN LAW, When a Question for the Jury.**—When the law of a foreign country is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally or by way of analogy, and where inferences may be drawn from them, the question is one of fact, to be determined by the jury and not by the judge. (p. 436.)

**FOREIGN LAW—Jury Trial—Error in Taking the Case from the Jury.**—If a case depends on a question of foreign law, respecting which an expert testifies, and other evidence is received from which an inference may be drawn that certain of the defendants were or were not liable, the court cannot take such question of law from the jury and direct a verdict for or against such defendants. (p. 437.)

**FOREIGN LAW—Former Decision Respecting.**—Where the question is what is the law of a foreign country upon a matter in dispute in the case, the former opinion of the supreme court on an appeal in the same case is not admissible in evidence for the purpose of proving such law. (p. 437.)

**APPEAL AND ERROR—Questions Which may be Submitted to the Supreme Court on the Report of a Case for Its Determination.** The trial court cannot, even with the consent of the parties, report a case to the supreme court for its decision as to the verdict which should have been rendered by the jury had the case been submitted to them. The full court as an appellate tribunal, on its law side, has jurisdiction only of questions of law. This rule remains applicable though the question is one of foreign law. (pp. 437, 438.)

**APPEAL AND ERROR—Questions of Discretion or Questions of Fact** of any other kind cannot be carried to the full court, either by report or by exceptions on appeal. (p. 438.)

E. F. McClennen, for the plaintiff.

C. A. Hight and G. S. Selfridge, for the defendants.

**388 KNOWLTON, C. J.** These seventeen cases, brought to enforce the same kind of a liability against different defendants, were tried together in the superior court and were reported by agreement of the parties for our determination. They have been before us previously, and the report of them may be found in 195 Mass. 242, 81 N. E. 306. At the first

trial verdicts for the defendants were ordered, and the cases were reported to this court on questions of law.

There were three counts in the declaration in each case. The verdict was treated as a separate verdict on each count, and the result of the hearing in this court was to leave the verdict to stand upon the first and third counts, and to set it aside on the second count in all the cases. The order in each rescript was "Case to stand for trial on the second count." This left the cases pending on the second count only. After the close of the evidence at the last trial an amendment to the declaration was allowed, which introduced a fourth count that rests upon the same general grounds as the second count, but seemingly was designed to meet the defendants' contention that there was a variance between the averments and the proof. The <sup>389</sup> principal facts appear in the report of the former decision of this court.

Besides the evidence taken at the first trial, which consisted of an auditor's report, answers to interrogatories, and decisions, there was additional evidence at the last trial, consisting of a deposition, testimony of some of the defendants, and particularly the oral testimony of a very eminent English barrister, Mr. Hamilton, who has written a text-book of authority known as "Hamilton's Company Law," and has often argued important cases of company law before the highest courts of England. He was called by the defendants and testified at great length, discussing and expounding most, if not all, of the numerous English decisions bearing upon the questions of law at issue in these cases. All of these decisions were put in evidence, many of them by the plaintiff, so that the court had before it a large body of English law contained in many decisions of the courts, together with the opinion of this expert in regard to these decisions and the act of parliament in question. The statute is "The companies' act," 25 & 26 Victoria, chapter 89, and the language on which the plaintiff sought particularly to hold the defendants is the last clause of section 323, as follows: "And every other person who has agreed to become a member of the company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The plaintiff's contention is that the defendants, by virtue of their several agreements with a promoter to underwrite certain amounts of the stock of the plaintiff corporation at its organization, and of the entry of their names as stockholders upon the registry of the corporation about sixteen months later, without their knowledge, followed by notice of the regis-



tration and their omission to take any action in regard to it, became bound to pay to the corporation the par value of the stock allotted to them. At the close of the evidence the presiding judge ordered verdicts for the plaintiff against the defendants Prince and Pope, each of whom had made a payment after the registration, and ordered verdicts for all the other defendants, and reported the cases.

The first questions that arise under the report are whether these orders were right as a matter of law. The principal contention between the parties was in regard to the law of England <sup>390</sup> by which their rights are governed. The law of a foreign country is not judicially recognized by our courts, but is a fact to be proved like any other fact in a case: *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 369; *Hazelton v. Valentine*, 113 Mass. 472. Said Mr. Justice Endicott in *Ames v. McCamber*, 124 Mass. 85: "When the law of another state is in dispute, it is to be determined as a question of fact by the court or jury trying the cause. . . . If the evidence was conflicting, as the plaintiff contends, we have no authority to revise the finding, although the judge has reported the evidence." The proof of the law of a foreign country may be by the introduction in evidence of its statutes and judicial decisions, or by the testimony of experts learned in the law, or by both. If the law is found in a single statute or in a single decision, the construction of it, like that of any other writing, is a question of law for the court. As was said in *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305, 49 N. E. 746: "The law of another state is a fact to be proved, like any other fact, by evidence. Where the evidence is a single statute or a decision of a court, the language of which is not in dispute, the interpretation of it presents a question of law for the court; but where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences may be drawn from them, the question to be determined is one of fact, and not of law." Questions of the latter kind must be decided by the jury and not by the judge.

In the present case, if the jury followed the opinion of the expert, they would decide that there was no liability on the part of those defendants who made no payments after the registration. We are of opinion that there was evidence in his testimony, taken in connection with inferences that might have been drawn from other evidence, which would have warranted them in reaching the same result as to the defendants

Prince and Pope, against whom verdicts were ordered. The counsel on both sides have been able to make strong arguments in favor of their respective contentions. A tribunal of fact well might find upon the whole evidence that there was no ground for charging the defendants under the law of England. On the other hand, all the decisions were in evidence on which this <sup>391</sup> court, in the former opinion, held that there was evidence which should have been submitted to the jury on which the defendants might have been found liable. These decisions would warrant a tribunal of fact in returning verdicts for the plaintiff. In its facts this case differs materially from any decided by the English courts, and such a tribunal might think that the expert witness was wrong in his application of the principles of law to the evidence. Then too, in connection with the determination of what the law of England is, comes the question what inferences shall be drawn from the findings of the auditor and the other evidence, considered in connection with the English statute as interpreted by the English courts. We are of opinion that all or nearly all the important questions in dispute were questions of fact, upon which the judge could not properly rule as matter of law, and that all the verdicts must be set aside.

The plaintiff's offer of the former opinion of this court as evidence was rightly rejected. The opinion was not evidence of the law of England: *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184, 19 L. R. A., N. S., 762. Our decision as to that part of the cases which was left open was only that the cases should have been submitted to the jury on the second count. In dealing with the law of England as a fact, the court held that the decisions put in evidence at the trial would warrant the jury in finding for the plaintiff.

In making his report the judge, with the consent of the parties, has undertaken to present to this court the question what verdicts the jury should have rendered, if the cases had been submitted to them. The power of a judge to report a case after a verdict on the law side of the court is found in Revised Laws, chapter 173, section 105, which is in part as follows: "A justice of the supreme judicial court or the superior court, after verdict, or after a finding of facts by the court, . . . may report the case for determination by the full court." Under this language the facts must first be found either by a jury or by the judge, and the case may then be reported. This means the case upon the facts found, or, in other words, the questions of law. The full court as an appellate tribunal, on its law side, has jurisdiction only of

questions of law. In the Revised Laws, chapter 156, section 7, the power of justices of the supreme judicial court to reserve questions for <sup>392</sup> the full court includes only questions of law. Under section 6 of the same chapter, the jurisdiction that is given in the classes of cases therein mentioned is only of questions of law. Questions of discretion or questions of fact of any other kind cannot be carried to the full court, either by report or by exception or appeal. Said Chief Justice Gray in *Churchill v. Palmer*, 115 Mass. 310: "The authority given by statute to the superior court to make reports to this court extends only to questions of law. A report, like a bill of exceptions, should be so framed by the presiding judge, or by the counsel with his approval, as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions to this court. The decision of the jury or the court below upon questions of fact or the weight of evidence is not open to revision here": See, also, *Sheffield v. Otis*, 107 Mass. 282. In equity the rule is different. Questions of discretion and other questions of fact are open upon an appeal or a reservation.

Under this part of the report we have no authority to take upon ourselves the duties of a tribunal of fact, and to determine what verdicts should have been rendered by the jury. No judgment could legally be founded upon such action by this court. Not even an agreement of the parties can give us jurisdiction so to act in a judicial capacity. Action of this kind at the request of the parties would be merely that of a number of arbitrators proceeding without statutory authority. Convenient and helpful as it might be to the litigants to have these cases finally decided without further litigation, we must decline to act extrajudicially in a matter that comes before us sitting as a court. In each of the cases the entry must be, verdicts set aside and new trial granted.

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*The Law of Another State is a Fact to be Proved*, like any other fact, by evidence. If the evidence consists of a single statute or a decision the language of which is not in dispute, the interpretation of it presents a question of law for the court; but if the law must be determined by construing numerous decisions, more or less conflicting, or bearing upon the subject collaterally or by way of analogy, from which inferences must be drawn, the question to be determined is one of fact and not of law: *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305; *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118. See, also, *Crandall v. Great Northern Ry. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458; *Myers v. Chicago etc. Ry. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779.

**WYETH v. BOARD OF HEALTH OF THE CITY OF CAMBRIDGE.**

[200 Mass. 474, 86 N. E. 925.]

**CONSTITUTIONAL LAW—Right to Pursue any Vocation.**—The right to enjoy liberty and the pursuit of happiness is secured to every one by the constitution of Massachusetts, and this includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the constitution of the United States. (p. 442.)

**CONSTITUTIONAL LAW.—The Refusal to Permit One to Engage in the Business of an Undertaker** is violative of the right to enjoy life, liberty and the pursuit of happiness, unless there is good reason for the refusal. (p. 442.)

**CONSTITUTIONAL LAW.—The Refusal to Permit One to Bury the Body of a Relative or friend**, except under unreasonable limitations, is interference with a private right not allowable under the constitution of Massachusetts nor that of the United States. (p. 442.)

**CONSTITUTIONAL LAW—Police Power, Interference Permitted in the Exercise of.**—In the exercise of the police power, such kinds of business as require regulation in the interests of the public health, the public safety or morals, and perhaps in a strict sense, in the interest of the public welfare, may be regulated by the state, but no other interference of the public to the detriment of the individual is permissible. (p. 442.)

**CONSTITUTIONAL LAW.—The Burial of the Dead has Such Relation to the Public Health**, morals and safety that it may be regulated by law; and of the power of the legislature to exercise complete control of burials of the dead so far as is necessary for the protection of the public health and the protection of the public safety there is no question. (p. 443.)

**CONSTITUTIONAL LAW—Police Power—Requirement of Knowledge of Embalming on the Part of Undertakers.**—Embalming is not generally an essential part of the duties of an undertaker and has no relation to the public health, and if there is some slight increase of knowledge from this source to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. (pp. 443, 444.)

**CONSTITUTIONAL LAW—Police Power—Board of Health Requirement that Undertakers be Licensed Embalmers.**—There is no such connection between the requiring of undertakers to be licensed embalmers and the protection of the public health as to justify the refusal of a license by a board of health to an undertaker who is not such an embalmer. (p. 444.)

**CONSTITUTIONAL LAW—Delegation of Legislative Power.**—The legislature cannot delegate the power to make laws, and no delegation of authority for local or special purposes or in matters of administration can sustain the delegation of authority to change a general law for all the people of the state, with no local or special reason for seeking the aid of an administrative body. (p. 445.)

Application for a writ of mandamus to compel the board of health of Cambridge to issue to petitioner a license as undertaker. The cause, having been heard before Chief Justice



Knowlton, was by him reported for the consideration of the full court in a report as follows:

"After a hearing, and by agreement of parties, the questions of law arising upon the petition and answer and agreed statement of facts in this case are reported for the consideration of the full court. If the refusal of the respondents to grant the petitioner a license as an undertaker solely for the reason that he is not licensed as an embalmer is unwarranted, improper, and illegal, a writ of mandamus is to issue; if it is legal and properly authorized under the law and constitution the petition is to be dismissed."

A. P. Stone, for the petitioner.

G. A. A. Pevey, for the respondents.

**476** KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the respondents, the board of health of the city of Cambridge, to grant the petitioner a license as an undertaker. Among the facts agreed are the following:

"Second. That the petitioner, Benjamin F. Wyeth, is an inhabitant of Cambridge, is an undertaker by trade, and has been for forty-six years engaged in the trade of undertaker in various capacities, and has carried on for some years past the business of undertaking under the name of Benjamin F. Wyeth; that said undertaking business as conducted by the petitioner is a profitable one, and it is his support and the support of his family; that the petitioner is the sexton of the First Church in Cambridge, and the members in attendance at that church and other residents of Cambridge and the vicinity have been accustomed from time to time to engage him to perform such services as may be required in connection with the burial of the dead.

"Third. That the petitioner, Benjamin F. Wyeth, is a competent undertaker and is well versed in the duties and practices of that trade or business, except in so far as he is ignorant of the processes of embalming.

"Fourth. That the petitioner, Benjamin F. Wyeth, does not hold himself out to the public as one skilled in the methods of embalming dead bodies, and has not and never has had, and has not applied for, a certificate or license from the board of registration in embalming to enable him to engage in the business of embalming dead bodies.

"Fifth. That a large part of the petitioner's trade or business does not require a knowledge of embalming, and in many instances the petitioner is not required nor directed to embalm the bodies of the dead intrusted to his care.

"Sixth. That in all cases in which the said Benjamin F. Wyeth has had occasion to have the bodies of the dead embalmed, he has, since January 1, 1906, procured the services of an embalmer duly registered by the board of registration in <sup>477</sup> embalming, or he has intrusted the work to some servant or agent in his employ who was duly registered as aforesaid.

"Seventh. That the respondents to this petition or their predecessors in office had, up to and including the first day of May, 1907, always given to the said Benjamin F. Wyeth a license to act as undertaker upon his application therefor."

From other facts in the case and from the respondent's answer, it appears that the only reason for refusing to grant the petitioner a license as an undertaker is that he is not licensed as an embalmer. He cannot obtain a license as an embalmer without making application under rule 2, section 1, adopted by the board of registration in embalming and complying with the requirements of this section, which is as follows:

"The applicant must have taken a regular course at a reputable school of embalming whose course of instruction is satisfactory to this board, and must have had not less than a year and a half of experience in active work with a practicing embalmer."

The question of law presented by the report of the single justice is whether the respondent's refusal to grant a license, solely for this reason is legal.

The Statutes of 1905, chapter 473, is "An act to establish a board of registration in embalming." Under section 6 the board is to adopt "rules and regulations not inconsistent with the provisions of this act and the statutes of the commonwealth governing the care and disposition of human dead bodies and the business of embalming." Under the authority of this section the board has adopted rules and regulations whereby they assume to put the whole business of the management of funerals and the burial of the dead in the hands of persons holding a license as embalmers from this board. The first part of rule 9, section 2, is as follows: "No permits for removal, burial or disinterment shall be issued by boards of health, city or town clerks or selectment of a town, or any other persons authorized to issue burial permits, to any person or persons who have not been registered and received a certificate from the state board of registration in embalming." Under this rule no one can bury lawfully the dead body of a former member of his family unless the permit for burial is obtained by a licensee of this board. No one can perform the

478 ordinary duties of an undertaker without first having procured a license as an embalmer. No one can obtain a permit for the disinterment of a dead body for any cause, at any time, however long after the burial, unless he is a licensed embalmer. Surely the fitness of a person to receive a permit for the disinterment of a dead body cannot depend upon his knowledge or ignorance of the process of embalming. The question is presented whether there is any warrant under the constitution and the laws for this interference with the liberties of the people.

The respondents in their answer rest their defense largely upon the action of the board of registration in embalming, and adopt as their own the views upon which this action presumably was founded.

The right to enjoy life, liberty and the pursuit of happiness is secured to everyone under the constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the constitution of the United States, which does not permit a state to deprive any person of life, liberty or property without due process of law. The nature of this right has been stated and illustrated in many cases: *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A., N. S., 968; *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126, 14 L. R. A. 325; *Winthrop v. New England Chocolate Co.*, 180 Mass. 464, 62 N. E. 969; *Austin v. Murray*, 16 Pick. 121; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455.

There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal, and the refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, is also an interference with a private right that is not allowable under the constitution of the commonwealth or the constitution of the United States.

In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety or the public morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated

by the state, and no other interference of the public to the detriment of an individual is permissible.

<sup>479</sup> The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of it its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the legislature of this state has made elaborate provisions and strict regulations covering these subjects: Revised Laws, c. 78, secs. 37 to 44 inclusive, c. 29, secs. 6-8, 10-12, 15. Of its power to exercise complete control of burials of the dead, so far as is necessary for the protection of the public health and the promotion of the public safety, there is no question.

No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. When such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health.

The only particular in which the respondents have suggested, either in their answer or their argument, that performance of an undertaker's duties by a licensed embalmer would tend to promote the public health, is that an embalmer would be more likely to discover that a deceased person died of a contagious disease than an undertaker who is not an embalmer. To use the language of the agreed statement of facts, "In the opinion of the respondent board of health these rules for preserving and embalming human dead bodies have a tendency to and do increase, on the part of the undertaker, the knowledge of the nature of the disease from which the party deceased may have suffered, and which may have caused death." There is certainly a grave reason to doubt the correctness of this opinion. No evidence is furnished that, through his knowledge of the business of embalming, one can form an opinion which an ordinary undertaker of experience could not form of the cause of death of a person whose body is seen by him. But if there may be some slight increase of knowledge, from this source, to one preparing a human <sup>480</sup> body for burial, its relation to the public health, if any, is too remote to be made



a foundation for legislation or regulation. As was said in the opinion in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, "the mere assertion that the subject relates though but in a remote degree to the public health does not render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." From such a possibility no such benefit could come as to justify a requirement that all human bodies should be embalmed for the purpose of procuring such information in regard to the cause of death as can be acquired through the process of embalming, or a requirement that an embalmer should always be employed as undertaker for the chance of a valuable discovery from his observation, without his using the process of embalming. The law recognizes direct ways of ascertaining whether death was from a contagious disease, without employing an embalmer for that purpose: Revised Laws, c. 29, secs. 1-6, 10-12. These ways seem a thousand-fold more important and reliable than any possible knowledge that an embalmer might have from his training in that business, beyond the knowledge of an undertaker of experience who was not an embalmer.

We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation, within the exercise of the police power by the state. If such a regulation had been made by an act of the legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking <sup>481</sup> unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the supreme court of that state: *People v. Ringe*, 125 App. Div. (N. Y.) 592.

From another point of view the rules and regulations of the board of registration in embalming, relied on by the respondents as an important reason for their decision, are invalid. In *Brodbyne v. Revere*, 182 Mass. 598, 600, is this language: "It is well established in this commonwealth and elsewhere, that the legislature cannot delegate the power to make laws, conferred upon it by a constitution like that of Massachusetts." Then follow numerous citations from different states, with the words: "This doctrine is held by the courts almost universally." None of the cases referred to later in the opinion, in which there was a delegation of legislative authority for a local or special purpose or in matters of administration, and none of the cases which have been decided since, and which are referred to in *Commonwealth v. Kingsbury*, 199 Mass. 542, go far enough to legalize a delegation of authority to change a general law for all the people of the commonwealth, with no local or special reason for seeking the aid of an administrative board, as the rule about the issuing of permits and some of the other rules of this board purport to change the general laws on this subject for all the people in every city and town in the commonwealth. If the statute were construed to authorize the making of such rules, it would be held unconstitutional as assuming to delegate general legislative authority.

We decide that the refusal of the respondents to grant the petitioner a license as an undertaker, solely for the reason that he is not licensed as an embalmer, is unwarranted, improper and illegal. According to the report, upon this determination of the question of law, a writ of mandamus is to issue. The case being on the law side of the court, only questions of law could be reported to the full court, and by the terms of the report the question of discretion whether to grant the writ must be taken to have been decided in favor of the petitioner. The report is equivalent to a finding upon the answer and the facts agreed that the only reason for the respondents' refusal was that the petitioner was not licensed as an embalmer, and that, except <sup>482</sup> for this, the respondents in the exercise of their judgment and discretion would have granted the license. Upon these facts nothing remains but to enter the order.

Peremptory writ of mandamus to issue.

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*A Statute Requiring Horseshoers to Pass an Examination and pay a license fee, and providing a penalty for following their trade without a license, is unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law: In re*

Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952. But the legislature is competent to require a barber to obtain a license as a condition to his right to follow his calling: State v. Zeno, 79 Minn. 80, 79 Am. St. Rep. 422; State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893; or a plumber: State v. Gardner, 58 Ohio St. 599, 65 Am. St. Rep. 785; or an engineer: St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560, 61 Am. St. Rep. 474; or a guide: State v. Snowman, 94 Me. 99, 80 Am. St. Rep. 380.

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## MUTUAL LOAN COMPANY v. MARTELL.

[200 Mass. 482, 86 N. E. 918.]

**CONSTITUTIONAL LAW—Assignment of Wages to be Earned, Regulation of.**—The legislature is justified, in the exercise of the police power, in enacting regulations of the right to make assignment of wages to be earned, and may require that such assignment be recorded. (pp. 448, 449.)

**CONSTITUTIONAL LAW—Assignment of Wages, Statute Invalidating Unless Accepted by the Employer.**—A statute providing that no assignment of wages to be earned shall be valid, as against any employer, unless accepted in writing by him, is constitutional. (pp. 449, 450.)

**CONSTITUTIONAL LAW—Discrimination Between Assignment to Secure Loans and Mortgages and Assignments to Secure Other Obligations.**—A statute invalidating assignments of wages to be earned to secure loans of less than two hundred dollars unless accepted by the employer, is unconstitutional because of the distinction made between such loans and assignments to secure liabilities arising from credit extended for other purposes. (p. 450.)

**CONSTITUTIONAL LAW—Assignment of Wages to be Earned, Statute Making Consent of Wife Necessary.**—A statute providing that no assignment of or order for wages to be earned in the future to secure a loan of less than two hundred dollars shall be valid if made by a married man unless the written consent of his wife is attached thereto, is not unconstitutional. (p. 450.)

**CONSTITUTIONAL LAW—Discrimination in Favor of Certain Banking Institutions.**—A statute invalidating assignments of wages to be earned to secure loans of less than two hundred dollars unless accepted in writing by the employer, or consented to in writing by the wife of the assignor if he is married, is not unconstitutional, because it exempts from its operation national banks or banking institutions under the supervision of the bank commissioner and loan companies established by special charters and placed under such supervision. The legislature may be supposed to have known that the business done by those corporations would not need regulation in the interest of employers or employés. (p. 451.)

**CONSTITUTIONAL LAW—Statutes Invalid in Part.**—If the last part of a statute is so far separable from the preceding parts that the legislature probably would have enacted the one part, though it had supposed that it could not constitutionally enact the other, each part may stand by itself, and one be held valid though the other is not. (p. 451.)

P. W. Carver and A. G. Carver, for the plaintiff.

O. C. Scales, for the defendant.

G. A. Ham, for the Millmen's Association of Greater Boston, filed a brief by leave of court.

**483** KNOWLTON, C. J. This is an action of contract to recover the amount of two promissory notes for twenty-seven dollars and fifty cents each, which were given by two different persons, with an assignment by each of wages to be earned in the future in the defendant's service. The declaration contains two counts, one for the amount of each note, and in each count it is averred that the assignment was recorded in the clerk's office of the city of Boston and a copy of it served on the defendant, and that the assignor earned wages to the amount of the note in the service of the defendant, which the defendant is bound, under the assignment, to pay to the plaintiff. The case comes before us upon an agreed statement of facts, under which a judgment for the defendant was ordered in the superior court and the plaintiff appealed.

The defense is founded upon the Statutes of 1908, chapter 605, of which sections 7 and 8 are as follows:

"Sec. 7. No assignment of or order for wages to be earned in the future, to secure a loan of less than two hundred dollars, shall be valid against an employer of the person making said assignment or order, until said assignment or order is accepted in writing by the employer, and said assignment or order and the acceptance of the same have been filed and recorded with the clerk of the city or town where the party making said assignment or order resides, if a resident of the commonwealth, or in which he is employed, if not a resident of the commonwealth.

"Sec. 8. No such assignment of or order for wages to be earned in the future shall be valid when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto."

Section 6 has this provision: "National banks, all banking institutions which are under the supervision of the bank commissioner, and loan companies and loan associations established by special charters and placed under state supervision shall be exempt from the provisions of this act."

Neither of these assignments was accepted in writing by the **484** employer as required by section 7, and the assignor in the second assignment was a married man whose wife did



not consent in writing to the making of the assignment. The question presented for our consideration is whether sections 7 and 8 are constitutional.

These sections interfere with the rights of the assignor and assignee to contract with each other, which right of contract, in general, is secured to all our citizens under the fourteenth amendment to the constitution of the United States, as well as under the constitution of Massachusetts. Such an interference by law with one's right to manage his property and to make contracts in relation to it and to pursue any proper vocation is in violation of such constitutional right, unless it can be justified upon an independent ground. The defendant contends that there is such justification, in the present case, in the enactment of this statute by the legislature in the exercise of the police power.

The state may legislate for the public health, the public safety, the public morals and the public welfare, in the exercise of this power. But, in balancing this right of the state against the constitutional right of the individual to personal liberty, it is often difficult to draw the line between permissible and impermissible legislation. The subject has been considered in many cases: *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A., N. S., 968; *Commonwealth v. Pear*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; *Commonwealth v. Interstate Consolidated Street Ry.*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A., N. S., 973; *Welsh v. Swasey*, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745; *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126, 14 L. R. A. 325; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, ante, p. 439, 86 N. E. 925; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 Sup. Ct. Rep. 684, 48 L. ed. 1142; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937.

In the present case we have to inquire how far the welfare of the community requires an interference by way of regulation with the right of workmen to dispose of their wages to be earned in the future. For many years statutes have been enacted in this commonwealth, and in other states, with a view to secure such wages against the bankruptcy of employers and other hazards. To a certain amount they are made a preferred claim <sup>485</sup> in statutes

relating to insolvency and bankruptcy: Rev. Laws, c. 163, sec. 118; U. S. Stats. 1898, c. 541, sec. 64. To a certain amount they are exempt from attachment by trustee process: Rev. Laws, c. 189, sec. 27. They are required by law to be paid weekly, and the statute requiring it has been held constitutional: Rev. Laws, c. 106, sec. 62; Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344. It has been deemed important that they be received by the employé regularly and promptly after they are earned.

In *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521, 65 L. R. A. 599, the court, in deciding that a statute which forbids altogether the assignment of future earnings of an employé was constitutional, used this language: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service—anticipation of pecuniary reward in the near future—their effect would be alike injurious to the laborer and his employer." Without deciding, as the supreme court of Indiana did, that these considerations would furnish the legislature constitutional authority for forbidding all assignments of future wages, we think they justify a strict regulation of the right to make such contracts. The requirement that they be recorded is certainly reasonable. It tends to lessen the opportunity of wage earners to be dishonest in procuring credit on the faith of their expected possession of earnings, as they might be if unrecorded assignments were outstanding. The requirement that the order or assignment be accepted in writing by the employer tends to diminish the risk of his refusal to pay, involving litigation

the result of which <sup>486</sup> might be loss of employment by the wage earner and injury to the business of the employer. Then, too, this requirement might operate as a check upon the rapacity of unscrupulous money lenders who are inclined to take advantage of the needs of employés. If the legislature saw an advantage to the community from this provision, we cannot say that they were acting beyond their constitutional authority in enacting the law.

Nor can we say that they might not find grounds for a distinction between assignments to secure loans of money and assignments as security for necessities or other property furnished or to be furnished. The occasions for making assignments as security for necessities may be far more pressing than for making them to obtain money, and the risk of wasting that which is obtained may be much less in one case than in the other. The statute is not unconstitutional because it deals only with security for loans and does not include security for other debts.

Section 8 presents a similar but more difficult question. A married man is bound by law to support his wife. If he is a wage earner, although she has no legal title to his wages, she has an interest in the right use of them. If there are such risks of his making an improper disposition of them by assigning them to secure the payment of money that he borrows for unnecessary purposes as to justify the legislature in limiting and regulating his exercise of this right, might they not regulate it by requiring the consent of his wife as a prerequisite to the validity of his assignment? A strong argument can be made in favor of the plaintiff's contention on this point. But on the whole we are of opinion that the legislature might look chiefly to the ordinary relations between husband and wife under the law, and adopt this form of regulation as salutary in its application to most members of the class with which they were dealing. The principles that are applicable to section 7 require us to hold section 8 to be constitutional.

It is contended that these sections are unconstitutional because of the provision of section 6 that renders the act inapplicable to certain banks, banking institutions and loan companies. The argument is that this makes a discrimination without reason, and thus deprives others of the "equal protection of the laws," secured by the <sup>487</sup> fourteenth amendment to the constitution of the United States. This would be so if no reason could be discovered by the legislature for making the discrimination. But seemingly the

legislature might decide that the dangers which the statute was intended to prevent would not exist in any considerable degree from the business of national banks, or other banking institutions under the supervision of the bank commissioner, or from that conducted by a loan company established by a special charter and placed under the supervision of this commissioner. The legislature may be supposed to have known the kind of business done and likely to be done by these corporations, and they may have believed rightly that the business done by them would not need regulation in the interest of employes or employers. This was held by the supreme court of Delaware in an elaborate opinion in a similar case: *State v. Wickenhoefer*, 64 Atl. 273.

A large number of states have enacted statutes regulating to a greater or less degree the assignment of future earnings as security for debts. Several decisions have been made upholding the constitutionality of laws securing to employes payment of their wages in money: *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1, 46 L. ed. 55; *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253, 6 L. R. A. 576; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385. The supreme court of Illinois has made a contrary decision: *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152.

In this commonwealth the Statutes of 1905, chapter 308, limiting the right to make assignments of future earnings to a period not exceeding two years, has been held constitutional: *McCallum v. Simplex Electrical Co.*, 197 Mass. 388, 83 N. E. 1108. So, also, has the statute regulating the business of pawnbrokers: *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461. We are of opinion that these two sections of the statute are constitutional.

The first part of the statute we have no occasion now to consider. The last part of the act is so far separable from the other that the legislature probably would have enacted it by itself, if they had supposed that they could not constitutionally enact the other. Without intimating an opinion in regard to the other, we are of opinion that this can stand by itself: *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Commonwealth v. Petranich*, 183 <sup>488</sup> Mass. 217, 66 N. E. 807; *Commonwealth v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790; *Commonwealth v. Hana*, 195 Mass. 262, 122 Am. St. Rep. 251, 81 N. E. 149, 11 L. R. A., N. S., 799.

Judgment affirmed.



*An Assignment of Future Earnings Which may Accrue* under an existing employment is a valid contract, and creates rights which may be enforced both at law and in equity: *Citizens' Loan Assn. v. Boston etc. R. R.*, 196 Mass. 528, 124 Am. St. Rep. 584. But a statute forbidding the assignment of future wages is constitutional: *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334.

*The Constitutionality of Statutes* regulating the time and method of paying wages is the subject of a note to *Shortall v. Puget Sound etc. Co.*, 122 Am. St. Rep. 903.

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### HASKELL v. MANSON.

[200 Mass. 599, 86 N. E. 937.]

**LIMITATION OF ACTIONS.**—An Executor or Administrator is not Bound to Plead the statute of limitations. (p. 454.)

**LIMITATIONS OF ACTIONS.**—Partial Payment by One of Two Joint Administrators or Executors ordinarily has the same effect as payment by all, but it is not settled that such payment has this effect if made against the objection of the coexecutor, if the indebtedness was entered into in the lifetime of the decedent. (pp. 454, 455.)

**LIMITATION OF ACTIONS.**—An Administrator cannot Revive a Debt Due to Himself if it was barred at the time of the death by the statute of limitations. (p. 456.)

Suit by the administratrix of Waldo C. Haskell against the executors of the estate of Jacob M. Haskell, of which such executrix was one, to enforce certain promissory notes. The trial court found against the complainant and made a memorandum of his decision as follows:

“It is admitted that the paper (exhibit 9) signed by two executors, one of whom is also the plaintiff in this suit and the only person interested in the prosecution of it, was prepared by the plaintiff's counsel in order to anticipate and avoid the defense of the statute of limitations, which it was expected the third executor would insist upon. If (as is conceded) one of several executors may insist upon the statutory bar even if the other executors are willing to waive it, I think it must follow that it is not open to the other executors to strike down his defense by the device which was resorted to in this case. See, also, Public Statutes, chapter 197, section 17, the language of which has been changed by the last revision: Rev. Laws, c. 202, sec. 14. I think, too, that the testimony tending to show that the son, ten years after the rights of action had accrued, asked the father to pay certain of his bills ‘on account,’ and that the father paid them, there being nothing in the testimony to

indicate on what account the bills were paid, is not enough to avoid the bar: *Pond v. Williams*, 1 Gray, 630; *Ramsey v. Warner*, 97 Mass. 8, 13. Bill to be dismissed."

G. C. Abbott, for the plaintiff.

J. W. Farley and A. G. Milton, for the defendants.

<sup>600</sup> KNOWLTON, C. J. This is a bill in equity to recover the <sup>601</sup> amount of five non-negotiable promissory notes, called in the bill evidences of indebtedness, which were signed by Jacob M. Haskell and made payable to his son Waldo C. Haskell, with interest at seven per cent. The son died on February 1, 1906, and the father died on the fourth day of November in the same year. The father left a will in which his partner, Albert C. Monson, his wife Adeline L. Haskell, and his daughter Adeline M. Haskell, were named as executors. The first of these notes, which was more than thirteen times as much in amount as all the others together, was barred by the statute of limitations nearly seven years before the son's death, and the last was so barred nearly four years before his death. The will of Jacob M. Haskell was made after the death of his son Waldo, and by its terms his widow was to have the income of all his property for her life, and after her death the principal is to be divided equally between his son Edward M. and his daughter Adeline M. After the probate of the will and the appointment of the three executors named in it, the widow was appointed administrator of the estate of her son Waldo, and sought to collect these notes. They amounted to fifteen thousand five hundred and seventy-five dollars as principal, with interest on nearly the whole amount for about fifteen years, at the time of the commencement of this suit. Her son Waldo left no debts, and one-half of this amount, if collected, would go to her absolutely as one of his heirs at law, and the other half would go back to her husband's estate. Her co-executor Manson was unwilling to pay these notes, because, among other reasons, he was advised that the statute of limitations had run against them and that he could not legally pay them. Thereupon she and her daughter joined in a written statement and admission that they, as executors of her husband's will, had made a payment of one dollar, upon each of the notes, to Mr. Abbott, as attorney for Adeline L. Haskell, "as she is the administratrix of the estate of Waldo C. Haskell." The paper closed with a copy of the notes, and contained this recital: "The object of these payments is to avoid the general statute of limitations,

which, in the absence of some evidence of payment, might be pleaded to some or all of said evidences of indebtedness. As such executors we do hereby admit the existence of the debts indicated by said evidences of indebtedness."

602 The principal question before us is whether this payment removed the bar of the statute of limitations, so that the other executor cannot rely upon it under his answer. The two executors who made the payments were defaulted, and as against them the bill was taken for confessed.

It is the rule in this commonwealth, in England, and in most of the American states, that an executor or administrator is not bound to plead the general statute of limitations: *Scott v. Hancock*, 13 Mass. 162; *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Mass. 429; *Slattery v. Doyle*, 180 Mass. 27, 61 N. E. 264; *Field v. White*, 29 Ch. D. 358; *Midgley v. Midgley* [1893], 3 Ch. 282; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; *Johnson v. Beardslee*, 15 Johns. 3; *Hord's Admr. v. Lee*, 4 T. B. Mon. 36. So, too, it is a general doctrine that payment by one of two or more joint executors will have the same effect as payment by all. Such is the usual effect of an authorized official act of an executor, so far as it relates to the property of the estate. But the rule that an executor or administrator is not bound to plead the statute of limitations is an exception to the general rule that it is his duty to protect the property and interests of the estate under his charge. It is universally agreed that it ought not to be extended. An executor or administrator is liable for a devastavit, if the estate suffers through his failure to plead the statute of frauds: *Field v. White*, 29 Ch. Div. 358. An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt.

The above-mentioned exception relative to the statute of limitations is founded upon the theory that an acknowledgment and new promise does not create a new liability, but continues an old one that otherwise might not be enforceable. There is some ground for holding that, where a debt has been barred by the statute before the death of the debtor, an administrator or executor should not be permitted to revive it, by a partial payment, or a new promise or acknowledgment of any kind. Although the distinction has not been established in this commonwealth between the effect of a payment and acknowledgment by an executor or administrator of a debt which was not barred at the time of his appointment, and the payment of a debt that

was barred in the lifetime of the debtor; and although <sup>603</sup> theoretically the nature of such a new undertaking by the original debtor may have been treated as the same in reference to a debt already barred as in reference to a debt against which the time of limitation has not expired, it is a significant fact that, in every case that we have found in Massachusetts in which a payment or acknowledgment by an executor or administrator was held to have extended the time, the debt was not barred in the lifetime of the debtor. The executor or administrator was simply continuing in force a debt which was collectible from him after his appointment. In *Pole v. Simmons*, 49 Md. 14, a promise by an executor, after the statute had fully run in the lifetime of the debtor, was treated as a new promise, made without authority, and insufficient to create a liability: See, also, *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Cayuga County Bank v. Bennett*, 5 Hill, 236. In many of the states of this country, either under statutes or the decisions of the courts, a debt which was barred in the lifetime of the debtor cannot be revived by his representative after his death: *McLaren v. McMartin*, 36 N. Y. 88; *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 39; *Langworthy v. Baker*, 23 Ill. 484; *Patterson v. Cobb*, 4 Fla. 481; *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Smith v. Pattie*, 81 Va. 654; *Bambrick v. Bambrick*, 157 Mo. 423, 58 S. W. 8; *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525; *Jones v. Powning*, 25 Nev. 399, 60 Pac. 833; *In re Mouillerat's Estate*, 14 Mont. 245, 36 Pac. 185; *Rector v. Conway*, 20 Ark. 79; *Moore v. Hardison*, 10 Tex. 467.

It has never been decided in Massachusetts that a payment made by one of two executors against the objection of his coexecutor, upon a note which was barred by the statute in the lifetime of the testator, would revive the note, nor has it been so decided in England. The lords justices of the court of appeal, in a late case, preferred to leave this subject open for future consideration: *Midgley v. Midgley* [1893], 3 Ch. 282.

But if we assume, without deciding, that these doubtful questions might be answered in favor of the plaintiff, she has another difficulty in her way. The payment was the joint act of the mother and daughter, and was made to the mother as the administratrix of her son's estate, entirely for her personal benefit as one of his two heirs at law. In her trust relation to the estate <sup>604</sup> of her husband, she could not make a payment to herself in a different relation.



especially when she would be the only beneficiary, and thereby bind her husband's estate, so as to put it in a pecuniary condition less favorable than it would have been in under a decision by the court. Such an act is voidable by anyone interested in her husband's estate. This is no less so because her daughter was induced to join her in making the payment. There was no separate and independent action by the daughter. The payment was a single act, and the declaration in writing was a single statement and acknowledgment in which they both joined. Because the mother was the other party to the transaction, with an adverse interest, it is voidable. The principle was applied in *Richmond*, Petitioner, 2 Pick. 567, of which the headnote is in part: "An administrator cannot revive a debt due to himself from the intestate, which at the time of the intestate's decease was barred by the statute of limitations." Chief Justice Parker said: "The petitioner cannot avoid the presumption of payment, except by showing a renewal of the promise, and he cannot show that, being himself the administrator." The same doctrine was again applied in *Grinnell v. Baxter*, 17 Pick. 383.

If these two executors had jointly paid to the mother the whole amount of the notes, and had sought to have the payment allowed in their account in the probate court, the other executor might have objected, and set up the contention that the notes were barred, and not a proper charge against the estate. As the payment by an executor or administrator of a debt to himself is always reviewable by the court, and as the court will, when different joint executors make different pleas to a claim against an estate, proceed upon the plea which is most favorable to the estate (2 *Williams on Executors*, 8th ed., 1953; *Midgley v. Midgley* [1893], 3 Ch. 282), the court would feel obliged to sustain the objection. A court of equity will not give to the joint payment and acknowledgment of these executors an effect that the probate court would not give to it, if the question arose there upon an objection of the defendant *Manson* that the claim could not be allowed against the estate.

The presiding judge rightly found that there were no payments upon these notes in the lifetime of the testator. His son <sup>605</sup> *Waldo* was forty-eight years of age at the time of his death. He had been an invalid all his life, and had lived all the time in his father's family. Only two years of the time did he do anything to earn an income. He had been a member of an expensive social club, and at different

times had been obliged to have surgical treatment at hospitals. His father had paid all his bills, and had furnished him money whenever he wanted it, without ever making any charge against him or keeping any account of it. In the same way he had provided support and paid money for his daughter Adeline. The relations of the parties and their dealings together tend to show that no payment was ever made upon either of these notes. So far as it appears, they were never referred to between the parties.

Decree affirmed.

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*The Power of One of Several Administrators*, by an acknowledgment or a new promise, to remove the bar of the statute of limitations so as to bind the estate, is considered in the note to *Aldering v. Allison*, 127 Am. St. Rep. 385. The principal case will there be found cited. As to the power of a sole administrator to revive or keep in force a debt against the decedent, see *Divine v. Miller*, 70 S. C. 225, 106 Am. St. Rep. 743; *Holly v. Gibbons*, 176 N. Y. 520, 98 Am. St. Rep. 694; notes to *Warren v. Cleveland*, 102 Am. St. Rep. 761; *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 188; *Schlicker v. Hemenway*, 78 Am. St. Rep. 123.

CASES  
IN THE  
SUPREME COURT  
OF  
MISSOURI.

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DONOVAN v. GRIFFITH.

[215 Mo. 149, 114 S. W. 621.]

**CURTESY in Equitable Estate.**—A husband is entitled to curtesy in the equitable estate of his wife, and this rule is not abrogated by the married woman's statute of Missouri. (p. 465.)

**CURTESY is an Equitable Estate in Lands or Tenements** to which a man is entitled on the death of his wife, she having been seised in fee simple or fee tail during their coverture, provided they had legal issue born alive which might have been capable of inheriting the estate. (p. 466.)

**CURTESY—Death of Child Before Wife Becomes Seised of an Estate.**—A husband's claim to curtesy in the lands of his wife is not defeated by the death of their child before she became seised of any estate in such estate. (p. 468.)

**ENTIRETIES, Estate in When the Property Belongs in Equity to the Wife.**—If property is purchased with moneys of a wife, and the conveyance is taken in the names of her and her husband, she has an equitable title to the whole of the land, and hence such conveyance does not vest any estate in him and her as tenants by the entireties. (p. 468.)

**MARRIED WOMAN—Property Purchased Partly with Her Moneys and Partly with Those of Her Husband.**—If real property is paid for partly with the separate moneys of a wife and partly with the moneys of her husband, and a conveyance is taken in their joint names without her consent in writing, a court of equity will protect her interest and declare a trust in her favor, and, in the event of her death, will not permit the whole to go to the husband as survivor of a tenancy by the entireties. (p. 470.)

**HUSBAND AND WIFE—Charging Him for Rent or Use of Her Property.**—If a husband and wife live in harmony during her life, he not denying her any control which she seeks to exercise over her separate real property, but they together enjoying its use, benefits and profits, he is not liable, after her death, to account with her other heirs for the rent of such property. This rule is not abrogated by the married woman's statute of Missouri. (p. 472.)

Hostetter & Jones, for the plaintiffs-appellants.

Ball & Sparrow, for the defendant-appellant.

**153** FOX, P. J. This cause is here upon appeal by both parties from a judgment and decree of the circuit court of Pike county.

This is a proceeding by which it is sought to declare that certain undivided portions of certain lands are held in trust by defendant for the plaintiffs, and after the ascertainment of the interests of the parties in this land to partition the same in accordance with the laws of this state. There are two forty-acre tracts of land, situated in Pike county, Missouri, which are involved in this proceeding. One is known as the Pritchett forty and the other as the Thornton forty, so called from the respective names of the grantors. Leona Griffith was the wife of the defendant, James R. Griffith. They were married on January 30, 1895, and on January 4, 1900, a child was born of this marriage. This child died on October 15, 1903. Leona Griffith, the wife of the defendant, and the mother of the deceased child, died April 9, 1904. She died intestate and left no debts. The only heirs at law surviving Leona Griffith were her husband, James R. Griffith, **154** the defendant herein, William H. Donovan, her brother, and Carrie I. Boyd, her half-sister, both of whom are plaintiffs in this cause. The petition described the land in controversy and averred that the wife, Leona Griffith, furnished the entire purchase price of each forty acres out of her own separate money and means.

Upon this state of facts the chancellor was asked to declare that the defendant, James R. Griffith, held the legal title to said lands as trustee for the wife, and since her death as trustee for her heirs at law, the plaintiffs in this cause. The interests of the parties in said real estate were alleged in the petition to be as follows, that is to say, William H. Donovan, one-third; Carrie I. Boyd, one-sixth; and James R. Griffith, one-half. From the allegations in the petition it was further sought to charge the interest of James R. Griffith with certain rents arising from said lands, which he had received from the date of the acquisition of title, which it is averred belonged to his wife, and was converted by him to his own use.

The answer of the defendant, James R. Griffith, admitted that Leona Griffith, the wife of the defendant, died intestate in Pike county, Missouri, on the ninth day of April, 1904. He also admitted that by and through his deceased wife, Leona Griffith, he received and invested in the lands described in plaintiff's petition the sum of nine hundred and twenty-five dollars, and no more. Further answering the



defendant says: "That there was born during the marriage of himself and deceased wife, Leona Griffith, one child, named — Griffith, and that said child died on the — day of —, 1904; therefore, defendant says that he has a curtesy, interest or life estate, in the remaining one-half of the land so purchased as aforesaid with the money of his deceased wife, Leona Griffith, and therefore denies the right of plaintiff to partition the lands <sup>155</sup> in question. Further answering, he says that he invested the money of his wife as her agent and as she directed. Defendant, further answering, denies each and every allegation, statement and charge made by plaintiffs' petition, not hereinbefore admitted to be true, and now having fully answered, asks to be discharged with his costs."

Plaintiffs' reply was a general denial of the new matter contained in defendant's answer.

Testimony was introduced by both plaintiffs and defendant upon the issues presented and the court, at the close of the testimony, took the case under advisement, and subsequently made a special finding of facts and entered its decree, which finding of facts and decree were as follows:

"Now, at this day again come the parties to the above-entitled cause, plaintiffs appearing by Hostetter & Jones, their attorneys, and the defendant appearing by Ball & Sparrow, his attorneys, and the court having had this cause under advisement since the hearing of the testimony and the submission of the same on a former day of this term of court and after the argument of counsel and being fully advised in the premises makes the following written finding of facts and conclusions of law which are as follows, to wit:

"Finding in reference to Pritchett forty, defendant owns ten twenty-thirds in his own right, defendant owns thirteen forty-sixths by inheritance from his wife, defendant owns curtesy in thirteen forty-sixths, defendant owes estate of deceased wife one-half rental value of thirteen twenty-thirds of wife's share for five years, i. e., one-half of \$276.90, to wit, \$138.45. That on the date of the death of the Mrs. Griffith defendant was indebted to her on account of said rental value in the sum of \$276.90. That one-half thereof, viz., \$138.45, became the property of defendant by inheritance from his deceased wife. This leaves the sum <sup>156</sup> of \$138.45, for which, as trustee of his wife's interest in said

land, the defendant should account and his marital interest acquired from his wife in said lands should be and is charged with the repayment of said sum of \$138.45. That the plaintiffs, Wm. H. Donovan and Carrie I. Boyd, as the sole surviving (collateral) heirs of said Leona Griffith, are entitled to have and receive from defendant before he receives any part of the sum that may be realized from the sale of said Pritchett lands belonging to said Leona Griffith said sum of \$138.45, said Donovan being entitled to two-thirds thereof, i. e., \$92.30, and Carrie Boyd to one-third thereof, i. e., \$46.15. That the interest of the respective parties in said Pritchett lands is as follows: Defendant is owner in his own right of a ten twenty-thirds interest in said lands; defendant is the owner, by inheritance, from his wife, of a thirteen forty-sixths interest in said lands subject to said charge of \$138.45; said defendant is the owner of a curtesy estate in thirteen forty-sixths interest in said lands; said Donovan is the owner, subject to defendant's said curtesy estate, of a thirteen sixty-ninths interest in said lands. Said Carrie Boyd is the owner, subject to said curtesy estate, of a thirteen one hundred and thirty-eighths interest in said land.

"That in purchasing the Thornton forty-acre tract for \$1,100, defendant invested \$275 of his wife's money in said purchase, and defendant by reason thereof held the legal title to one-fourth thereof in trust for his wife, Leona. Defendant is the owner in his own right of an undivided three-fourths interest in the Thornton forty acres. Defendant is the owner by inheritance from his wife of an undivided one-eighth interest in said land.

"Decree of partition, order of sale of said land by sheriff at public sale to highest bidder for cash in hand at regular October term, 1904, of this court. Said <sup>157</sup> tracts to be sold separately. In case the full amount of said charge of \$138.45 shall not be realized from the sale of defendant's interest in the Pritchett forty, the remaining balance shall be deducted from the proceeds of defendant's interest inherited from his wife in the Thornton forty and paid to said Donovan and to Carrie Boyd's guardian in the respective proportion aforesaid. The court doth further find that Leona Griffith was the wife of James R. Griffith and that she died intestate in the county of Pike and state of Missouri on the — day of April, 1904, without issue and without any father or mother surviving her, and leaving as her sole heirs at law her husband James R. Griffith, defendant

herein, and her brother, William H. Donovan, plaintiff herein, and her sister of the half-blood, Carrie I. Boyd, also a plaintiff herein.

“The court further finds that during the coverture there was born to said Leona Griffith and her husband, James R. Griffith, a child which lived for some months, but died prior to the death of said Leona Griffith.

“The court further finds that during the coverture Mary E. Pritchett and S. A. Pritchett, her husband, conveyed to the said James R. Griffith and Leona Griffith, his wife, by proper and suitable deed of conveyance, the title to the following described real estate, situated in Pike county, Missouri, to wit: Beginning at a corner stone from which a pin oak twenty inches in diameter bears north 36 degrees, east 3.35 chains, the same being the southwest corner of S. A. Pritchett’s land; thence south 13.04 chains to Mrs. Sallie Porter’s land; thence east with Mrs. Porter’s north line 33.50 chains to Salt river; thence north with the meanderings of Salt river to the southeast corner of S. A. Pritchett’s land; thence west with Pritchett’s south line 27.90 chains to place of beginning, containing in all forty acres, more or less, and all being in section 14, township 55 north, range 3 west, said deed <sup>158</sup> of conveyance being recorded in book 113, at page 567, of the deed records of Pike county, Missouri. The court finds that during said coverture the defendant, James R. Griffith, acquired by a proper deed of conveyance from Ella Thornton and others the legal title to the following described real estate, also situated in Pike county, Missouri, to wit: The northwest quarter of the southwest quarter of section 14 in township 55, range 3 west, containing forty acres, more or less.

“The court further finds that in the purchase of the first-named forty acres, which was acquired from Mary E. Pritchett and husband, the defendant contributed ten twenty-thirds of the purchase money, and that thirteen twenty-thirds was the separate money and means of his wife, Leona Griffith, and that in the purchase of the last-named forty acres which was acquired from Ella Thornton et al., defendant contributed three-fourths of the purchase money and the remaining one-fourth was the separate money and means of his wife, Leona Griffith.

“The court further finds that upon the acquisition of the title to said Thornton forty acres the defendant, James R. Griffith held the legal title to an undivided one-fourth

interest therein in trust for his said wife, Leona Griffith, and that upon the death of said Leona Griffith he holds the legal title to that portion of the Pritchett forty acres, which was paid for by her separate money and means in trust for the heirs of his said wife subject to his own right of inheritance and the marital interests therein, and that he now holds the legal title to one-fourth interest in the Thornton forty acres in trust for the heirs of said deceased wife subject to his own interest by inheritance and to his marital interests therein, and it is ordered and decreed by the court that that portion of the title to each of the forty-acre tracts above mentioned now held in <sup>159</sup> trust by the defendant, James R. Griffith, for the plaintiffs, William H. Donovan and Carrie I. Boyd, be and the same is hereby divested out of the defendant and vested in the plaintiffs. In accordance with the written findings made by the court and filed in this cause and set out hereinbefore in this decree it is considered and adjudged by the court that the said lands are not susceptible of division in kind and the same are hereby ordered sold by the sheriff of Pike county, at public sale, to the highest bidder for cash in hand at the next regular October term, 1904, of this court, in accordance with the statute governing sales of real estate in partition. It is further considered and adjudged by the court that said tracts be sold separately and that in case the full amount of the said charge \$138.45 shall not be realized from the proceeds of the sale of the said James R. Griffith's interest in the forty acres acquired from Mary E. Pritchett et al., the remaining balance of such charge shall be deducted from the proceeds of the sale of the defendant James R. Griffith's interest inherited from his wife in the said Thornton forty acres, and shall be paid to the plaintiffs in the respective portions as hereinbefore found and adjudicated, and it is further ordered by the court that the sheriff make report of his proceedings under this order as soon as the sale had thereunder shall be consummated and that no distribution be made by said sheriff until further order of this court, and it is further ordered that this cause be and the same is hereby continued." To which action of the court plaintiffs and defendant excepted at the time and saved their exceptions.

There is little or no dispute as to the facts developed upon the trial of this cause, and it is sufficient to say that the testimony introduced furnished ample support to the



finding of the trial court, with the exception of that portion of its finding concerning the <sup>160</sup> charge sought to be made upon the interests of the defendant in the land involved as to rents. We do not deem it necessary to set out in detail the testimony of the witnesses in this cause, but will further refer to the general tendency of the testimony during the course of the opinion.

Both plaintiffs and defendant preserved their exceptions to the action of the court in its finding of facts and the decree rendered, and on October 20, 1904, both plaintiffs and defendant filed their motions for a new trial, which were by the court overruled, and this appeal was prosecuted by both sides from the finding and decree rendered by the trial court to the supreme court, and the record is now before us for consideration.

The record discloses that the complaint of the plaintiffs is solely directed to the recognition by the trial court of an estate by the curtesy in the defendant, James R. Griffin, in the aliquot parts of the respective tracts designated in the special findings of the court. The errors complained of on the part of the defendant-appellant challenge the correctness of practically all the findings of the court and its decree ordering a partition of the land involved in this proceeding.

We will first direct our attention to the complaint of the plaintiffs, who are appellants also in this case, respecting the recognition given by the court to the estate of curtesy claimed by the defendant. The testimony as disclosed by the record applicable to this proposition shows that the Thornton forty-acre tract of land was conveyed to James R. Griffith alone on February 20, 1904, which was shortly after the death of their only child.

<sup>161</sup> 1. It is insisted that, the entire legal title to the Thornton forty having been conveyed to the husband, James R. Griffith, the defendant in this cause, the wife, Leona Griffith, was never seised of that forty, and that seisin was always essential to establish curtesy. It is sufficient to say upon that proposition that learned counsel for the plaintiffs overlook the question that the wife was seised of an equitable estate. Certainly that will not be disputed by the plaintiffs, for the reason that the very foundation of this action, in which it is sought to have the chancellor declare that the legal title to this forty acres should be held in trust for the wife, and she being dead in trust for the plain-

tiffs to this action, fully recognizes that the wife did have in this forty acres, at the time of her death, an equitable estate, otherwise the plaintiffs would have no standing in this court. Their right to successfully maintain this action is predicated upon the theory that the wife, at the time of her death, was in equity entitled to certain interests in the lands involved in this controversy.

The facts developed upon the trial of this cause and the finding of the trial court indicate very clearly that the wife was entitled in equity to certain portions of the lands involved in this controversy, and that it was the equitable separate estate of the wife and that she died seised of that equitable estate.

In *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001, speaking through Judge Gantt, it was said: "It is also well-settled law in Missouri that a husband is entitled to curtesy in the equitable separate estate of the wife, of which she died seised, although limited to her separate use," citing, in support of the doctrine, *Alexander v. Warrance*, 17 Mo. 228; *Tremmel* <sup>162</sup> v. *Kleiboldt*, 75 Mo. 255; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95.

In *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137, it was expressly ruled that the married woman's statute, section 4340, Revised Statutes of 1899, which is the same as section 6869, Revised Statutes of 1889, did not further impair the rights of the husband's estate by the curtesy in land held by the wife as her separate equitable estate than to take away from the husband his common-law right to the possession and usufruct of the land during the life of the wife.

Applying the doctrine as announced in the cases above indicated, it is clear that the law is well settled in this state that a husband is entitled to curtesy in the equitable separate estate of the wife, and the provisions of section 4340, which is denominated the married woman's statute, has in no way changed the rights of the husband other than to the extent as heretofore indicated.

It is also suggested by counsel for plaintiffs that curtesy at common law could only exist in real estate which lawful issue of the wife born alive was or might be capable of inheriting.

If this suggestion is to be taken as a contention on the part of the plaintiffs that the Thornton forty-acre tract was not acquired until after the death of the child of the

wife of the defendant, James R. Griffith, therefore there was no issue of the wife born alive after the acquiring of this Thornton forty acres, and as to that there could be no estate by the curtesy in the husband, we have no hesitation in saying that we are unwilling to give our assent to such contention.

Curtesy is defined by the leading authors as "the estate to which by common law a man is entitled on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they had lawful <sup>163</sup> issue born alive which might have been capable of inheriting the estate. It is a freehold estate in the husband for his natural life cast upon him by operation of law immediately upon the happening of the necessary incidents": 12 Cyc. 1002.

Lord Coke says of this subject that the four essential things necessary to constitute an estate of tenancy by the curtesy are, first, marriage; second, seisin of the wife; third, issue born alive; fourth, death of the wife. He said, however: "But it is not requisite that these should occur together all at one time. And, therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So, if he hath issue which dieth before the descent, as aforesaid."

Chancellor Kent, in his Commentaries, stated the doctrine as applicable to the tenancy by the curtesy in this language: "Tenancy by the curtesy is an estate for life, created by the act of the law. When a man marries a woman, seised, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin or the death of the wife, or whether it was born before or after the seisin": 4 Kent's Commentaries, 14th ed., 27.

In *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435, the precise question under discussion in the case at bar was passed upon and thoroughly discussed, and all the authorities reviewed. The facts as applicable to that case, from which the legal propositions arose, were as follows:

"During the coverture P. L. and Eveline A. Twitty had two children born unto them—a boy and a girl, <sup>164</sup> the former dying July 17, 1857, at the age of about four years, and the latter dying August 4, 1857, at the age of about three years. Both children were born and died before their mother acquired any land; and, for this reason, it is said that their father could not have taken an estate as tenant by the curtesy. In other words the contention in behalf of defendants is that because the wife's seisin did not commence until after the death of her children there was no right of curtesy in her husband." The Tennessee supreme court, in responding to the contention of the defendant in that case, speaking through Caldwell, J., said: "All the authorities of which we have any knowledge are contrary to this contention. Whether seisin arose before or after the death of the child is an unimportant circumstance. If there was a child which by possibility might have inherited the land from the mother—a child to whom the land would have descended had it survived the mother—that is all that is required as to issue, and the father takes an estate for life as tenant by the curtesy."

In 1 Cruise's Digest, 147, section 7, the rule applicable to this subject was thus stated: "The time when the seisin commences, whether before or after issue had, is immaterial; for if a man marries a woman seised in fee, is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So, if he has issue which dies before the descent of the lands on the wife."

The distinguished American author, Mr. Washburn, on Real Property, fourth edition, volume 1, pages 178 and 179, section 45, very clearly states the rule as applicable to this proposition: "It is immaterial whether the child is born before or after the wife acquires her estate, if, had it lived, it would have inherited that estate; and it matters not though it die before she <sup>165</sup> acquires the estate, so far as the husband's right to curtesy is concerned."

Judge Caldwell, in the Tennessee case, directs attention to the celebrated case of Jackson v. Johnson, 5 Cow. 74, 15 Am. Dec. 433, in which Chief Justice Savage, in treating of this question, says: "It is immaterial at what period during coverture the wife became seised, whether before issue or after; nor is it material whether the issue be living at the time of the seisin."

In Heath v. White, 5 Conn. 228, the subject of tenancy by the curtesy was thoroughly considered and all the au-



thorities exhaustively reviewed, and it was expressly ruled in that case that whether the issue were born before or after the wife's seisin of the lands; or whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband would be tenant by the curtesy; citing 2 Blackstone's Commentaries, 128; Coke on Littleton, 29 b; *Bush v. Bradley*, 4 Day, 298.

We see no necessity for pursuing this subject further. Applying the authorities as heretofore indicated to the proposition now under discussion, there is no escape from the conclusion that the defendant, James R. Griffith, had a curtesy interest in the Thornton forty-acre tract.

Learned counsel for plaintiffs-appellants insist that as to the Pritchett forty, that being the forty in which the conveyance was taken to the husband and wife jointly, as the deed was made to the husband and wife, which ordinarily was an estate by the entirety at common law, it was no such a title as that the husband's curtesy estate would attach, and it is argued at common law such estate was one by entirety, and if the wife died first her surviving husband would take not a curtesy consummate, even though all the other requisites should exist, but he would become invested <sup>166</sup> with the entire fee. In other words, the survivor took the entire title.

Upon this proposition it must be again repeated that counsel overlook the question as to the character of the estate that the facts developed at the trial show this estate to be. In equity the conveyance, if made jointly to husband and wife, would not be held an estate by the entirety. This has been expressly ruled by this court in *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847; *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261.

If this estate created by this deed conveying the Pritchett forty acres to the husband and wife jointly is to be construed for the purpose of defeating the husband of the curtesy as an estate by the entirety, then it is clear that the plaintiffs, as to that forty acres, would have no standing in this court, for the reason that under that construction of the deed the husband would be the absolute owner of the Pritchett forty by his right of survivorship. Upon that proposition we have reached the conclusion that the defendant is also entitled to a curtesy interest in the Pritchett forty-acre tract.

2. This leads us to the consideration of the complaints of the defendant-appellant, James R. Griffith. Learned

counsel for defendant insist that the conveyance of the Pritchett forty-acre tract to James R. Griffith and Leona Griffith, his wife, created an estate by entirety, and that upon the death of the wife the defendant became the absolute owner in fee of said forty acres by right of survivorship.

It must be conceded that, if nothing else was disclosed by the record in this cause other than the conveyance itself, the contention of counsel for the defendant would be unanswerable. The authorities are all one way on that proposition; but this suit involves <sup>167</sup> a contest as to the nature and character of the estate created by this conveyance, and all the facts were developed concerning the execution and delivery of the deed. That the purchase money for this land was partly furnished by the defendant, James R. Griffith, and partly by money constituting the separate estate of the wife, the testimony shows beyond dispute. We have read in detail the testimony developed upon the trial, and it fully supports the finding of the court concerning the amount of money belonging to the husband and wife which was applied to the payment for the purchase of the Pritchett forty, as well as the interests of the parties in said lands.

Upon the facts disclosed by the record applicable to this case, it comes directly within the rules of law announced in *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, and *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261, and the doctrine as announced in those cases is a full and complete answer to the contention of the defendant that the deed to Griffith and wife constituted an estate by entirety.

It was expressly ruled in *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261, that where the husband purchases land and pays for it with the separate money of his wife in part, without her written assent authorizing him so to do, and in part with his own money, and takes the legal title jointly to himself and wife, a court of equity will protect the wife in the enjoyment of her interest in the property, and declare a trust in her favor.

In *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, the case of *Jones v. Elkins* was unqualifiedly approved, and it was held that under the rule announced in the *Elkins* case, as well as under the exceptions to the common-law rule announced distinctly in *Garner v. Jones*, 52 Mo. 68, and under the facts in that case, the wife had a trust estate in the land in proportion to the amount contributed by her to the full amount of the purchase money, which a court of equity

would protect. An <sup>168</sup> examination of those cases will demonstrate that the facts upon which the rules of law are predicated are nearly identical with the facts in the case at bar.

Counsel for defendant manifestly rely upon the case of *Garner v. Jones*, 52 Mo. 68. That case, it is true, very clearly and correctly announced the rules of law applicable to estates by the entirety, and in a clear, painstaking manner sets forth the reasons upon which the doctrines of estates by the entirety are predicated. With the doctrine announced upon that subject in *Garner v. Jones* we have no fault to find or criticism to suggest. It is entirely in harmony with the uniform unbroken line of decisions by this court, as well as most of the courts of our sister states where the subject has been in judgment before them. However, it is apparent that defendant overlooked what was said in that case, which is strikingly applicable to the case at bar. The learned judge, after discussing the law applicable to estates by the entirety, in conclusion announced this rule in the following language: "It may be conceded that if a husband invests the separate funds of his wife in real estate and takes a deed to them jointly, a court of equity would protect her in the enjoyment of the property and declare a trust in her favor. But no such point arises in this case."

The cases to which I have directed attention treating of this proposition cite numerous authorities in support of the conclusions therein reached, and it is sufficient to say that if the doctrine as announced in the cases applicable to this proposition are longer to be followed, then there can be but one conclusion reached upon this question, and that is that Leona Griffith, the wife of the defendant-appellant, had an interest in the lands involved in this proceeding, which a court of equity would protect, and she being dead, that the plaintiffs were entitled to the interests as designated in the written finding of the court, and the court was <sup>169</sup> warranted, as was done in the case of *McLeod v. Venable*, 163 Mo. 536, 63 N. W. 847, to decree partition and order the land to be sold and the proceeds distributed in accordance with the interests of the parties.

3. This brings us to the consideration of the final question in this case, as to whether or not, under the testimony as developed at the trial, the chancellor was warranted in charging the interests of the defendant in the land involved with certain rents, which it seems is claimed accrued by

reason of the occupancy of a part of the land by the defendant and the renting out by the defendant of a part of it prior to the death of the wife.

We take it that the charge of rents was based upon the use of the premises prior to the death of the wife, for subsequent to her death the defendant was a tenant by the curtesy and therefore was not liable for the payment of rents.

We have fully considered the testimony which is sought to be made the basis of that part of the decree which charges the interests of the defendant with rents, and have reached the conclusion that these rents were improperly charged, and should be entirely omitted from the decree. It is true that there is testimony showing that defendant used this land, but it must not be overlooked that he and his wife were living together, both of whom, doubtless, enjoyed the benefits and products of such land. Again it must not be overlooked that this is not a contest between the wife and the husband as to the control of her separate estate in this land. There is an entire absence from this record of any dispute while they were living together as husband and wife, up to the time of her death, as to the control of the premises, or as to whom the rents should be paid.

<sup>170</sup> After the passage of the married woman's act, the unity of husband and wife as to their property rights designated in such act was dissolved, hence as to such property rights they had full authority to contract with each other in respect to the same.

Manifestly as applicable to this case, if the wife, during the time that she and her husband were occupying the premises, was denied any right of control of her interest in such premises, or denied the right to collect the rents to which she was entitled, she could have maintained an action in her own name against her husband asserting her rights, thereby recovering a judgment for any rents her husband had deprived her of respecting those premises.

In *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S. W. 898, it was expressly ruled by this court, after a most exhaustive review of all the authorities, that after the passage of the married woman's act, the husband and wife had the right to deal at arm's-length with each other, and it was there said, speaking through Judge Gantt, that "the statutes dissolve the unity of husband and wife as to the property rights enumerated in our married woman's acts, and make the wife a feme sole, and as the husband could always



have contracted with a feme sole and granted his property after marriage as before, with the exceptions that he could not receive a deed directly from her, and could not dispose of her inchoate dower, there remains no obstacle to their dealing directly with each other at law as well as in equity. That such was the purpose of these married woman's acts we have no doubt whatever, and we think that releasing the bonds which bound the wife necessarily left the husband free of the disability which rested on him solely and only because the law rendered his wife incompetent, and when she was rendered *sui juris* nothing <sup>171</sup> remained of the common-law rule as to their incapacity to contract."

We repeat that this suit does not involve any contest between the wife and her husband as to the control and collection of rents upon lands in which she had a separate estate; neither does the record disclose any dispute or controversy while they were living together up to the time of her death, about the application of rents. While they were authorized under the law respecting their rights of property to contract concerning such property with each other, there is an entire absence from this record of any disclosures showing an express contract or any reference made as to the accounting for rents by the husband to the wife by reason of his occupancy and control of these premises.

The law manifestly would not favor the implication of a contract between parties where the relation of husband and wife existed, where they were residing together in harmony with due respect and consideration for such relation.

It is significant in *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, where, as before stated, a similar state of facts to the case at bar was developed, that the conveyance was made to the husband and wife jointly on July 10, 1876, and the title to the land involved in that suit remained in the husband and wife until January 24, 1897, a period of nearly twenty-one years, when the wife died, and that no effort was made in that litigation to charge the interest of the husband with any rents, but the decree simply made partition and ordered the sale of the land and the distribution of the proceeds between the husband and her collateral heirs, who were parties to the proceeding. While it is true the record of that cause does not disclose how the lands involved in suit were controlled, yet the conveyance having been made jointly to the husband and wife, together with other facts recited as to the purchase of the land, indicate

<sup>172</sup> that the husband managed and controlled the property, the same as was done by the husband in the case at bar.

Our attention has not been directed to any cases directly in point upon the proposition now in hand. There are cases in which the husband has been required to account for the separate estate of the wife, and has been required to pay money which constituted a part of her separate estate, together with the interest upon such money, but in those cases it must not be overlooked that it was a controversy between the husband and wife while living, and not a dispute as between the collateral heirs of the wife after her death and the husband as to whether or not he should be charged with rents for lands jointly owned by both of them, and about which, as to the use, management and control of the lands, there had never been any reference to a contract, or as to the application of rents, or any dispute whatever concerning the manner in which the property was used.

Our conclusion is that the defendant-appellant's interest in the land in this suit should not be charged with the rents, as contained in the decree. That in order to warrant such a charge the record should clearly disclose that the wife had been denied the control of her interest in the estate, and had also been denied the payment of rents which may have accrued from the premises.

We repeat, that the husband and wife, under the facts as disclosed in this case, were living together and jointly enjoying the use, benefits and products of th's land in a manner entirely satisfactory to themselves, and we at least are unwilling, upon the facts as disclosed by this record, to hold that the husband should be made to account for the rent upon the lands involved in this controversy.

We have given expression to our views upon the legal propositions disclosed by this record, and have <sup>173</sup> pointed out the error of the decree. The judgment and decree of the trial court is affirmed, except that part of it to which we have called attention, in which it seeks to charge the interests of the defendant in the lands sought to be partitioned with rents. The subject of rents has no place in that decree.

It is therefore ordered that this cause be remanded to the circuit court with directions that it modify the decree, by omitting entirely from it the subject of rents.

All concur.

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### I. Definition.

The principal case quotes, apparently with approval, the definition from 12 Cyc. 1002: "Curtesy is the estate to which by the common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple, or in tail, during their coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate": *Donovan v. Griffith*, 215 Mo. 149, ante, p. 458, 114 S. W. 621. This definition appears to us faulty, in apparently excluding the estate which a husband has during the continuance of the coverture, and in implying that he has no estate until after the death of his wife. Blackstone more correctly defines it as follows: "Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate": 2 Blackstone's Commentaries, p. 126. This is practically the definition given in *Day v. Cochran*, 24 Miss. 261: "Tenancy by curtesy is an estate for life created by the act of the law. It occurs where a man marries a woman who is seised at any time during coverture of an estate of inheritance, and has by her

issue born alive, and which might by possibility inherit the same estate as heir to the wife." This definition, it will be noted, differs from the others in not requiring that the estate of the wife be either in fee or in tail, provided it is an estate of inheritance. Upon this subject see further, post, IV, c, d. e.

## II. Classification.

We think, notwithstanding some of the definitions previously quoted, that the husband's estate is not postponed until the death of the wife, but necessarily commences before that time. Being, however, an estate for his life only, it cannot continue after her death unless he survives her. Prior to the death of his wife, issue having been born alive and capable of inheriting, his estate is known as a tenancy by the curtesy initiate, and after her death, leaving him surviving, his estate is a tenancy by the curtesy consummate: *Hunter v. Whitworth*, 9 Ala. 965; *Plumb v. Sawyer*, 21 Conn. 351; *Foster v. Marshall*, 22 N. H. 491; *Nicholls v. O'Neill*, 10 N. J. Eq. 28; *Billings v. Baker*, 28 Barb. 343; *Williams v. Lanier*, 44 N. C. 30; *Lancaster Co. Bank v. Stauffer*, 10 Pa. 328; *Mattocks v. Stearns*, 9 Vt. 326; *Wyatt v. Smith*, 25 W. Va. 813; *National Metropolitan Bank v. Hitz*, 1 Mackey, 111. These decisions show that the estate of the husband is of the same general character before as after the death of his wife, namely: that it is an estate for his life and subject to the same incidents as if acquired in some other manner or from some other source.

## III. Requisites.

a. **Classification of.**—To a tenancy by the curtesy three things are indispensable: 1. Marriage; 2. Seisin of the wife of a freehold of inheritance; 3. Issue of the marriage born alive capable of inheriting: *Hunter v. Whitworth*, 9 Ala. 965; *Neil v. Johnson*, 11 Ala. 615; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Carrington v. Richardson*, 79 Ala. 101; *McDaniel v. Grace*, 15 Ark. 465; *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; *Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346; *Monroe v. Van Meter*, 100 Ill. 347; *Bozarth v. Sargent*, 128 Ill. 95, 21 N. E. 218; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; *Stewart v. Ross*, 50 Miss. 776; *Ferguson v. Tweedy*, 56 Barb. 168; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Burgess v. Muldoon*, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798; *Withers v. Jenkins*, 14 S. C. 597; *Guion v. Anderson*, 8 Humph. 298; *Gillespie v. Worford*, 2 Cold. 632; *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435; *Carpenter v. Garrett*, 75 Va. 129; *Muse v. Friedenwald*, 77 Va. 57; *Winkler v. Winkler's Exr.*, 18 W. Va. 455; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *Westcott v. Miller*, 42 Wis. 454. To these, for a tenancy by the curtesy consummate, there must be added (4) the death of the wife leaving a husband surviving.

b. **Marriage.**—The fact of marriage is indispensable. It must, doubtless, be a valid marriage, that is to say, one not void ab initio; but however irregular it may have been, it will support the



estate if not absolutely void, and the rules for determining its validity must be the same as in other cases where rights of property are dependent on marriage: *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; 12 Cyc. 1005B.

### c. Seisin of Wife.

1. **Necessity for.**—At the common law seisin of the wife during the coverture is necessary to the creation of an estate by the curtesy, and this rule generally prevails in the United States, except where supplanted by statutes expressly or impliedly abolishing the estate or dispensing with the condition here under consideration: *McDaniel v. Grace*, 15 Ark. 465; *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211, 2 S. W. 186; *Luttrell v. Reynolds*, 63 Ark. 254, 37 S. W. 1051; *Hunter v. Lank*, 1 Harr. (Del.) 10; *Adams v. Logan*, 6 T. B. Mon. 175; *Stevens v. Smith*, 4 J. J. Marsh. 64, 20 Am. Dec. 205; *Neely v. Butler*, 10 B. Mon. 48; *Stewart v. Ross*, 50 Miss. 776; *Hopper v. Demarest*, 21 N. J. L. 525; *De Camp v. Crane*, 19 N. J. Eq. 166; *Taylor v. Gould*, 10 Barb. 388; *Burke v. Valentine*, 52 Barb. 412; *Ferguson v. Tweedy*, 56 Barb. 168; *Carr v. Anderson*, 6 App. Div. 6, 39 N. Y. Supp. 746; *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862; *Collins v. Russell*, 184 N. Y. 74, 112 Am. St. Rep. 569, 76 N. E. 731; *Sears v. McBride*, 70 N. C. 152; *Stuart v. Stuart*, 18 W. Va. 675; *Fulton v. Johnson*, 24 W. Va. 95; *Mercer v. Selden*, 1 How. 37, 11 L. ed. 38; *Moore v. Greene*, 2 Curt. 202, Fed. Cas. No. 9763; *Hart v. Dean*, 2 MacAr. 60. Perhaps there is not a full agreement respecting what constitutes seisin within the meaning of the rule. In the first place, we apprehend that there can be little or no dissent from the proposition that the seisin need not be maintained by either the husband or wife in person, but may be by any person expressly or impliedly authorized to represent her. Thus, she may be one of several co-owners, or may have leased the property, or may be a ward for whom possession is held by her guardian, or may have constituted some one her agent to take and hold possession for her. In all such cases, the act of her co-owner, tenant, guardian or other agent is, in contemplation of law, her act, and the seisin maintained by either of them is her seisin and adequately supports the claim of her husband to an estate by the curtesy: *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. 401; *Powell v. Gossom*, 18 B. Mon. 179; *Phillips v. Ditto*, 2 Duvall, 549; *Ellis v. Dittay*, 94 Ky. 620, 15 Ky. Law. Rep. 378, 23 S. W. 366; *Carr v. Givens*, 9 Bush, 679, 15 Am. Rep. 747; *Yankey v. Sweeney*, 8 Ky. Law Rep. 944, 2 S. W. 559; *Dugan v. Gittings*, 3 Gill, 138, 43 Am. Dec. 306; *Day v. Cochran*, 24 Miss. 261; *Romaine v. Hendrickson's Exrs.*, 24 N. J. Eq. 231; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Buckley v. Buckley*, 11 Barb. 43; *Ferguson v. Tweedy*, 43 N. Y. 543; *Robertson v. Stephens*, 36 N. C. 247; *Nixon v. Williams*, 95 N. C. 103; *Lowry's Lessee v. Steele*, 4 Ohio, 170; *Rankin's Appeal* (Pa.), 16 Atl. 82; *Nightingale v. Hidden*, 7 R. I. 115; *McNeeley v. South Penn. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; *Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90; *Rhodes v. Robie*, 9 App. D. C. 305; *Frey v. Allen*, 9

App. D. C. 400. So, in many, and perhaps in a majority, of the states, the possession of real property will be held to correspond to the title, unless there is an occupancy adverse thereto. Where such is the case, a wife, for the purpose of creating a tenancy by the curtesy, must be deemed to have been seised of all real property in which she had an estate of inheritance during the coverture and respecting which there is no actual disseisin or adverse possession: *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Bush v. Bradley*, 4 Day, 298; *Kline v. Beebe*, 6 Conn. 494; *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529; *Sweeney v. Montgomery*, 85 Ky. 55, 2 S. W. 562; *Ellis v. Dittay*, 94 Ky. 620, 23 S. W. 366; *Wass v. Buckman*, 38 Me. 356; *Day v. Cochran*, 24 Miss. 261; *Redus v. Hayden*, 43 Miss. 614; *Reaume v. Chambers*, 22 Mo. 36; *Harvey v. Wickman*, 23 Mo. 112; *Stephens v. Hume*, 25 Mo. 349; *Adair v. Lott*, 3 Hill, 182; *Jackson v. Sellick*, 8 Johns. 262; *Pierce v. Wanett*, 32 N. C. 446; *Childers v. Bumgarner*, 53 N. C. 297; *Murdock v. Reed*, 1 Disn. 274; *Merritt v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298; *Buchanan v. Duncan*, 40 Pa. 82; *McCorry v. King's Heirs*, 3 Humph. 267, 39 Am. Dec. 165; *Guion v. Anderson*, 8 Humph. 298; *Seim v. O'Grady*, 42 W. Va. 77, 24 S. E. 994; *Bragg v. Wiseman*, 55 W. Va. 330, 47 S. E. 90; *Barr v. Galloway*, 1 McLean, 476, Fed. Cas. No. 1037; *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239. A statute of North Carolina dispenses with seisin, both of law and of fact, and makes the estate by curtesy dependent on the title of the wife, regardless of her seisin or disseisin: *Sears v. McBride*, 70 N. C. 152. In an early decision in New York, the court conceded the claim of counsel that the rule requiring an actual seisin "applies only to cases in which the title of the person claiming is not complete until entry. Thus a person claiming by descent or devise has only a seisin in law before entry; and if he dies before entry, the inheritance will not go to his heir, but to the person last seised. Upon such a seisin of the wife, there could be no estate by the curtesy. Her issue would not be capable of inheriting from her, and the rule seems to be that, to enable the husband to be tenant by the curtesy, the wife must have such seisin as will enable her issue to inherit from her. Now, in all the cases in which an actual seisin of the wife has been held necessary, it will be found that she claimed either as heir or devisee, and not by virtue of a deed or conveyance to which effect is given by the statute of uses." Hence the court has held that, as the wife, in the case before it, claimed under a conveyance, her seisin was not required to create in her husband an estate by the curtesy: *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433. See, also, *Ellsworth v. Cook*, 8 Paige, 543, holding that where a decree settles the rights of a husband and wife in her lands, this is equivalent to an actual possession on his part, and entitles him to curtesy. A number of Kentucky decisions speak of the seisin of the husband during coverture as being essential to his estate by the curtesy: *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. 41; *Stinebaugh v. Wisdom*, 13 B. Mon. 467; *Petty v. Malier*, 15 B. Mon. 591; but we

apprehend that what the court meant was that the wife should be seised, and not that her husband should have a seisin independent of, or in addition to, hers.

2. **Time of.**—The definitions and descriptions given of estates by the curtesy, in speaking of the seisin of the wife, refer only to its existence during coverture. Hence, it does not appear to be material whether the seisin existed before or after the birth of issue, nor that, having existed at some time during such coverture, the wife was subsequently disseised. While seisin and birth of issue are requisites of the estate, they need not be concurrent: *Hunter v. Whitworth*, 9 Ala. 965; *Heath v. White*, 5 Conn. 228; *Comer v. Chamberlain*, 6 Allen, 166; *Jackson v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433.

#### d. Birth of Issue Alive and Capable of Inheriting.

1. **Necessity for.**—By the common law it is indispensable that issue be born alive during the coverture, capable of inheriting the estate of the mother, and this rule continues in force in a majority of the states of the Union wherein estates by the curtesy have not been abolished: *Baker v. Prewitt*, 64 Ala. 551; *Grimball v. Patton*, 70 Ala. 626; *Nicrosi v. Phillippi*, 91 Ala. 299, 8 South. 561; *McDaniel v. Grace*, 15 Ark. 465; *Heath v. White*, 5 Conn. 228; *Cannon v. Killin*, 5 Houst. 14; *Wolf v. Wolf*, 67 Ill. 55; *Churchill v. Reamer*, 8 Bush, 256; *Goff v. Anderson*, 91 Ky. 303, 12 Ky. Law Rep. 888, 15 S. W. 866, 11 L. R. A. 825; *Garner v. Wills*, 13 Ky. Law Rep. 726, 17 S. W. 1023; *Comer v. Chamberlain*, 6 Allen, 166; *Ryan v. Freeman*, 36 Miss. 175; *Taylor v. Smith*, 54 Miss. 50; *Dyer v. Wittler*, 14 Mo. App. 52; *Richter v. Bohnsack*, 144 Mo. 516, 46 S. W. 748; *Murdock v. Murdock*, 74 N. H. 77, 65 Atl. 392; *Hatfield v. Sneden*, 42 Barb. 615; *Schermerhorn v. Miller*, 2 Cow. 439; *Benedict v. Seymour*, 11 How. Pr. 176; *Marsellis v. Thalheimer*, 2 Paige, 35, 21 Am. Dec. 66; *Gentry v. Wagstaff*, 14 N. C. 270; *Childers v. Bumgarner*, 53 N. C. 297; *Haywood v. Moore*, 2 Humph. 584; *Bennett v. Camp*, 54 Vt. 36; *Winkler v. Winkler's Exr.*, 18 W. Va. 455. The necessity for the birth of children of the marriage has, however, been dispensed with by statute in several of the states: *Forbes v. Sweesy*, 8 Neb. 520, 1 N. W. 571; *Murdock v. Reed*, 1 Disn. 274; *Denny v. McCabe*, 35 Ohio St. 576; *Bruner v. Briggs*, 39 Ohio St. 478; *Hershizer v. Florence*, 39 Ohio St. 516; *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641; *McMasters v. Feltyberger*, 152 Pa. 313, 25 Atl. 644; *Kingsley v. Smith*, 14 Wis. 360.

2. **Time of Birth.**—All the definitions of tenancy by the curtesy imply that the birth of the issue must be during the coverture. The wife may have previously married and borne children which survive her second marriage. In this event, the existence of the children of the first marriage does not entitle the husband of the second marriage, but if that marriage has been fruitful, he may become a tenant by the curtesy. The extent of his estate has been much affected by statutes in this country. These statutes have usually been enacted with the purpose of preventing the diminution of

the interest of the widow's children by her second marriage, so far as may be accomplished without disinheriting the children of that marriage. Hence, the curtesy of the second husband is measured by the inheritable right of his child or children by that marriage, and he becomes a tenant by the curtesy of the shares inheritable by them, but not of any share inherited by the children of any marriage preceding his: *Hathon v. Lyon*, 2 Mich. 93; *Denny v. McCabe*, 35 Ohio St. 576; *Bruner v. Briggs*, 39 Ohio St. 478; *Tilden v. Barker*, 40 Ohio St. 411; *Kingsley v. Smith*, 14 Wis. 360. But if, under these statutes, the mother of an illegitimate child marries and has issue of that marriage, and thereby her husband acquires an estate by the curtesy, it is not diminished because of such illegitimate child: *Bruner v. Briggs*, 39 Ohio St. 478. By statute curtesy may exist because of the birth of a child prior to the marriage, as where it is shown to have been the child of the husband and wife due to their antenuptial intercourse, and the statute provides that if the mother of a bastard and its imputed father marry after its birth, it shall in all respects be deemed legitimate: *Hunter v. Whitworth*, 9 Ala. 965. The birth of the child must occur in the lifetime of the husband, because a tenancy by the curtesy, being only for the life of the husband and father, no estate in him can be created or exist after such death. The operation of natural laws must ordinarily restrict the birth to the life of the mother. It has been assumed, however, that if, after the death of its mother, a child should be delivered alive by aid of a Caesarian or other operation, its father could not thereby become entitled to an estate by the curtesy: *Matter of Winne*, 1 Lans. 508; *Marsellis v. Thalhimier*, 2 Paige, 35, 21 Am. Dec. 66; *Murdock v. Reed*, 1 Disn. 274.

It is not, as we have already shown, essential that the birth be concurrent with the fact of seisin or of ownership by the mother. It may be either before or after such ownership or seisin, provided there is a seisin during coverture: *Donovan v. Griffith*, 215 Mo. 149, ante, p. 458, 114 S. W. 621. If a wife conveys her real property without her husband joining in the deed, though she is by statute authorized so to do, the purchaser takes his title subject to the risk that the subsequent birth of a child to his grantor will create in her husband an estate by the curtesy enforceable against such purchaser: *Comer v. Chamberlain*, 6 Allen, 166.

3. **What Amounts to.**—The question of what is the birth of the child needs no answer, but there may be much doubt whether it was born alive and capable of inheriting. The burden of proving that the child was born alive rests upon him who claims an estate by the curtesy dependent on such birth. "Mere foetal life, that is to say, that life which is incepted in the womb of the mother, and which is derived from and dependent on the mother, is not sufficient for this purpose. On the contrary, the child's life must be distinct from, and independent of, the mother. It must have an independent existence of its own, manifested by an independent circulation within its own body after birth. Respiration or breathing is certainly evidence



of life, but we do not think it necessary to prove the fact of respiration from actual observation if such independent circulation is established and shown. It has been held that life may exist in a newly-born child without proof that it was observed to have breathed; indeed, it has been held that life may exist for a time without respiration. It is only one of the signs which manifest the existence of life. There are other signs or indications of life, among which the beating of the heart and pulsation of the arteries after the separation of the child from the body of the mother may be considered satisfactory evidence of life in the child, because they show the fact that circulation has been established in the body of the child and was maintained and carried on in the body of the child independently of the mother": *Cannon v. Killen*, 5 *Houst.* 14. In so far as this language may imply that life must exist subsequent to, or at, the cutting of the umbilical cord and the consequent separation of the infant from its mother, it has been disputed in the comparatively recent case of *Goff v. Anderson*, 91 *Ky.* 303, 15 *S. W.* 866, 11 *L. R. A.* 825, wherein it was said: "Born, as ordinarily understood, and in fact, means 'brought forth,' and a child is completely born when delivered or expelled from and becomes external of the mother, whether the placenta has been separated or the cord cut or not; and if not at that instant dead, it is to be regarded as born alive for every legal purpose whatever." In the same case it was held that a full inspiration was not necessary, that "a sort of struggling or gasping to get a full inspiration might be sufficient, though the child did not have strength to breathe enough to establish circulation of the blood independent of circulation derived from the mother through the umbilical cord, and there was no perceptible breathing when the cord was cut": *Goff v. Anderson*, 91 *Ky.* 303, 15 *S. W.* 866, 11 *L. R. A.* 825.

**4. Adoption of Child.**—Statutes in many of the states authorize the adoption of children, and confer on a child by adoption the same right of inheritance as if it were born of the adopting parents. These general provisions do not affect the right of the husband to an estate by the curtesy, nor entitle him to such an estate, though the child, by virtue of the adoption and the subsequent death of the adopting mother, inherited her real property or some portion thereof: *Murdock v. Murdock*, 74 *N. H.* 77, 65 *Atl.* 392.

**e. Death of the Mother.**—Upon the birth of issue, living and capable of inheriting, the husband of its mother became at once, by the common law, tenant by the curtesy initiate: *Hunter v. Whitworth*, 9 *Ala.* 965; *Watson v. Watson*, 13 *Conn.* 83; *Foster v. Marshall*, 22 *N. H.* 491; *Jackson v. Johnson*, 5 *Cow.* 74, 15 *Am. Dec.* 433; *Lancaster Co. Bank v. Stauffer*, 10 *Pa.* 398; *Jones v. Davies*, 5 *Hurl. & N.* 766, 29 *L. J. Eq.* 374, 8 *Week. Rep.* 628, 7 *Hurl. & N.* 527, 31 *L. J. Ex.* 116, 8 *Jur.*, *N. S.*, 592, 6 *L. T.* 444, 10 *Week. Rep.* 464, *Ex. Ch.* This is denied in *Weisinger v. Murphy*, 2 *Head*, 674. The denial can be sustained, however, only in those states where what are commonly known as the married woman's statutes, by giving such women com-

plete control over their real property, impliedly exclude their husbands from all estate or right of possession therein, in which case tenancy by the curtesy initiate is abolished, and only upon the death of the wife does any estate by the curtesy come into being: *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Lucas v. Lucas*, 103 Ill. 121; *Oldham v. Henderson*, 5 Dana, 254; *Comer v. Chamberlain*, 6 Allen, 166; *Hill v. Chambers*, 30 Mich. 422; *Porch v. Fries*, 18 N. J. Eq. 204; *Burke v. Valentine*, 52 Barb. 412; *Matter of Winne*, 2 Lans. 21; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562. It is not material that the death of the mother does not occur until after the death of her child, and that, therefore, it did not inherit anything from her. All that is requisite is that the child, when born, have capacity to inherit. This capacity exists, in contemplation of law, though its mother then had no estate to be inherited, and though, by surviving her child, it never had any opportunity to become her heir, provided always that during the coverture she had or acquired and was seised of an estate of inheritance: *Donovan v. Griffith*, 215 Mo. 149, ante, p. 458, 114 S. W. 621. The requisite birth of issue having taken place, the estate vests and is not subsequently divested by the death of such issue either during or after the life of the mother: *Hunter v. Whitworth*, 9 Ala. 965.

f. **Continuance of Marriage—Effect of Divorce.**—To the creation of a tenancy by the curtesy consummate not only is the death of the woman indispensable, but, furthermore, the man claiming the estate must have been her husband immediately preceding such death. Her continuance in the marital relation is equally indispensable to the continuance of the husband's estate by the curtesy initiate. The granting of a divorce, regardless of the cause, and irrespective of the question whether the husband or the wife was the applicant or the party in default, terminates the marital relation, and with it all his interest in her real property dependent on that relation. In it, therefore, he cannot thereafter be a tenant by the curtesy, either initiate or consummate. His rights are terminated as effectually as if he were dead, as also are the rights of all persons claiming under him, whether the transfer was voluntary or involuntary: *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 319; *Starry v. Pease*, 8 Conn. 541; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Townsend v. Griffith*, 4 Harr. (Del.) 440; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Oldham v. Henderson*, 5 Dana, 254; *Hays v. Sanderson*, 7 Bush, 489; *Wright v. Wright's Lessee*, 2 Md. 429, 56 Am. Dec. 723; *Barber v. Root*, 10 Mass. 260; *Dunham v. Dunham*, 128 Mass. 34; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Clark v. Slaughter*, 38 Miss. 64; *Doyle v. Rolwing*, 165 Mo. 231, 88 Am. St. Rep. 416, 65 S. W. 315, 55 L. R. A. 332; *Schult v. Moll*, 10 N. Y. Supp. 703; *Renwick v. Renwick*, 10 Paige, 420; *Davis v. Davis*, 68 N. C. 180; *Mattocks v. Stearns*, 9 Vt. 326; *Burt v. Hurlburt*, 16 Vt. 292; *Porter v. Porter*, 27 Gratt. 599. The

courts of Tennessee refuse to apply this rule against purchasers from the husband prior to the divorce: *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269; *Gillespie v. Worford*, 2 Cold. 632; and it may be made inapplicable by statutes refusing to relieve the wife from claims of her husband when she is the party for whose fault the divorce was decreed: *Meachan v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, 28 L. R. A. 618.

#### IV. Estates Subject to.

**a. The General Rule.**—Of the definitions heretofore quoted, some of them merely required the estate to be of inheritance, and others added that it must be in fee simple or fee tail. We think this latter qualification is not essential, and that whenever the estate of a wife is one to which her child may succeed by inheritance from her, its birth gives her husband an estate by the curtesy. At the common law it was necessary that the estate be a freehold, viz., one to the creation of which livery of seisin was indispensable: *Hall v. Crabb*, 56 Neb. 392, 76 N. W. 865; but not all freehold estates were subjects of this tenancy, for some of them were not of inheritance.

**b. The Source of the Title.**—It is not material whence, nor by what means, the wife acquired her title. The tests to be applied relate to the character of the title and not to its source: *Neil v. Johnson*, 11 Ala. 615; *Jones v. Wilson*, 60 Ala. 332; *Dake v. Sewell*, 145 Ala. 581, 39 South. 581; *Potts v. Shirley*, 28 Ky. Law Rep. 872, 90 S. W. 590; *Rabb v. Griffin*, 26 Miss. 579; *Young v. Langbein*, 7 Hun, 161; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *In re Kaufman*, 142 Fed. 898. Hence, the husband's estate exists though the property was acquired by her as the result of gifts or donations from third persons intended for the benefit of the family: *Neil v. Johnson*, 11 Ala. 615; or through a conveyance from him to a third person who subsequently conveyed to his wife: *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *In re Kaufman*, 142 Fed. 898.

**c. Estates for Life.**—An estate for the life of a wife cannot be a sufficient foundation for an estate by the curtesy, for it does not vest in her heir by descent nor continue after her death. It is not material that the property goes to her children or heirs upon her death, unless its so going is by way of inheritance from her: *Carpenter v. Davis*, 72 Ill. 14; *Moore v. Calvert*, 6 Bush, 356; *Churchill v. Reamer*, 8 Bush, 256; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918. Hence, if she holds the life estate, and they the estate in remainder, and therefore the property will become wholly theirs on her death, this does not create any curtesy in their father, for the sufficient reason that their interest comes to them as remaindermen and not by inheritance: *Allen v. Terrell*, 1 Ky. Law Rep. 336; *Janney v. Sprigg*, 7 Gill, 197, 48 Am. Dec. 557; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918; *Chavis v. Chavis*, 57 S. C. 173, 35 S. E. 507; *Beecher v. Hicks*,

7 Lea, 207; Stovall v. Austin, 84 Tenn. 700; Waller v. Martin, 106 Tenn. 341, 82 Am. St. Rep. 882, 61 S. W. 73; Haynes v. Bourn, 42 Vt. 686. Property which a wife has no power to devise cannot vest in her husband an estate by the curtesy: Mason v. Johnson, 47 Md. 347. The rule seems to have been ignored in Alabama, for it was there held that the second husband of a widow to whom dower had been assigned for her life out of the real property of her first husband was entitled to a life estate therein: Neil v. Johnson, 11 Ala. 615. In Iowa, also, a second husband may be tenant by the curtesy of his wife's dower estate in the realty of her first husband: Blair v. Wilson, 57 Iowa, 177, 10 N. W. 327.

Estates which a wife holds for the life of another may continue after her death, and in this country may descend to her heirs. They were not, however, at the common law, estates of inheritance, and we, hence, infer that her husband has no estate as tenant by the curtesy. This rule is probably abrogated by any statutory provision clearly making the estate one of inheritance, as where the term "lands" is defined as including lands, tenements and hereditaments and all rights thereto and interests therein, and all lands belonging to an estate are made inheritable: Alexander v. Miller, 7 Heisk. 65.

**d. Estates for Years.**—These were not, at the common law, estates of inheritance, and hence the husband had no curtesy therein: Murdock v. Reed, 1 Disn. 274. A different rule has been recognized in one state respecting what are there regarded as permanent leasehold estates renewable forever: Murdock v. Reed, 1 Disn. 274; but the general tendency is to retain and apply the common-law rule, notwithstanding statutory provisions enlarging the meaning of the terms "lands," "real estate," or "real property," so as to make them include lands, tenements, and hereditaments, and all rights thereto and interests therein: Lewis v. Glass, 92 Tenn. 147, 20 S. W. 571.

**e. Equitable Estates.**—In determining whether a husband is entitled to curtesy in the real estate of his wife, it is not necessary to inquire whether her interest was legal or equitable, provided it amounted to an estate of inheritance of which she was seised during the coverture: Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796; Jackson v. Bechtold P. & B. Mfg. Co. (Ark.), 112 S. W. 161; Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239, 41 N. E. 175, 28 L. R. A. 618; Luntz v. Greve, 102 Ind. 173, 26 N. E. 128; Payne v. Payne, 11 B. Mon. 138; Hill v. Anderson, 1 Ky. Law Rep. 269; Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306; Rawlings v. Adams, 7 Md. 26; Richardson v. Stodder, 100 Mass. 528; Alexander v. Warrance, 17 Mo. 228; Tremmel v. Kleiboldt, 75 Mo. 255; Soltan v. Soltan, 93 Mo. 307, 6 S. W. 95; McTigue v. McTigue, 116 Mo. 138, 22 S. W. 501; Miller v. Quick, 158 Mo. 495, 59 S. W. 955; Donovan v. Griffith, 215 Mo. 149, ante, p. 458, 114 S. W. 621; Tremmel v. Kleiboldt, 6 Mo. App. 549; Robinson v. Lakeman, 28 Mo. App. 135; De Camp v. Crane, 19 N. J. Eq. 166; Cushing v. Blake, 29 N. J. Eq. 399, 30 N. J. Eq. 689; Vanderveer v. Vanderveer, 49 Hun, 608, 1



N. Y. Supp. 897; *Sentill v. Robeson*, 55 N. C. 510; *Hunt v. Satterwhite*, 85 N. C. 73; *Lowry's Lessee v. Steele*, 4 Ohio, 170; *Pierce v. Hakes*, 23 Pa. 231; *Dubs v. Dubs*, 31 Pa. 149; *Freyvogel v. Hughes*, 56 Pa. 228; *Ege v. Medlar*, 82 Pa. 86; *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *Withers v. Jenkins*, 14 S. C. 597; *Baker v. Heiskell*, 1 Cold. 641; *Frazer v. Hightower*, 12 Heisk. 94; *Jones v. Jones' Exr.*, 96 Va. 749, 32 S. E. 463; *Robison v. Codman*, 1 Sumn. 121; *Fed. Cas. No. 11,970*; *Frey v. Allen*, 9 App. D. C. 400. It is indispensable, however, that the estate be such, and held under such conditions that, if legal instead of equitable, a husband could be tenant by the curtesy thereof. Hence, he may have no rights as such tenant when the estate is so limited as to indicate that it is for the sole use of the wife, and this free from any interest on his part therein: *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Cochran v. O'Hern*, 4 Watts & S. 95, 39 Am. Dec. 60; *Stokes v. McKibben*, 13 Pa. 267. There are even opinions to the effect that the husband has no curtesy in lands conveyed by himself to be held for the use of his wife: *Rigler v. Cloud*, 14 Pa. 361; *Sayers v. Wall*, 26 Gratt. 354, 21 Am. Rep. 303; or purchased by him with her funds: *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171. The only state whose decisions are clearly in opposition to the great weight of authority respecting curtesy of husbands in equitable estates are those of the courts of Nebraska. The statutes of that state provide that "when any man and his wife shall be seised in her right to any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by the curtesy," etc. This declaration does not differ from the common-law definitions of estates by the curtesy, but the courts of that state, on the assumption that an equitable estate is not one of which there can be seisin, and is less than a freehold, is not of inheritance, and therefore not subject to a curtesy: *Hall v. Crabb*, 56 Neb. 392, 76 N. W. 865; *In re Grandjean's Estate*, 78 Neb. 349, 110 N. W. 1108.

f. **Conditional Estates.**—"In case of a qualified or base fee, dower and curtesy cease when the estate is determined; and it is said that where an estate in fee is made determinable on some particular event, if that event happens, dower and curtesy cease with the estate. On the other hand, it is well settled in the English common law that, in the case of an estate tail, dower and curtesy continue after the estate is determined, as where land is given to a man or a woman and the heirs of his or her body, and the donee marries and dies, leaving no heirs of the body, the surviving wife is entitled to dower, or the husband, if there has been issue born alive, to curtesy, though the estate in tail is determined, according to its own limitation, and the interest of the donor or remainderman becomes immediate": *Norcutt v. Whipp*, 12 B. Mon. 65; *Webb v. Trustees of First Colored Baptist Church*, 90 Ky. 117, 13 S. W. 362; *Hatfield v. Sneden*, 54 N. Y. 280; *Hay v. Mayer*, 8 Watts, 203, 34 Am. Dec. 453; *Thorn-ton's Exrs. v. Krepps*, 37 Pa. 391; *Holden v. Wells*, 18 R. I. 802, 31

Atl. 265; *Wright v. Herron*, 6 Rich. Eq. 406; *Withers v. Jenkins*, 14 S. C. 597; *Odom v. Beverly*, 32 S. C. 107, 10 S. E. 835; *Crumley v. Deake*, 8 Baxt. 361; *Taliaferro v. Burwell*, 4 Call, 321. "It is well settled in respect to estates tail that, though the issue in tail fail by the death of the child or children in the lifetime of the wife, whereby her estate at her death is at an end, yet the husband takes curtesy, the same being a right incident to such an estate": *Holden v. Wells*, 18 R. I. 802, 31 Atl. 265.

We have seen above that in the case of a qualified or base fee, dower and curtesy cease when the estate is determined. "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is not at an end. As, in the case of a grant to A or his heirs, tenants of the manor of Dale, in this instance whenever the heirs of A cease to be tenants of that manor, the grant is strictly defeated": 2 Blackstone's Commentaries, 109. If an estate is given to a woman with a provision that it shall revert if she dies without issue before reaching the age of twenty-five years, then in the event of such death, her husband has no curtesy: *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641.

If the wife has a power of disposal, and exercises it, this cuts off all right of her husband to curtesy: *Pool v. Blakie*, 53 Ill. 495; *Harvey v. Brisbin*, 143 N. Y. 151, 38 N. E. 108; *Withers v. Jenkins*, 14 S. C. 597. The rule appears to be otherwise where the power of sale is vested in a third person: *Romains v. Hendrickson's Exrs.*, 24 N. J. Eq. 231; *Dunscumb v. Dunscumb*, 1 Johns. Ch. 508, 7 Am. Dec. 504; *Buchanan's Lessee v. Sheffer*, 2 Yates, 374; *Rankin's Appeal (Pa.)*, 16 Atl. 82.

If the limitation over is by "way of surprising use or executory devise, which takes effect at her decease, thereby defeating or determining her original estate before its natural expiration, and substituting a new one in its place, which could not be done at the common law, the seisin and estate which she had in the fee simple or fee tail will give the husband curtesy": *Martin v. Renaker*, 10 Ky. Law Rep. 469, 9 S. W. 419; *Hatfield v. Sneden*, 54 N. Y. 280; *McMasters v. Negley*, 152 Pa. 303, 20 Atl. 641; *Crumley v. Deake*, 8 Baxt. 361.

**g. Estates not in Possession.**—All the definitions of estates by the curtesy require that the wife shall be seised during coverture. This rule, as we have seen, has been so far modified in many states as to give the same effect to constructive as to actual seisin. Where the estate is, however, in remainder or reversion, or for any other reason does not entitle the wife to possession, there can be no curtesy, unless the particular estate ends during the coverture, and then the estate by the curtesy cannot antedate such ending: *Planters' Bank v. Davis*, 31 Ala. 626; *Baker v. Flournoy*, 58 Ala. 650; *Todd v. Oviatt*, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; *Mackey v. Proctor*, 12 B. Mon. 433; *Stewart v. Barclay*, 2 Bush, 550; *Potts v. Shirely*, 28 Ky. Law Rep. 872, 90 S. W. 590; *Hunt v. Phillips*, 32 Ky. Law Rep. 257, 105 S. W. 445; *Maupin v. Maupin's Guardian*, 33 Ky. Law Rep. 658,

110 S. W. 840; *Shores v. Carley*, 8 Allen, 425; *Webster v. Ellsworth*, 147 Mass. 602, 18 N. E. 569; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Redus v. Hayden*, 43 Miss. 614; *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6; *Martin v. Trail*, 142 Mo. 85, 43 S. W. 655; *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483, 54 S. W. 467; *Cox v. Hunter*, 152 Mo. 584, 54 S. W. 1102; *Orford v. Benton*, 36 N. H. 395; *Taylor v. Gould*, 10 Barb. 388; *Ferguson v. Tweedy*, 43 N. Y. 543; *Collins v. Collins*, 96 App. Div. 136, 89 N. Y. Supp. 414, 184 N. Y. 74, 112 Am. St. Rep. 569, 76 N. E. 731; *Carter v. Williams*, 43 N. C. 177; *Watkins v. Thornton*, 11 Ohio St. 367; *Hebuer v. Ege*, 23 Pa. 305; *Brandmier v. Pond Creek Coal Co.*, 219 Pa. 19, 67 Atl. 951; *Reed v. Reed*, 3 Head, 491, 78 Am. Dec. 777; *Prater v. Hoover*, 1 Cold. 544; *Carpenter v. Garrett*, 75 Va. 129; *Stoddard v. Gibbs*, 1 Sumn. 263, Fed. Cas. No. 13,468. An exception to this rule exists in Maryland, where the statute provides that the property of a married woman shall be held to her separate use with power to devise the same as a feme sole, and if she dies intestate without issue, her husband shall have a life estate in her real property. The court there held that a vested fee simple estate in remainder, subject to an intervening life estate, was real property belonging to the wife, and on her death her husband was entitled to a life estate therein: *Snyder v. Jones*, 99 Md. 693, 59 Atl. 118; *McKee v. Cottle*, 6 Mo. App. 416. If dower has been assigned to a widow and she is in possession and entitled to possession under the assignment, the interest of a female heir, being subject to such assignment and possession, does not entitle her husband to curtesy: *In re Cregier*, 1 Barb. Ch. 598, 45 Am. Dec. 416; *Upchurch v. Anderson*, 3 Baxt. (62 Tenn.) 410. If a conveyance, after the granting clause, excepts and reserves the rents and profits during the grantor's life, and he continues in possession, the grantee being a married woman, her estate is in remainder, and does not support a claim of curtesy in favor of her husband: *Dozier v. Toalson*, 180 Mo. 546, 103 Am. St. Rep. 586, 79 S. W. 420.

**h. Possessory and Pre-emption Rights.**—The few cases that have considered the subject have regarded a mere possessory right, not supported by any title, as not constituting such an estate as could create an estate by the curtesy in favor of the possessor's husband: *Brown v. Watkins*, 98 Tenn. 454, 40 S. W. 480; and the same conclusion resulted though she, because of her possession, had a pre-emption right, or, in other words, was entitled to acquire the title from the government: *McDaniel v. Grace*, 15 Ark. 465.

**i. Title Held in Trust.**—If the title is held by a married woman in trust, the husband's curtesy does not impair the trust, and if it extends to the whole beneficial interest, he can have no curtesy whatever: *Quinn v. Ladd*, 37 Or. 261, 59 Pac. 457; *Norton v. McDevitt*, 122 N. C. 755, 30 S. E. 24; *Chew v. Commissioners of Southwark*, 5 Rawle, 166.

**j. Proceeds of Sales and Leases.**—If lands upon which there exists an estate by the curtesy are subjected to a compulsory sale or taking, as where they are sold in partition proceedings, or taken in

the exercise of the right of eminent domain, the moneys realized from the wife's share or portion retain their character of realty, and her husband is hence entitled to their possession and use during her life: *Barkhoefer v. Barkhoefer*, 93 Mo. App. 373, 67 S. W. 674; *In re Camp*, 126 N. Y. 377, 27 N. E. 799; *Forbes v. Smith*, 40 N. C. 369, 49 Am. Dec. 432; *In re Tilghman's Estate*, 5 Whart. 44. So, if the property is leased, the lease is practically during the husband's life a lease of his estate, and he must be entitled to the rents, unless, by statute, his right to the possession or to the rents of his wife's realty has been taken away. So, if mining rights are granted upon lands, as the right to take coal or petroleum, the husband, during his life and as tenant by the curtesy, is entitled to the rents or royalties, and having received them, is under no obligation to account to the heirs of his wife therefor: *Bubb v. Bubb*, 201 Pa. 212, 50 Atl. 759; *Alderson's Admr. v. Alderson*, 46 W. Va. 242, 33 S. E. 228. But if the owner of land demises all the coal under the surface thereof, reserving royalties, this is a sale of the land and the royalties are the purchase price, and if he dies, a husband of his daughter does not become entitled to any part of such royalties as tenant by the curtesy: *Fairchild v. Fairchild (Pa.)*, 9 Atl. 255.

## V. Statutory Control of.

### a. Constitutional Law.

1. **Statutes Creating.**—If in any state estates by the curtesy have never existed or have been abolished, and a statute is enacted creating or reserving such estates, it may be given operation, at least from the death of the wife, and "there is no room for the suggestion that her constitutional rights were invalid." The power so exercised by statute is the same with the power to modify the rules of descent for the subsequent transmission of property: *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679.

2. **Statutes Abolishing.**—By the common law the tenancy by the curtesy initiate was a present estate vested in the husband and subject to his control and transfer, and capable of being taken in execution by his creditors. It must therefore, we think, be deemed a vested estate, and not subject to be defeated by an statute subsequently enacted undertaking to destroy estates by the curtesy and otherwise to deprive him of this vested interest: *Shryock v. Cannon*, 39 Ark. 434; *Erwin v. Puryear*, 50 Ark. 356, 7 S. W. 449; *Plumb v. Sawyer*, 21 Conn. 351; *Rose v. Sanderson*, 38 Ill. 247; *Noble v. McFarland*, 51 Ill. 226; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Logan v. Walton*, 12 Ind. 639; *Frantz v. Harrow*, 13 Ind. 507; *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195; *Clay v. Mayer*, 144 Mo. 376, 46 S. W. 157; *Withnell v. Withnell*, 69 Neb. 605, 96 N. W. 221; *Burson's Appeal*, 22 Pa. 164; *Bachman v. Chrisman*, 23 Pa. 162; *Wyatt v. Smith*, 25 W. Va. 813. Until the birth of issue, however, the husband had no vested estate, and, therefore, any statute enacted be-



fore that time, though after the marriage, was effective against him: *Phillips v. Farley*, 112 Ky. 837, 66 S. W. 1006; *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655. A like result must follow in those states where, before the birth of issue, statutes have been enacted expressly or impliedly abolishing tenancy by the curtesy initiate. Under such statutes the interest of a husband is a mere expectancy and may be destroyed by any statute enacted before he becomes a tenant by the curtesy consummate: *Hill v. Chambers*, 30 Mich. 422; *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679; *Thurber v. Townsend*, 22 N. Y. 517; *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Alexander v. Alexander*, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125. If, though issue has been born alive and the tenancy by the curtesy initiate has not been abolished, the wife has not acquired nor become seised of any real property to which the tenancy by the curtesy could attach prior to the enactment of the statute destroying or impairing the tenancy, such statute becomes applicable to all property which she may subsequently acquire. As to such property, her husband has no vested interest at the date of such enactment: *Hathon v. Lyon*, 2 Mich. 93; *Tony v. Marvin*, 15 Mich. 60; *Clarke v. McCreary*, 12 Smedes & M. 347; *Thurber v. Townsend*, 22 N. Y. 517; *Allen v. Hanks*, 136 U. S. 309, 10 Sup. Ct. Rep. 961, 34 L. ed. 414.

b. **What Statutes Abolish.**—The abolition of estates by the curtesy, where it has taken place, has generally been implied rather than direct, and has resulted from the class of statutes commonly designated as married women's acts, whereby they have been given absolute control of their separate estates, or, at least, have been given a greater control or power of disposition than they had at the common law. Whenever this power of control or disposition interferes with or takes away the rights which a husband theretofore possessed as tenant by the curtesy, either initiate or consummate, to that extent it impairs or divests his tenancy by the curtesy. Conformably to the rule heretofore stated, that his vested rights cannot be impaired by the retrospective operation of any statute, these married women's acts must either be considered as not designed to so affect such rights, or must be declared unconstitutional in so far as they attempt to do so: *Noble v. McFarland*, 51 Ill. 226; *Wolf v. Wolf*, 67 Ill. 55; *Koehler v. Miller*, 21 Ill. App. 557; *Branson v. Thompson*, 5 Ky. Law Rep. 359; *Dillon v. Dillon*, 24 Ky. Law Rep. 781, 69 S. W. 1099; *McLellan v. Nelson*, 27 Me. 129; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Smith v. Colvin*, 17 Barb. 157. The effect generally attributed to these statutes when applied prospectively is, that they abolish tenancies by the curtesy initiate and give to married women the power to dispose of their estates, if they choose to do so, either by conveyance or by will, but no such disposition being made, their surviving husbands become tenants by the curtesy consummate: *Neely v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752, 1 S. W. 66; *Hampton v. Cook*, 64 Ark. 353, 62 Am.

St. Rep. 194, 42 S. W. 535; Loyd v. Planters' Mut. Ins. Co., 80 Ark. 486, 97 S. W. 658; Moore v. Darby, 61 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346; Cole v. Van Riper, 44 Ill. 58; McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Heisen v. Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; Luntz v. Greve, 102 Ind. 173, 26 N. E. 128; Dillon v. Dillon, 24 Ky. Law Rep. 781, 69 S. W. 1099; Rivers v. Morris, 25 Ky. Law Rep. 1416, 78 S. W. 196; Jones v. Brown, 1 Md. Ch. 191; Tong v. Marvin, 15 Mich. 60; Brown v. Clark, 44 Mich. 309, 6 N. W. 679; Rabb v. Griffin, 26 Miss. 579; Stewart v. Ross, 50 Miss. 776; Myers v. Hansbrough, 202 Mo. 495, 100 S. W. 1137; Donovan v. Griffith, 215 Mo. 149, ante, p. 458, 114 S. W. 621; Allen v. Roush, 15 Mont. 446, 39 Pac. 459; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Porch v. Fries, 18 N. J. Eq. 204; Ross v. Adams, 28 N. J. L. 160; Hurd v. Cass, 9 Barb. 366; Clark v. Clark, 24 Barb. 581; Billings v. Baker, 28 Barb. 343; Burke v. Valentine, 52 Barb. 412, 5 Abb. Pr., N. S., 164; Mack v. Roch, 13 Daly, 103; Lansing v. Gulick, 26 How. Pr. 250; Jaycox v. Collins, 26 How. Pr. 496; Zimmerman v. Schoenfeldt, 3 Hun, 692, 6 Thomp. & C. 142; Arrowsmith v. Arrowsmith, 8 Hun, 606; Leach v. Leach, 21 Hun, 381; *In re Winne*, 2 Lans. 21; Beamish v. Hoyt, 25 N. Y. Super. Ct. 307; Williams v. Lanier, 44 N. C. 30; Houston v. Brown, 52 N. C. 161; Morris v. Morris, 94 N. C. 613; *Ex parte Watts*, 130 N. C. 237, 41 S. E. 289; Denny v. McCabe, 35 Ohio St. 576; Hershizer v. Florence, 39 Ohio St. 516; Robert v. Sliffe, 41 Ohio St. 225; Commissioners of Rouse's Estate v. Directors of Poor, 169 Pa. 116, 32 Atl. 541; *In re Voting Laws*, 12 R. I. 586; McCorry v. King's Heirs, 3 Humph. 267; Bottoms v. Corley, 5 Heisk. 1; Carter v. Dale, 3 Lea, 710, 31 Am. Rep. 660; Lewis v. Glass, 92 Tenn. 147, 20 S. W. 571; Stratton v. Robinson, 28 Tex. Civ. App. 285, 67 S. W. 539; Bennett v. Camp, 54 Vt. 36; Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740; Browne v. Bockover, 84 Va. 424, 4 S. E. 745; Graham v. Graham, 10 W. Va. 355; Winkler v. Winkler, 18 W. Va. 455; Alderson's Admr. v. Alderson, 46 W. Va. 242, 33 S. E. 228; Guernsey v. Lazear, 51 W. Va. 328, 41 S. E. 405; Kingsley v. Smith, 14 Wis. 360; Oatman v. Goodrich, 15 Wis. 589; Smith v. Smith, 21 D. C. 289; Uhler v. Adams, 1 App. D. C. 392; or, at least, tenants of a statutory life estate: Mason v. Johnson, 47 Md. 347. Sometimes it has been said that the tenancy by the curtesy initiate has not been abolished, but has been converted from an absolute to a contingent interest: Rabb v. Griffin, 26 Miss. 579; Stewart v. Ross, 50 Miss. 776; Hill v. Nash, 73 Miss. 849, 19 South. 707. Where no statutes of this character have been enacted, tenancy by the curtesy exists as at the common law, unless some statute has abolished it in express terms: Conoly v. Gayle, 54 Ala. 269; Thompson v. Thompson, 107 Ala. 163, 18 South. 247; Watson v. Watson, 13 Conn. 83; Appeal of Staples, 52 Conn. 421; Appeal of Ward, 75 Conn. 598, 54 Atl. 730; and a few statutes so abolishing it or containing provisions wholly inconsistent with it doubtless pre-

vail: *Allen v. Roush*, 15 Mont. 446, 39 Pac. 459; *Gaffney v. Peeler*, 21 S. C. 55; *Frost v. Frost*, 21 S. C. 501.

#### VI. Creation of, How may be Avoided.

Apparently the only way to avoid creating a tenancy by the curtesy through a conveyance or devise of property to a woman is to so limit the title that she may not at any time have an estate of inheritance therein. Though the conveyance is "to have and hold to her sole and separate use, free from the control, debts, or contracts of her present or any future husband," still it is possible that an estate by the curtesy may subsequently exist in his favor, for she may die intestate, and the property in that contingency must pass under the laws of inheritance of estates of decedents, and hence an opportunity may arise for the existence of an estate by the curtesy in the husband: *Connolly v. Mahoney*, 103 Ala. 568, 15 South. 903; *Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128; *Wood v. Raumer*, 118 Ky. 841 26 Ky. Law Rep. 819, 82 S. W. 572; *McTigue v. McTigue*, 116 Mo. 138, 22 S. W. 501; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001; *Cushing v. Blake*, 30 N. J. Eq. 689; *Weyand v. Weyand*, 1 Woodw. Dec. 1; *Rank v. Rank*, 120 Pa. 191, 13 Atl. 827; *De Hart v. Dean*, 2 MacAr. 60.

Indeed, it is the prevailing doctrine in England and the United States that it is not competent at common law in a grant to a wife of an estate of inheritance to exclude her husband from his right to curtesy, but it is equally well settled that in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention, to exclude and deprive the husband of curtesy: *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463. Possibly there are decisions ignoring this rule, for a person conveying or devising property to a woman is not bound to make a conveyance or devise which may accrue to the benefit of her present or future husband, and the courts, where the intention to exclude him appears, will strive to give it effect: *Northcutt v. Curry*, 6 Ky. Law Rep. 588; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879. This intent has been held to have been sufficiently expressed by a conveyance to a woman "for her sole and separate use, free from all use, interest or control of said husband, or any other," with an habendum "to the said E. D. H., her heirs and assigns forever, with a covenant of general warranty, and with the full power in her to sell, convey, follow and reinvest the proceeds, and dispose of such property or its proceeds by last will and testament, and always to the exclusion of any use, interest or control of her said husband or any other": *Rautenbusch v. Donaldson* (Ky.), 18 S. W. 536; "to her sole and separate use, free from the interference and control of her said husband, or any other person, to have and to hold the said estates, with all the privileges and appurtenances to the same belonging, to her and to her sole and separate use as aforesaid, free from interference or control of her said husband or of any

other person whatsoever, and to the child or children of the said L., or the issue of any deceased child in equal proportions": *Hatfield v. Sohier*, 114 Mass. 48; "to have and to hold in her own right, free from any claims or demands from her husband, or any other person or persons claiming through or against him in any way now or at any time hereafter": *Chapman v. Price*, 83 Va. 392, 11 S. E. 879; "to have and to hold the said granted premises with all the privileges and appurtenances to the same belonging to her, the said S. B. H., to her sole and separate use, free from the interference or control of her said husband, or any husband, and her heirs and assigns, to her and their only proper use and benefit forever": *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122, 42 N. W. 109. If the conveyance under which the wife acquired title was made by her husband, there is a stronger tendency than in other cases to so construe it as to exclude him from all curtesy or other marital right or interest in the property: *Jones v. Jones' Exr.*, 96 Va. 749, 32 S. E. 463; *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007.

A contract entered into between a husband and wife whereby in consideration of a sum designated she was to join with him in a conveyance and relinquishment of her dower in sundry lands, and both were to live separate and absolve each other from all the obligations of husband and wife, was held, after complete performance, to estop him from maintaining an action brought after her death to recover property which she had acquired with her own means, the court saying: "The covenants in the agreement were for the mutual benefit of both parties, and were acted upon by them. Ever after the execution of the agreement, the parties lived apart, and the plaintiff was relieved of his wife's support, and upon no principle of equity or good conscience should he now be permitted to have possession of the property, as tenant by the curtesy, which she afterward acquired with her own means, although it was not her equitable separate estate. By the terms of his own deliberate and solemn covenants he should be estopped, for otherwise it would be the grossest injustice, to prevent which the doctrine of estoppel may be invoked. It would be hard to find a case in which the claim of property is so inconsistent with honesty and fair dealing as is the plaintiff's in this, and if the doctrine of equitable estoppel should be applied in any case, it should be in this": *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463.



## LOHSE PATENT DOOR COMPANY v. FUELLE.

[215 Mo. 421, 114 S. W. 997.]

**MONOPOLY, What cannot be the Subject of.**—At the common law personal services could not be the subject of a monopoly. Unless there is property to be affected by a public interest, there is no basis for a charge of monopoly. (p. 503.)

**LABOR ORGANIZATIONS, Right to Form.**—Individuals have a perfect legal right to form labor organizations for the protection and promotion of the interests of the laboring classes. (p. 503.)

**AN INJUNCTION will not Issue to Enjoin Members of a Labor Organization** from peacefully withdrawing from the services of an employer. (p. 503.)

**COMBINATIONS in Restraint of Trade, What are not.**—The United Brotherhood of Carpenters and Joiners and their allied associations are not unlawful combinations in restraint of trade, but are legal and highly laudable when confined within proper bounds. (p. 503.)

**CONSPIRACY—Boycott.**—A combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and it may be enjoined. (p. 504.)

**LABOR UNIONS—Boycotts by, Which are Prohibited.**—The prohibition of the members of a labor organization from working for dealers, contractors and other persons who purchase and use building materials manufactured by the plaintiff in the conduct of his planing-mill is illegal, and a boycott to enforce such prohibition will be enjoined. (pp. 504, 526.)

W. M. Williams, Block & Sullivan, George S. Johnson and Herbert R. Marlatt, for the appellant.

John B. Dempsey, for the respondents.

**430** WOODSON, J. This suit had its origin in the circuit court of the city of St. Louis, the object of which is to enjoin the defendants from declaring and prosecuting a boycott against the appellant and its business.

Defendants demurred to the petition, which was by the court sustained. Plaintiff declined to plead further, and the court entered final judgment for defendants, and, in due time, plaintiff appealed the cause to this court.

As counsel for the respective parties do not agree upon just what the petition charges, it will be necessary to set it out in *haec verba*. Omitting the formal parts, it reads as follows:

**431** "The plaintiff, Lohse Patent Door Company, a corporation organized under the laws of the state of Missouri, files this its amended petition herein by leave of court, and alleges that it is and was at all times hereinafter men-

tioned engaged in the planing-mill business in the city of St. Louis, Missouri, to wit, in the manufacture and sale of sashes, doors, blinds and woodwork of all kinds for use in the erection of buildings, and also in the manufacture and sale of cabinet and kindred lines of woodwork. And plaintiff avers that during all the time that it has been so engaged in said line of business in the city of St. Louis it has enjoyed, and now enjoys, a large and profitable trade and business among builders and contractors for and upon building in the city of St. Louis and vicinity, exceeding in amount fifty thousand dollars yearly; that during all of that time it has been necessary for plaintiff to employ, and it has at all times so employed, and now employs, large numbers of skilled artisans in woodwork in the production of the articles and things which plaintiff manufactures and deals in, as above set forth, and it is necessary and essential to the continued and successful operation of the business of the plaintiff that it should continue to so employ such skilled labor. And plaintiff avers that at all times hereinafter mentioned and set forth, the employés of plaintiff were satisfied with the terms of their employment, the hours of their labor, and with the compensation paid to them by plaintiff for their services; that none of the employés of plaintiff herein were, at any of the times hereinafter mentioned, complaining of the nature of their employment, nor claiming any grievances or seeking any redress of any sort or nature in connection with their said employment, nor were they desirous, so far as plaintiff is advised, of becoming associated with the United Brotherhood of Carpenters and Joiners, hereinafter mentioned and referred to, or of any local lodge thereof, nor were they seeking any aid <sup>432</sup> or assistance from defendants with reference to their employment.

“Plaintiff further states that the United Brotherhood of Carpenters and Joiners of America in St. Louis is an association and organization consisting of numerous members, the identity of whom (except as shall be hereinafter set forth) is now unknown to the plaintiff, and whose membership consists of persons engaged in industry as carpenters and joiners and wood-workmen, and is composed in part of wood-workmen engaged in the same line of occupation and employment as that which the character of the business of the plaintiff makes it necessary that it should enjoy.

“Plaintiff avers that the United Brotherhood of Carpenters and Joiners, in the city of St. Louis is a trust, an illegal

association and combination, and that said association and organization is against public policy and contrary to law, in this, to wit: That it is contrived and intended and designed to create, for and in behalf of the members thereof in that particular line of industry, a monopoly, and to hinder and prevent others in the same line of industry, but not members of said association, from obtaining employment, and to stifle and destroy competition in that particular line of employment; to fix and maintain, by agreement among the members of said association and by the use of arbitrary methods, the price to be paid persons for services in that line of industry, and to fix and regulate the amount of labor which persons in that line of industry shall return for a specified consideration, and to restrict the supply of labor in that line by restraining the number of apprentices or persons learning the trade which any particular artisan may employ; and to hinder and prevent persons and corporations, engaged in such a business as necessitates the employment by them of artisans of the class and doing the character of work of those belonging to said <sup>433</sup> association, from employing for the performance of such work, any person or persons not a member or members of said association; and to hinder and prevent this plaintiff, and others engaged in the manufacture of similar articles, from employing, in the production thereof, artisans except such as are members of said association; and to hinder and prevent contractors and builders, and others whose business requires the use of materials such as are produced by the plaintiff, from procuring the same from this plaintiff or any other person, firm or corporation who or which, in the production of such articles, employ artisans of the class and kind such as compose said association, but who are not members thereof, and to hinder and prevent such contractors and builders from employing any person in the same line of industry but not members of such association; and to create a monopoly, to be enjoyed by the members of said association in the lines of industry hereinbefore set forth, and to destroy all competition therein, and to destroy and take away the business of all persons, firms or corporations employing artisans of the same class but not members of the association.

“And plaintiff states that by and under the terms and rules of said organization, the controlling and governmental body thereof is what is known as the ‘Carpenters’ District Council,’ of which the defendant, Reinhard Fuelle, is president, and the defendant, George C. Newman, is secretary,

and which body is composed of said two defendants and the other defendants and other persons whose identity is unknown to plaintiff herein; and that defendants herein are what is known as business agents of said association, and are the active representatives, agents and officers of said association of said Carpenters' District Council; that said Carpenters' District Council, so composed, is, by the scheme of said association, <sup>434</sup> authorized and empowered to, and does, approve rules and regulations for the government of the entire association and all of the members thereof, and which rules and regulations, so fixed, each member is called upon and required, by the rules of said association, to obey, and which said members do obey.

"That there have been promulgated by said association and approved by said District Council rules for the control of the members thereof, by which it is provided that no member thereof shall work at his trade for a longer number of hours per day than that prescribed by the District Council without the payment of extra compensation fixed by said District Council for such extra time, and that no members shall work upon holidays without the payment of such extra compensation so fixed, and upon certain holidays and other days not holidays, that no member shall do any labor; that no member shall work for wages or compensation fixed by the amount of work performed, but only and always must work on a time basis; that no member shall work for less than the rate of wage prescribed and fixed by said District Council without the special approval and consent of said District Council, and that the representatives of said District Council and of said association may, at any time, at their pleasure, examine into the wages being received by the individual member and ascertain whether or not said member is receiving at least the wages fixed and determined by said District Council, and that each member shall be provided with a working card when in good standing in the order, to be issued to him by said District Council, and that he shall not be allowed to accept employment or perform services for any person or under any terms except when holding such a card, and that no member shall employ more than one apprentice, the purpose thereof being to restrict the number of persons who may learn the trade of the members of said association and thus come in competition with them; <sup>435</sup> that when a person not a member of said association shall be employed to perform services, or shall desire to perform services similar to the occupation of mem-



bers of said association, he shall apply for membership in said association, otherwise he shall not be allowed to work at such trade or occupation, nor shall any member of the association be permitted to work at such trade or occupation with him, and the agents and representatives of said District Council and of said association are at all times authorized and empowered whenever in their or either of their judgment any of the rules and regulations aforesaid, promulgated by said District Council, are being violated, and especially whenever it appears to them or either of them, that members of the association are working in conjunction with others not members or are receiving wages less than those prescribed by said rules and regulations or are working on or with materials produced by any person, firm or corporation employing others than members of said association in the same line of trade and occupation, to immediately require all members of such association engaged in connection with the particular work upon or about which such conditions exist, to immediately and at once cease to carry on said work; and it is made the duty of each and every member of said association to obey this requirement; and it is provided by said rules and regulations that all of said rules are to be enforced upon and against the members thereof, and obedience by them to such rules is enforced by a series of fines and penalties levied by said Carpenters' District Council upon the members and by a forfeiture of his membership, so that plaintiff says by the terms of the organization of said association it has been placed in the power of the defendants, and their associates aforesaid as composing said District Council, and the business agents of said association, to immediately require and cause any and all members of said association to at once decline and  
436 refuse to perform services for customers of the plaintiff and for contractors, builders and other persons who may buy materials from any persons, firm or corporation using in the production thereof the services of others than members of said association.

“And plaintiff says that said association and said Carpenters' District Council, and said business agents acting therefor, are associated and affiliated with similar associations of other persons engaged in other lines connected with the building industry, the object and purpose of which associations are the same as the object and purpose of said United Brotherhood of Carpenters and Joiners, as hereinbefore set forth, and having officers and agents having and

exercising the same authority over their several and respective members as are had and exercised over said Carpenters and Joiners Association by said District Council, and that they act together in support of each other, and so acting together it is within the power of said District Council and said business agents to exercise the same authority over the members of said affiliated associations through their respective governing bodies.

“Plaintiff states that there has been intrusted to said Carpenters’ District Council, and to said business agents, the furtherance of the purposes for which said association was founded, to wit: The creation of a monopoly in that branch of trade and labor in behalf of the members of said association, and that defendants and their unknown associates are now actively and earnestly engaged in carrying out said purpose by the use of every means known to them.

“Plaintiff states that in the past year representatives of the defendants, as such Carpenters’ District Council, and said business agents, have communicated with the plaintiff and have required of it that it should have its employees become members of said association, and that it should decline and refuse to employ any person or persons in the furtherance of its business <sup>437</sup> hereinbefore described who was not a member of said association, and that plaintiff should permit defendants and their associates, and said association and its said District Council to regulate the hours of labor and the wages to be paid by plaintiff in the operation of its said plant, and have made known to plaintiff that in the event of the failure of plaintiff so to do, the defendants, as such Carpenters’ District Council, and as business agents of said association would immediately cause each and every member of said association to decline to accept service from any person buying materials from the plaintiff, and to quit service if engaged by any person buying materials from the plaintiff, and that they would also cause and procure the other and similar associations with which they were affiliated to take similar steps so as to cause all the members of said associations to decline to be employed by any person, firm or corporation who might purchase materials or supplies from plaintiff, and would boycott plaintiff and all materials manufactured and sold by plaintiff, and would cause and procure said other associations so to do; and would cause and procure contractors and dealers in the city of St. Louis to refuse and decline to buy materials from plaintiff.

"And plaintiff says that these defendants, in order to carry out the scheme of said association to create a monopoly in behalf of the members, have conspired and combined and confederated with each other, with other members of said association whose names are unknown, and with the officers, agents and members of other associations in other lines of the building industry organized for a similar purpose, to harass plaintiff and to injure it in a business way and to deprive it of the patronage of the contractors and builders of the city of St. Louis, until such time as plaintiff submits to their demands as hereinbefore set forth.

438 "Plaintiff states that the scheme of said association and the endeavors of said District Council and of the defendants herein, as such District Council, and as business agents of said association, to create a monopoly in behalf of the members of said association, and similar endeavors in their own behalf by the affiliated associations aforesaid, have been so far successful as that contractors and builders in the city of St. Louis are not able to obtain the requisite amount and supply of skilled labor of the class of the members of this and the affiliated associations entirely exclusive of members of said association and of members of affiliated associations; that plaintiff's customers, being said contractors and builders, are frequently and more often than otherwise under contract to complete or erect the particular building or do a given work within a given time, and that these defendants herein, as such District Council, and as the business agents of said association through their agents, have threatened to the plaintiff and to many of its customers (being such contractors and builders) that if they bought material from the plaintiff, and if they did not refuse further to deal with plaintiff in that regard, said Carpenters' District Council and said business agents would exercise their authority to cause such members of said association as were employed by said contractors and builders to quit such employment and to refuse to be employed by them, and not only that, but would also cause and induce said affiliated organizations, their officers and agents, to take similar steps with reference to their respective members, and thus cause such contractors and builders and customers of the plaintiff irretrievable injury and damage and hinder and prevent them from carrying on their business; and have issued circulars containing a declaration of boycott against the plaintiff and its manufactures, and containing threats



to cause all members of said association to cease from employment, and to refuse employment <sup>439</sup> with any person, firm or corporation buying or using materials produced by plaintiff; and have circulated and caused to be circulated such circulars among contractors and builders and others connected with the building trade in the city of St. Louis, and have threatened to maintain representatives in the vicinity of plaintiff's establishment and cause them to follow plaintiff's wagons engaged in delivering materials to plaintiff's customers, and make the same threats to such customers unless plaintiff acceded to such demands; that in some cases defendants did cause and call strikes and lockouts by the members of said association and other affiliated associations, in cases where some of said contractors and builders and customers of plaintiff refused to accede to said demands; that as a result of said threats and conduct, said contractors and builders (customers of the plaintiff, as aforesaid), have been led to fear strikes and lockouts in connection with the contracts which they have undertaken or might undertake, and they therefore have refused, and still refuse, to deal with plaintiff, as heretofore, and have in many instances been forced by defendants to sign written contracts not to deal further with plaintiff, all because and only because of such threats and intimidation and conduct by the defendants as such District Council, and as the business agents of said association, and because of the power of said District Council and of said defendants, as hereinbefore set forth, to act in that behalf as threatened and suggested; that by reason of such acts and conduct on the part of said defendants in fostering said monopoly and interfering with the rights of this plaintiff, the trade of the plaintiff in the city of St. Louis has been seriously impaired and is still further threatened by reason of the fact that defendants now threaten and now intend to continue to so interfere with contractors and builders and persons dealing with plaintiff, until such time as a complete and perfect monopoly <sup>440</sup> of all the trade in their line in the city of St. Louis shall have been obtained for and in behalf of the members of said association.

"The defendants are insolvent, and plaintiff does not know the names of the members of said association, other than the defendants, and they number in the city of St. Louis many thousands of persons, and plaintiff can have no adequate remedy at law because of their inability to ascertain the persons composing said association, and because of



the multiplicity of suits that would be entailed upon the plaintiff in an endeavor to right its wrongs by actions at law.

"Plaintiff says that under the scheme of said association, as above set forth, and under the powers conferred by said association upon said District Council and said business agents, and now being exercised and threatened as above set forth, each of said organizations is in restraint of trade, against public policy and in violation of the law, and that neither said association nor said Carpenters' District Council, as the governing body thereof, ought to be longer permitted to exist, and these defendants herein ought not longer be permitted to exercise the functions and powers which they are assuming to exercise as such District Council, and as business agents of said association, and officers thereof, in fostering and creating a monopoly for the membership of said association.

"Plaintiff alleges that it has not been able to ascertain the identity of all the persons composing said Carpenters' District Council, but that these defendants are the active managers thereof and also, as stated above, the business and active agents of said association, and plaintiff believes and avers that these defendants sufficiently represent each of said organizations to bring each thereof before the court for such orders and decrees as may be meet and proper herein.

"Plaintiff states that the value of the relief sought and the damages which will accrue to plaintiff if the <sup>441</sup> defendants be not restrained as herein prayed exceeds ten thousand dollars.

"Wherefore plaintiff prays that a temporary injunction may be granted the plaintiff, restraining and enjoining said defendants and each of them and their successors in office, individually and as members of said Carpenters' District Council and as business agents of said association, their confederates, associates, agents and representatives, and the officers, agents and representatives of the United Brotherhood of Carpenters and Joiners and of the Carpenters' District Council thereof, and said associations, from boycotting or making effectual, promulgating or in anywise proclaiming any boycott upon or against the plaintiff, or its goods, and from sending, conveying or delivering in any way to any person, firm, corporation or association any boycott notice, verbal or otherwise, upon or against the plaintiff, or its goods, and from in any way menacing, hindering or ob-

structing the plaintiff by interfering with its patronage, business of customers, and from in any way impeding the plaintiff from the fullest enjoyment of all the patronage, business and custom which it may possess, enjoy or acquire, and from interfering with the plaintiff or its business by threats to any person who might be or become a customer of the plaintiff, that said defendants or any of them will cause or procure any person or persons whomsoever to cease business relations with any such customer of plaintiff, and from causing or procuring by any order, direction, request or command any person or persons whomsoever to decline to accept employment from, or to cease employment with any person, firm or corporation because of the fact that such person, firm or corporation has been or is about to be, or contemplates becoming a customer of the plaintiff; and that upon a final hearing hereof said injunction may be made perpetual, and said United Brotherhood of Carpenters and Joiners and said Carpenters' <sup>442</sup> District Council may be adjudged and decreed to be illegal organizations, and said defendants, their associates, confederates, agents and representatives, and the other officers and agents and representatives of said association be forever enjoined from further exercising any of the functions thereof, or acting as officers or agents thereof, and that said associations be dissolved by the judgment and decree of this court.

"And that plaintiff have leave, whenever it may be able to do so, to make other persons who have combined with the defendants herein in the behalf aforesaid, and persons associated with them as members of said District Council, parties hereto, and to have process issued and served upon them.

"And for such other and further relief as to the court may seem meet and proper."

The demurrer, omitting formal parts, reads as follows:

"Now come Reinhard Fuelle, George C. Newman, Walter G. Cole, Charles P. Gore, Emil R. Ruhle, James W. Trainer and James N. Shine, defendants in the above-entitled cause, and demur to plaintiff's second amended petition herein, and for grounds of said demurrer say:

"1. That said second amended petition fails to state facts sufficient to constitute a cause of action against these defendants or either of them.

"2. That upon the averments of said second amended petition, plaintiff is not entitled to the relief prayed for, nor to any equitable relief.

"3. Because under the averments in said second petition it appears that for any cause for complaint which plaintiff may have against these defendants or any of them, have a complete and adequate remedy at law.

"4. That, if any right to proceed in a court of equity against these defendants or any of them exists, section 8979 of the Revised Statutes of Missouri of <sup>443</sup> 1899, expressly provides that the same shall be brought by the attorney general of the state or the circuit attorney of the city of St. Louis, when so directed by said attorney general.

"5. Because there is a defect of parties plaintiff."

1. The discussion of the legal propositions involved in this case took a wide range both in oral argument and in briefs.

Both show the great research made by learned counsel in the preparation and presentation of this case. So thorough and learned has it been, there remains but little or nothing to be said upon the principles underlying the case.

When reduced to its final analysis, this suit presents but two legal propositions for determination, namely:

First. Do the United Brotherhood of Carpenters and Joiners of the city of St. Louis and their allied associations, whom defendants represent, constitute a monopoly or combination in restraint of trade?

Second. Is the conduct and action of defendants, prohibiting its members from working for builders, contractors and such other persons who purchase and use building materials manufactured by plaintiff, legal or illegal, and if illegal, will a court of equity enjoin such illegal conduct?

We will dispose of those two propositions in the order in which they are stated.

First. According to the allegations of the petition and admissions of the demurrer, the United Brotherhood of Carpenters and Joiners of the city of St. Louis, and the various other associations with which it affiliates, are composed of carpenters, joiners and other persons who do carpenter work and other labor in the construction of houses and other buildings in the city of St. Louis and throughout the country. It <sup>444</sup> is alleged and admitted that the object and purpose of those associations is to shorten the hours of work and to increase the pay they are to receive for their labor.

While it might be conceded that labor organizations might be proper subjects for legislative control and regulation, yet the legislature has not in its wisdom seen proper to do so; and at common law personal service—an occupation—

could not be the subject of a monopoly. In discussing that question, in the case of *State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368, 60 S. W. 91, 51 L. R. A. 156, this court used this language: "But there is nothing here on which a monopoly can attach. The business is one of mere personal service; an occupation. Unless there is 'property' to be 'affected with a public interest,' there is no basis laid for the fact or the charge of a monopoly."

The authorities seem to be uniform in holding that individuals have a perfect legal right to form labor organizations for the protection and promotion of the interest of the laboring classes, and deny the power to enjoin the members of such organizations from peaceably withdrawing from the service of the employer: *Wabash R. R. Co. v. Hannahan*, 121 Fed. 563; *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135; *Bowen v. Matheson*, 14 Allen, 499; *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 752; *Thomas v. Cincinnati etc. R. R. Co.*, 62 Fed. 803; *Ames v. Union Pac. R. R. Co.*, 62 Fed. 7; *Atchison etc. R. R. Co. v. Gee*, 140 Fed. 153; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414.

Many more adjudications of the same nature exist and might be cited, but as there is no conflict between the modern decisions upon this question, it would be a useless waste of time and labor to cite more. These decisions are based upon the law which permits every one to enter into any kind of a contract which has for its object and purpose the protection and promotion of the interest of the parties thereto, as well as the betterment of their condition in life; and that <sup>445</sup> right to so contract is not curtailed or abridged if, perchance, the contract indirectly or incidentally operates in restraint of trade.

We must, therefore, hold that the United Brotherhood of Carpenters and Joiners and their allied associations, whom the defendants represent, are not unlawful combinations made and entered into in restraint of trade, but are legal and highly laudable when confined within proper bounds.

2. The second proposition presented for consideration seems to be equally well settled by the authorities; and nothing we might say upon the question could throw any light upon it or strengthen the principle of law upon which it is founded. We will, therefore, content ourselves by simply restating the rule as we find it in the numerous ad-



judications of this country, and quote from a few leading cases showing its application.

In brief, the petition charges defendants and those with whom they are affiliated with having entered into a conspiracy or an unlawful combination to injure and damage plaintiff's business by having coerced and intimidated certain contractors and builders from purchasing and using all building materials manufactured by it in any building to be constructed by them by prohibiting their members from working upon all buildings in which plaintiff's said materials were being used.

The demurrer admits the allegations of the petition to be true, except the allegation that the conduct of defendants is unlawful. In other words, counsel for plaintiff contends that the petition, in short, charges defendants with boycotting plaintiff's business, and that the demurrer admits the charge to be true; while counsel for defendants contends that the petition only charges them with having entered into an agreement to <sup>446</sup> protect their own interest and that the conduct complained of is not for that reason unlawful.

The word "boycott" has been defined by many courts, in different language, but all agree substantially as to the meaning of the word. After an extensive review of the authorities, the supreme court of Minnesota, in the recent case of *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 97 N. W. 663, 63 L. R. A. 752, defines the word in the following language: "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction."

If that is the proper definition of the word "boycott," then the petition clearly charges the defendant with being guilty of boycotting plaintiff's business, for the reason, as before stated, the petition charges the defendants with having formed a combination to injure plaintiff's business, by having caused the builders of the city of St. Louis, against their will, to withdraw from plaintiff their beneficial busi-

ness intercourse through threats that unless a compliance with their demands be made, the defendants will cause a strike to be called against the said business.

All the authorities hold that a combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy <sup>447</sup> regardless of the name by which it is known, and may be restrained by injunction.

In discussing this question the supreme court of Minnesota, in the case before cited, on pages 180 to 183, used this language:

"In *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99, Judge Thayer, speaking for the court of appeals of the eighth circuit, said: 'While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing, . . . either singly or in a body, even where such withdrawal involves a breach of contract, . . . yet they have very generally condemned those combinations usually termed "boycotts," which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments.'

"In the case of *Moores v. Bricklayers' Union*, 23 Week. Law Bull. 48, it appears that a labor union became involved in some controversy with one Parker concerning various matters, and, in order to bring Parker to their terms, the union notified materialmen that anyone selling to him would be boycotted. Moores, plaintiff in the action, persisted in selling to Parker notwithstanding this notice, and the union promptly notified all of Parker's customers or prospective customers that none of its members would work Moores' material, thereby causing serious damage to the business of Moores. There were no acts or threats of violence shown, but the court held that the acts of the members of the union amounted to an unlawful conspiracy, and a recovery against them was upheld.

<sup>448</sup> "While the question of boycott was not involved in the case of *Ertz v. Produce Exchange*, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. W. 737, 48 L. R. A. 90, the principles of the law applicable thereto were involved and discussed

by the court. It was there held, upon facts showing that a dealer in farm produce had established a profitable business, and that defendants had conspired to induce others not to deal with him, it not appearing that their interference with his business was to further any legitimate interests of their own, but done maliciously to injure him, that it was a conspiracy and actionable. The court there said: 'But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him.' The decision in that case is in line with the authorities generally, and places this court with the weight of authority in holding that boycotts are illegal. . . .

"What amounts to coercion, intimidation, or threats of injury must necessarily depend upon the facts of each particular case: *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307. In *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, it was said that: 'The clear weight of authority undoubtedly is that a man may be intimidated into doing or refraining from doing [a particular act] by fear of loss of life or injury to health or limb; and the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him not to do, or to do, that which otherwise he would have done or have left undone.' Intimidation, within the meaning of the law, is not necessarily limited to threats of violence to person or property. A combination between persons merely to regulate their own conduct and affairs is allowable, and a lawful combination, though others may be indirectly affected thereby; but a combination <sup>449</sup> to do injurious acts, expressly directed to another by way of intimidation or constraint, either of himself or of persons employed, or seeking to be employed, by him, is outside of allowable competition and unlawful: *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722. The interference is held by many of the authorities unlawful, although it does not affect existing contract relations. The wrongful interference with one's business and prospective customers is as much an infringement of his rights as though contractual relations actually existed and were interfered with: *Jersey City Ptg. Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Addison on Torts*, 7.



"In restraining boycotts, the authorities proceed on the theory that they are unlawful interferences with property rights. The constitution of our state guarantees liberty to every citizen, and a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; and their rights so guaranteed are fundamental, and can be taken away only by the law of the land, or interfered with, or the enjoyment thereof modified, only by lawful regulations adopted as necessary for the general public welfare. As remarked by Judge Bradley in the 'Slaughter-House Cases,' 16 Wall. 36, 21 L. ed. 394: 'For the preservation, exercise and enjoyment of those rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.' A person's occupation or calling, by means of which he earns a livelihood and endeavors to better his condition, and to provide for and support himself and <sup>450</sup> those dependent upon him, is property within the meaning of the law, and entitled to protection as such; and as conducted by the merchant, by the capitalist, by the contractor or laborer, is, aside from the goods, chattels, money, or effects employed and used in connection therewith, property in every sense of the word. Labor may organize, as capital does, for its own protection and to further the interests of the laboring class. They may strike, and persuade and induce others to join them, but when they resort to unlawful means to cause injury to others with whom they have no relation, contractual or otherwise, the limit permitted by the law is passed, and they may be restrained."

The same question came before the supreme court of Michigan, in the case of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407, and this language was used:

"It is conceded that courts of equity have jurisdiction to restrain conspiracies of this character when irreparable injury is sure to follow. Suits at law would be inadequate, and a multiplicity of suits at law would arise. Complainants were engaged in a lawful business, and carrying it on in a lawful manner. They had done nothing to the defendants, or any of them, either illegal, immoral or unjust.



They were paying wages to their teamsters in fact greater than the union teamsters received, because they made no deductions for certain lost time which the union employers made. The law protects them in the right to employ whom they please, at prices they and their employes can agree upon, and to discharge them at the expiration of their term of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure <sup>451</sup> better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor when, to whom, and for what price he chooses is involved.

"The five teamsters of the complainants were satisfied with their wages and their treatment. By the action of the defendants, they were thrown out of employment during the summer, except as complainants employed them, when they could, at other work about their mill. The union would not permit Mr. Pfaff to use a horse and wagon which complainants tendered him free of expense, in order that he might provide for himself and family. A boycott of labor as well as of capital is therefore involved in this controversy. The acts and conduct of these defendants are not those of freedom, but of tyranny.

"Let us look at the correlative of what these defendants did. If employes have the right to combine to fix their wage rate—and this is conceded—employers have the like right to combine to fix a rate they are willing to pay. The law is the same for both, and is alike open to both. If the employers of Detroit had combined in secret organization, established a rate, and agreed to boycott, in the manner these defendants boycotted complainants, any employer and his laborers who would pay more than the price the combination had agreed to, and had carried the conspiracy out,

as was done here, would <sup>452</sup> these defendants consider that just and lawful conduct? Neither courts of equity nor of law would turn such employer and employés away from its temple of justice without a remedy.

"It requires no argument to show that in this case, both in reason and authority, actions at law would be utterly inadequate. The course pursued by these defendants, if unchecked, would soon ruin the complainants' business, and bring upon them financial ruin. The defendants and their associates well knew this, and undoubtedly hoped to force complainants to abdicate their legal rights, and to permit defendants to dictate whom complainants should employ, the price they should pay, and the reasons for discharging their employés. While some writers have doubted the remedy by injunction, it is now settled beyond dispute: *Thomas v. Cincinnati etc. R. R. Co.*, 62 Fed. 803; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551; *Vegehn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; *Davis v. Zimmermann*, 91 Hun, 489, 36 N. Y. Supp. 303; *Gilbert v. Mickle*, 4 Sand. Ch. 357; *United States v. Elliott*, 64 Fed. 27; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99; *Toledo etc. R. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. Many more authorities might be cited.

"There is a long list of civil and criminal authorities which might also be cited holding such combinations unlawful. Among them are the following: *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *Regina v. Bunn*, 12 Cox C. C. 316; *Rex v. Ferguson*, 2 Stark. 489; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *People v. Kostka*, 4 N. Y. Cr. 429; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *People v. Melvin*, 2 Wheel. <sup>453</sup> C. C. 262; *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32 L. ed. 223. For instances of lawful combinations, see *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1; *Wood v. Bowron*, 10 Cox C. C. 344; *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Allen v. Flood*, [1898] L. R. App. Cas. 1; *Brewster v. Miller*, 101 Ky.

368, 41 S. W. 301, 38 L. R. A. 509; *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 37 L. R. A. 455, 33 Atl. 1; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367.

"The law abhors subterfuges. It lays aside the covering and looks to the actual facts beneath. In the language of Chief Justice Shaw: 'The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguise it may assume': *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

"Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats. So, where banners were displayed in front of one's premises bearing the following inscription: 'Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.'—it was held unlawful, and the act restrained by injunction: *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307. The court said: 'The banner was a standing menace to all who were, or wished to be, in the employment of the plaintiffs, to deter them from entering the plaintiff's premises.' The court held that the display of the banners was part of the scheme unlawfully entered into.

"So, when these defendants went, in numbers of from five to twenty-five, along the streets, and into the business houses of complainants' customers, distributing these circulars, which contained false statements, as hereinafter shown, and which commenced and closed with <sup>454</sup> the words, 'Boycott Jacob Beck & Sons,' they intended, in emphatic manner, to convey to the customers of complainants that they would be treated in like manner unless they ceased to trade with complainants. The distance that this was done from the mill of the complainants does not detract from its character or harmfulness. It was just as effective and as wrong when done one thousand feet from the mill as when done ten feet from it. The act itself, not the distance, determines its character."

Upon the same subject the supreme court of Maryland, in the case of *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 753, said:

"The plaintiff was engaged in a lawful business, and was carrying it on in a lawful way. There is no pretense that he had done anything to any of the defendants which was either illegal, immoral or unjust. He was paying wages to his employes at a higher rate than wages paid by other establishments, and was willing to still further increase them



so as to reach the ten per cent addition which the defendants demanded he should pay. The law protects him in his right to employ whom he pleases, at prices which he and his employes can agree upon, and he has the further right to discharge them at the expiration of their term of service, or for violation of their contract. This right must be conceded, or personal liberty is a delusion. On the other hand, the employes have a perfect legal right to fix a price upon their labor, and to refuse to work unless that price is obtained. They have the right both as individuals and in combination. They may organize to improve their condition and to secure better wages. They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion <sup>455</sup> of these rights, it is a damage without remedy. But the law does not permit either employer or employe to use force, violence, threats of force or threats of violence, intimidation or coercion. As is very aptly stated by the supreme court of Connecticut in *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890: 'It seems strange that in this day, and in this free country—a country in which law interferes so little with the liberty of the individual—it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own, so long as he does nothing unlawful and acts with due regard to the rights of others; and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control by means little, if any, better than force, the action of employers.' *Glidden's* case was a criminal prosecution. The indictment charged that if the Carington Publishing Company did not yield to the demands of the defendants with respect to discharging certain of its workmen and with respect to employing others, they, the defendants, and their associates would threaten all persons dealing with the corporation, and that they could and would so control, boycott and injure the business customers, and by stopping and preventing the patronage of others through threats and intimidations and by other unlawful means compel such customers, though against their will, to cease doing business with the subscribers and other patrons of the pub-



lishing company; and that the defendants would not give up or abandon those proceedings to injure the business of the company until they had either destroyed said business and prevented it from being carried on, or until the company should comply with their demands. In addition to the language we have just above quoted from the judgment of the court, the opinion states: 'If we look at this <sup>456</sup> transaction as it appears on the face of this information we shall be satisfied that the defendants' purpose was to deprive the Carrington Publishing Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was a selfish one—to gain an advantage unjustly, and at the expense of others, and therefore the act was legally corrupt. As a means of accomplishing the purpose the parties intended to harm the Carrington Publishing Company, and therefore it was malicious.' A case strikingly like the one at bar is *Beck v. Railway Teamsters Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407. In the case which has last been alluded to, an injunction was issued to restrain a boycott, and the boycott circular was somewhat more elaborate but not more pointed than the one which we have quoted in full in an early part of this opinion.

"It is too late to doubt the jurisdiction of a court of equity to grant relief in such cases as this, if the averments of the bill are sustained by the evidence. The adjudged cases seem to be all one way: *Thomas v. Cincinnati etc. R. R. Co.*, 62 Fed. 803; *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722; *Toledo etc. R. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Barr v. Essex Trades Council*, 35 N. J. Eq. 101, 30 Atl. 881; *Sherry v. Perkins*, 147 Mass. 212, 7 Am. St. Rep. 689, 17 N. E. 307; *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, 43 L. R. A. 803; *Casey v. Cincinnati Typ. Union*, 45 Fed. 135, 12 L. R. A. 193; *Passaic P. Works v. Ely etc. Co.*, 62 L. R. A. 694, note 4. This list of cases might be swelled a hundred-fold; but we do not deem it necessary to cite any others. Those that we have referred to are quite analogous to the one now before us.

"In *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193, there was an attempt to compel the plaintiff, the proprietor and publisher of a daily and weekly newspaper, to unionize his establishment. No violence <sup>457</sup> or threats of violence were used, and the court says it was an

organized conspiracy to force the plaintiff to yield his right to select his own workmen, and submit himself to the control of the union, and to allow it to regulate prices for him and to determine whom he should employ and whom he should discharge. In other words, it was an organized effort to force printers to come into the union or be driven from their calling for want of employment, and to make the destruction of the plaintiff's business the penalty for his refusing to surrender to the union. Whatever moral obligation may have been incurred by the plaintiff by reason of his promises to unionize his office, they were wholly without consideration. 'No case has been cited where upon a proper showing of facts an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way. At common law an agreement to control the will of employers by improper molestation was an illegal conspiracy.' "

This question also came before the supreme court of New Jersey in the case of *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, which is one of the best and most carefully considered cases to be found upon the subject, and on pages 111 to 119 this language is used:

"No unprejudiced person at this day wishes to place any obstacle in the way of labor organizations conducting their operations within lawful limits. It is unfortunate that, despite the warning and counsel of accredited leaders, the reckless and revengeful among the members, with the vicious and lawless always to be found among the idle, so often take advantage of labor demonstrations to commit acts of violence against persons and property, and thus weaken the sympathy of the public with the system. Yet, everyone must acknowledge that organization has accomplished much in the past for the benefit of the workingman,<sup>458</sup> and recognize its possibilities to secure to him, in the future, the enjoyment of other privileges. But while engaged in this laudable purpose, those who give direction to affairs should not attempt to secure their ends by infringing the lawful rights of others. When they are accused of so doing, it is the province of the courts, when the question is properly presented, to define and protect the rights of those brought within their jurisdiction. In discharging this duty, judges can only decide on established principles and rules, and are not empowered to create rights or initiate new powers or privileges. That is a legislative, not a judicial, function. It would seem to be unnecessary to state such elementary

truths were it not that other views appear to be entertained by some. . . .

"Are the defendants, then, privileged knowingly to inflict this injury on the complainant? 8 Harv. Law Rev. 1.

"A man's business is property. By the first section of the bill of rights of the constitution of New Jersey, the right of acquiring, possessing and protecting property is classed, as a natural and inalienable right which all men have, with those of enjoying and defending life and liberty, and of pursuing and obtaining safety and happiness. This is an echo of Magna Charta repeated in the Declaration of Independence. Mr. Justice Bradley, in the Slaughter-house Cases, 16 Wall. 36, 21 L. ed. 394, says: 'For the preservation, exercise and enjoyment of these rights [life, liberty and the pursuit of happiness] the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.'

459 "Mr. Barr's business of publishing the paper with the incidents of its circulation and advertising was as much his property as were the type and presses upon which the paper was printed. A harmful interference with the circulation and with the advertising in his paper was, therefore, an injury to his property. It was Mr. Barr's personal right, without interference or dictation from any person or persons, to employ, in the prosecution of his business, such mechanical appliances as were safe and healthful, and to employ, in the protection of his paper, such persons and lawful means as he might choose.

"It is said in *Hilton v. Eckersley*, 6 El. & B. 47: 'It is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it [his business] on according to his own discretion and choice.'

"Mr. Justice Beatty, in *Coeur D'Alene Con. & Min. Co. v. Miners' Union*, 51 Fed. 260, 19 L. R. A. 382, says: 'Whatever enthusiasts may hope for, in this country every owner of property may work it as he will, by whom he pleases, at such wages and upon such terms as he can make; and every

laborer may work or not, as he sees fit, for whom, and at such wages as he pleases; and neither can dictate to the other how he shall use his own, whether of property, time or skill.'

'Sir William Erle, in his book entitled 'The Law Relating to Trades Unions,' which Lord Esher has said is a book more full of careful and accurate law than is to be found in many judgments (at page 13), says: 'These propositions assume that a person has a right to do so as he chooses with his own, whether labor or capital, within the limits set by law; that a right involves a prohibition against the infringement thereof, and that a prohibition involves a remedy for the violation thereof.'

'At page 12: 'Every person has a right under the law, as between him and his fellow-subjects, to full <sup>460</sup> freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction of the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another, in the exercise of the right, comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or indictment, as the case may be. It is equally wrong whether it be done by one or by many—subject to this observation, that a combination of many to do a wrong, in a matter where the public has an interest, is a substantive offense of conspiracy.'

'This freedom of business action lies at the foundation of all commercial and industrial enterprises—men are willing to embark capital, time and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them from interference by those who are not interested with them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have come to the time when capital will seek other than industrial channels for investments, when enterprises and development will be crippled, when interstate railroads, canals and means



of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain changes of co-operative systems.

<sup>461</sup> "The acts of the defendants directly infringe upon the exercise of this right by Mr. Barr. True, explicitly in words, they recognize the right and protest earnestly that they have no wish to interfere with him in the management of his business, with such means as he may select, but is it not perfectly apparent that the only purpose of the movement is to force him to abandon his determination to use plate matter in the make-up of his newspaper?

"Certain members of Typographical Union No. 103, who were employ  s in his newspaper office, abandoned his employment. This they had a perfect right to do under the law. No man can be required to work for another unless he so desires, and it is his right, outside of contractual duties, to cease an employment which is distasteful to him, and, within the limit authorized by the statute of 1883, it is lawful for a number to combine to leave the service of their employer. If the defendants had stopped here, they would have been clearly within the exercise of their legal rights. But the members of the Typographical Union No. 103 were not content to stand on this right; they, through the Essex Trades Council, are affiliated with other unions and aggregate a body in a single county of this state which boasts (and I have no doubt truly) of a purchasing power of four hundred thousand dollars a week. The bare declaration by the Typographical Union that it no longer recognized the 'Newark Times' was, according to Mr. Beckmeyer's affidavit, sufficient, under this perfect organization, to render it incumbent upon every member of these different unions to withhold his patronage from it. Not only this, but by the passage of the resolutions mentioned by the different unions, and the distribution thereof among advertisers, a moral intimidation was brought to bear upon the latter to further cripple the paper, either by wholly withdrawing their advertisements or by leaving spaces, a most effective <sup>462</sup> method of calling attention to the fact that the paper was under the ban of organized labor.

"Why this action? It must have had a purpose. None of the different labor organizations or the members thereof, except the Typographical Union No. 103, had or has any grievance against the complainant. Their action, in the language of the times, was purely sympathetic. As to the

typographical union, its members had no complaint against Mr. Barr, except that he used certain appliances which were not acceptable to the union. He paid the wages fixed by, and employed only members of, the union. The withdrawal of certain of the members from his employment was solely because he chose to use plate matter interdicted by the union, and it is plain, if the complainant would forego his own judgment in the management of his business in this regard, and comply with the wishes and determination of the typographical union with reference thereto, all matters being as they were, the whole difficulty would be at an end. To effect this purpose, therefore, the typographical union, through the trades council, enlisted the co-operation of the other organizations in an attempt to so impair the success of the newspaper that the complainant would be forced to accept the alternative proposed rather than sustain the loss.

"We return to the question whether defendants' acts are actionable.

"Malicious injury to the business of another has long been held to give a right of action to the injured party: *Garret v. Taylor*, Cro. Jac. 567; *Keeble v. Hickeringill*, 11 East, 574; *Gunter v. Astor*, 4 J. B. Moore, 12; *Lumley v. Gye*, 2 El. & B. 216; *Gregory v. Brunswick*, 6 Man. & G. 205; *Young v. Hichens*, 6 Ad. & E., N. S., 606; *Temperton v. Russell* (1893), L. R. 1 Q. B. 715; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; *Lucke v. Clothing Cutters'* <sup>463</sup> and *Trimmers' Assembly*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505, 19 L. R. A. 408; *Curran v. Galen*, 22 N. Y. Supp. 826; *Bradley v. Pierson*, 148 Pa. 502, 24 Atl. 65; *Ryan v. Burger & Hower Brewing Co.*, 13 N. Y. Supp. 660; *Moore v. Bricklayers' Union*, 23 Week. Law Bull. 48, 7 Corp. L. J. 108; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *International etc. R. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559; *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 South. 934; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Mapstrick v. Ramge*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739.

"In *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, Chief Justice Chapman says: 'Freedom is the policy of this country. But freedom does not imply a right in one

person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace.'

"Mr. Justice Van Syckel, in *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669, after reviewing the cases involving the recovery of damages in an action on the case as for a conspiracy, says: 'The rule to be deduced from these cases, and one which has the most ample support, is that, while a trader may lawfully engage in the sharpest competition with those in a like business by holding out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet, when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results from it the injured party is entitled to redress. Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation. The courts look through the instrumentality or means used to the wrong perpetrated with the malicious intent, and base the right of action upon that.' The right of action depends, then, not so much upon <sup>464</sup> the nature of the act as upon the intent with which it is done, always assuming that injury has attended the doing of it. Mr. Justice Taft, in *Toledo etc. R. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387, with reference to a condition similar to that presented here, says. 'Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or ends which make the combination an unlawful conspiracy, for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e., with the intention to injure another without lawful excuse': Citing many authorities.

"In *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, it is said: 'If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in

fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it.'

"Lord Justice Bowen, in *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. Div. 608: 'Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong': See, also, *Templeton v. Russell* (1893), L. R. 1 Q. B. 715.

"This renders necessary an inquiry as to the intent of the defendants to ascertain if the case falls <sup>465</sup> within the class in which it is held that a malicious motive in the defendant may make an act which would not be wrongful without the malice, a wrongful act when done with malice: *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 608. From the authorities, the test is, Has the injury been inflicted intentionally and without legal excuse?

"When we speak in this connection of an act done with a malicious motive, it does not necessarily imply that the defendants were actuated in their proceedings by spite or malice against the complainant Mr. Barr, in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do: *Temperton v. Russell* (1893), L. R. 1 Q. B. 715. In this case the defendants have, I doubt not, no personal spite against Mr. Barr individually, and no desire to do him a personal injury. Nor do I suppose they wish to permanently injure his enterprise, for they undoubtedly want re-employment for those who left him. They only wish, by crippling his business, to compel him to accede to their views as to materials he shall use in the make-up of his paper. They in fact claim that they had no intention to injure the business of the complainant, and that their only desire was for the protection of themselves. If the injury which has been sustained or which is threatened is not only the natural but the inevitable consequence of the defendants' acts, it is without effect for them to disclaim the intention to injure. It is folly for a man who deliberately thrusts a firebrand into a rick of hay to declare, after it has been destroyed, that he did not intend to burn it. If a person deliberately discharges a loaded pistol, at point-blank range, directly at the person of another, it is useless for him to say that he



did not intend to maim his victim. The law, as a rule, presumes that a person intends the natural result <sup>466</sup> of his act; and this is true with reference to civil as well as criminal acts. 'Courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention': *United States v. Kane*, 23 Fed. 748.

"What other result than injury could ensue to the business of the 'Newark Times,' published and circulated in Newark and its vicinity, if organizations of individuals representing there a purchasing power of four hundred thousand dollars a week, each and every one not only determined not to patronize the paper or to buy it, but by resolutions passed in their various organizations call upon the trading community to cease advertising in it, with implied threats that the appearance of an advertisement by a tradesman in the paper would be a warning to the members of the organizations to avoid trading with such persons? Loss of business is the only natural result to be expected from such a condition of affairs, and if continued the failure of the enterprise would seem to be inevitable. That this is not an unfounded fear, we have it proved and admitted by the resolutions of the unions that the property of the complainant has already been injured by the acts of the defendants."

The supreme court of California, in the case of *Goldberg etc. Co. v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, 86 Pac. 806, 8 L. R. A., N. S., 460, said:

"We think that the complaint clearly states facts sufficient to constitute the cause of action alleged. It is not necessary here to undertake to define the limits within which a number of persons conspiring for the purpose of injuring the business of another may legally do acts tending to accomplish that result. It is averred in the complaint that in the case at bar, and for the purpose above stated, and with intent to <sup>467</sup> threaten and intimidate employes and patrons and customers of plaintiff, the said defendants do keep immediately in front of plaintiff's place of business, and threaten to so keep there, representatives and pickets bearing the placards and transparencies above set forth, and that by said means they have intimidated patrons and customers of plaintiff from entering said place of business, and will, if not restrained, continue to so intimidate the said patrons. It cannot be successfully contended that the said

acts of defendants committed immediately in front of plaintiff's place of business as aforesaid could not, in the nature of things, have had the effect of intimidating plaintiff's patrons, and as it is averred that they did have that effect, the fact of such intimidation must, for the purposes of this case, be considered as established. And such acts, having such effect, undoubtedly interfered with and violated plaintiff's constitutional right to acquire, possess, defend and enjoy property. In many cases cited in respondent's brief a 'boycott' was enjoined without reference to the means used to carry it into effect; as, for instance, in *Oxley Stave Co. v. Coopers' etc. Union*, 72 Fed. 695, it was held that: 'A boycott by the members of trades unions or assemblies (which term in law implies a combination to inaugurate and maintain a general proscription of articles manufactured by the party against whom it is directed) is unlawful and may be enjoined by a court of equity.' But there is no necessity to go that far in the case at bar; here the alleged acts tended directly to intimidate customers, and did intimidate them. That in such a case the threatened acts will be enjoined has been frequently held. In *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264, the court said: 'That a conspiracy existed among a number of these officers and members to stop and thereby injure the business of complainant by intimidation and violence is evident. . . . These being the facts in the case, the law is clear and emphatic. <sup>468</sup> The jurisdiction being established, is there any doubt as to whether the court should, in this case, grant the temporary injunction prayed for. I am clear there is not. As now presented, the court must grant the writ, in broad and unmistakable terms, commensurate with the exigencies of the situation, as shown by the facts and evidence upon this proceeding. To do so will work no hardship, nor will it even hamper the actions of any law-abiding person. Indeed, no one without purpose to commit an unlawful act could be affected thereby.' In *United States v. Haggerty*, 116 Fed. 510, the court said: 'This court, however, has heretofore, upon repeated occasions, recognized the power of the court to issue injunctions in cases where there is a combination and conspiracy upon the part of any class of people to prevent them from interfering with the business of others.' In *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152, the court said: 'Now, then, I think it is quite clear from what I have said that these defendants had no right to use the means which are forbidden by the restraining order now brought in question to prevent these operatives from continu-

ing to work for the complainants, and that in doing so they are inflicting an injury upon the complainants, in respect to their private rights, precisely the same as they would if they broke, interfered with or clogged the engine that drove their machinery, and that for such injury the complainants are entitled to a legal remedy by action. Now, this being so, the next question is, What right have the complainants here in this court asking for the restraining power of the court? Why, the answer to this is twofold: First, it is quite clear that the relief in damages to be recovered in an action at law is entirely inadequate. It is quite absurd to say that they can sue each of these persons, and recover damages against them in separate suits for every little act which in the aggregate tends to result in injury. And, in the second <sup>469</sup> place, the injury is continuing and irreparable, and not capable of admeasurement according to legal principles. So that at law the remedy is entirely inadequate. It is, therefore, a clear case for the interposition of a court of equity to exercise its preventive remedy, and that is the particular sphere at this day of a court of equity, as contradistinguished from a court of law.' There are many other cases to the same effect decided in England, and in many of the American states."

The supreme court of Wisconsin, in the case of *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 1, 81 N. W. 1003, 49 L. R. A. 475, said upon this subject:

"It is not necessary in this case to decide what length a combination of persons in restraint of trade, and interfering with personal liberty, may go to promote the interests of its members, without violating common-law rights and rendering such persons liable to respond in damages to the persons specially injured. Judicial expressions, in recent years at least, have not been in perfect harmony on the subject. The only safe course for the public, and legitimate course for the court, is for it to adhere strictly to the rules of the common law, both as regards what constitutes an unlawful conspiracy in restraint of trade, and the consequences to the guilty parties. So long as that is the law by which rights in regard to such matters must be tested, it is not the province of the court to change, but to administer it.

"The law applicable to this case, as regards the illegality of the combination in question, was plainly stated by this court in *Milwaukee etc. Assn. v. Niezerowski*, 95 Wis. 129, 60 Am. St. Rep. 97, 70 N. W. 166, 37 L. R. A. 127. It was there decided that all combinations in restraint of trade are contrary to public policy and illegal, unless they are for the

reasonable protection, by reasonable and lawful means, of persons dealing legally with some subject matter of contract. A combination that will resort to such means <sup>470</sup> as the ruthless breaking in upon the solemnities of a funeral ceremony, or that aims to entirely monopolize such an essential to the burial of the dead according to the customs of the country as is usually furnished in cities by liverymen, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, will not stand the test above indicated. Such was the liverymen's union under consideration, by the uncontroverted evidence. Such a combination is clearly unlawful as against public policy, and the means resorted to to effect its purposes in this case were likewise unlawful. It would be hard to conceive of a combination more odiously detrimental to the public interests, and more heartlessly oppressive to individuals, than one that seeks to control the customary means used in the burial of the dead, by the resort to such wanton acts as were perpetrated by the defendants in aid of the purposes of their combination.

"This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischief complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood. In *Regina v. Druitt*, 10 Cox C. C. 593, it was held that any combination of persons to stifle and prevent the free use of labor or capital within legitimate bound is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how <sup>471</sup> he shall bestow himself and his means, his talents, and his industry, is as much the subject of the law's protection as is his body.

" 'A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful': 2 Bishop's New Criminal Law, sec. 230; Desty's



Criminal Law, sec. 11b; *Morris Run C. Co. v. Barclay C. Co.*, 68 Pa. 173, 8 Am. Rep. 159.

"Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.

"If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purpose of the conspiracy.

"The union under consideration is within the condemnation of the common-law rule that a combination of persons, natural or artificial, to restrict legitimate trade or commerce in any field, by hampering or destroying individual liberty, stifling competition, or preventing the exercise of individual freedom to dispose <sup>472</sup> of one's labor or capital according to his own free will, so long as the legal rights of other persons are not infringed upon, is unlawful. The limitations upon the rule are in the nature of exceptions to it to be shown by way of defense where the combination is shown to exist. If it is not so far-reaching, as regards effects upon the public, or time or place, or the benefits of the members are not so large, as to render the combination an unreasonable interference with trade or individual freedom, that will remove from it the stamp of illegality; yet overt, unlawful acts, by two or more members of the combination acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. The plainest principles of public policy, as before indicated, condemn such a monopoly as was attempted in this case, and the conduct of the defendants to carry out the purposes of the combination was as clearly unlawful": *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep.

1301, 32 L. ed. 223; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; *Erdman v. Mitchell*, 207 Pa. 79, 99 Am. St. Rep. 783, 56 Atl. 327, 63 L. R. A. 534; *Rocky Mt. B. Telephone Co. v. Montana Federation of Labor*, 156 Fed. 809; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Stove Co. v. Federation*, 35 Wash. L. R. 797; *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 78 N. E. 753, 6 L. R. A., N. S., 1067.

The same principle was announced by this court in the case of *State v. Kansas City Live Stock Exchange*, 211 Mo. 181, 124 Am. St. Rep. 776, 109 S. W. 675.

We might prolong this opinion by citing and quoting from many more of the hundreds of reported cases, where this subject has been discussed by the state and federal courts of the country, but no wise purpose would be served by doing so, for the reason that they are all in harmony with the views expressed by the various courts above mentioned.

During the oral argument it was suggested by counsel that the case of *Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391, 56 L. R. A. 951, announced views not in harmony with those expressed by the courts in the cases before cited. We <sup>473</sup> do not so understand that case. By a careful reading of that case it will be seen that the question there discussed was whether or not under the constitution defendant in that case could be enjoined from publishing a boycott, and it was there held that he could not be so enjoined, but that is not the purpose of this suit. The clear object of this case is to prohibit the defendant from continuing the boycott in force heretofore declared or to enjoin the defendants from declaring a threatened boycott against plaintiff's business, and not to enjoin its publication. If the boycott itself is enjoined, there would be no occasion for complaint against its publication.

Learned counsel for defendants, several times during the course of the oral argument of this case, asked the question: If a single individual may lawfully do all of the things which are charged against the defendants, then why may not two or more persons agree to do the same things without violating the law?

The answer is plain and simple. Neither the individual nor two or more persons can lawfully conspire to do the things charged. In the first place, the individual cannot do the things charged in the petition at all, either legally or

illegally, for the reason he cannot conspire with himself to injure plaintiff's business however well his intention may be to do so; nor can he intimidate the builders from using materials manufactured by plaintiff, for the reason he has no associates bound to him by contract or otherwise with which to intimidate them. It is true, the individual might make up his mind to injure plaintiff's business, and determine in his own mind that he would work such injuries by threatening to no longer work for the builders and contractors if they continued to use materials manufactured by the plaintiff; but the practical working of such an undertaking by an individual would result in most, if not in all, instances in such a small loss to the builders and contractors over and <sup>474</sup> above the profit they would probably make by continuing to deal with plaintiff, that the threat would have but little or no intimidating effect upon them, and in no manner force them from doing business with plaintiff. Certainly the law would take no notice of such infinitesimal loss nor such slight intimidation. *Lex non curat de minimis*.

But so much cannot be said regarding combinations or conspiracies formed between two or more persons to injure and destroy the business of a person by means of a boycott.

The books are full of cases where such combinations or conspiracies have wrought great injury and loss, and even wrecked and destroyed great and powerful business institutions, and, if left untrammelled, would cause the strongest of them to fall, and the very foundation of our government to crumble.

Such combinations are differentiated from the labor organizations mentioned in paragraph one of this opinion by the fact that they are formed for the direct purpose of protecting and promoting the interests of the laboring classes, which only indirectly and incidentally operate in restraint of trade; while these have for their direct object the immediate effect to injure and damage the business of the persons at whom they are directed, and thereby compel them to discharge the nonunion laborers, and thereby indirectly and incidentally protect and benefit the parties to the combination or conspiracy.

All of the authorities permit and encourage the former organizations in carrying out their laudable purposes, but the law with an equally firm hand prohibits all combinations and conspiracies which are formed for the purpose of working injury and damages to the business of another.

We are, therefore, of the opinion that the trial court erred in sustaining the demurrer to the petition.

<sup>475</sup> The judgment is reversed and the cause remanded for a new trial.

All concur.

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*Boycotting* is the subject of a note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488; and strikes and strikers are discussed in the note to *O'Neill v. Behanna*, 61 Am. St. Rep. 706. Laborers have the right to organize into unions for the purpose of promoting their welfare, and labor unions have a general right to call a strike. But when they go further and seek to enforce their demands by violence, intimidation and boycotting, courts will enjoin their unlawful conduct: *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, and cases cited in the cross-reference note thereto; *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272. It seems, however, that a boycott may be so conducted as to be lawful: *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722. And equity will not enjoin employes who have quit the service of their employer from attempting by proper argument to persuade others from taking their places, so long as they do not resort to force or intimidation or obstruct the public thoroughfares: *Jones v. E. Van Winkle Gin etc. Works*, 131 Ga. 336, 127 Am. St. Rep. 235.



**CASES**  
IN THE  
**COURT OF APPEALS**  
OF  
**NEW YORK.**

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**PEOPLE v. HESTERBERG.**

[184 N. Y. 126, 76 N. E. 1032.]

**GAME LAWS—Birds Taken in Foreign Countries.**—A statute forbidding possession within the state, during the closed season, of game birds taken in foreign countries is constitutional and does not deprive any person of property without due process of law. (p. 529.)

**GAME LAWS—Birds Taken in Foreign Countries.**—The act of Congress of May 25, 1900, prohibiting the importation or interstate transportation of game killed in violation of local statutes confers power upon the legislature of a state to forbid possession, during the closed season, within the state of game birds taken in foreign countries. (p. 530.)

**GAME LAWS—Birds Taken in Foreign Countries.**—The fact that game birds taken in a foreign country and imported into a state where their possession is prohibited, during the closed season, differ in some respects from local birds of that variety, is no defense to a prosecution under the statute. (p. 534.)

Julius M. Mayer, attorney general, Alex T. Mason, John F. Clarke and Robert H. Elder, for the appellant.

Edward Lauterbach, Edward R. Finch, John B. Coleman and John L. Hill, for the respondent.

**129 CULLEN, C. J.** The relators were arrested on warrants charging them with a violation of the game law. They sought discharge from their arrest by writs of habeas corpus. On the return to those writs they were remanded to custody. On appeal to the appellate division the orders of the special term were reversed and the relators discharged from custody. From those orders these appeals are taken. As the affidavits on which the warrants for the arrest of the relators were issued differ materially in their statements of facts, we will first consider the one made in the Hill case. The affidavit

avers that on the third day of March said John Hill did have in his possession in the Clarendon Hotel, in the borough of Brooklyn, one dead body of a bird known as a golden plover, <sup>130</sup> and one dead body of a fowl commonly called a grouse; that, as the affiant was informed and believed, the said plover and grouse were taken without the state of New York, to wit, from England and Russia, and thence brought into the borough of Brooklyn.

The forest, fish and game law (Laws 1900, c. 20; Laws 1902, amended cc. 194, 317; Laws 1904, c. 588), by sections 106 and 108, enacts that grouse shall not be taken or possessed from January 1st to October 31st, nor plover from January 1st to July 15th. By section 140 of said act grouse is defined to include ruffed grouse, partridge and every member of the grouse family. By section 141 the inhibition enacted by the other sections of the statute is made to apply to fish, game or flesh coming from without the state, as well as to that taken within the state. By section 119 anyone violating the provisions of the statute hereinbefore recited is guilty of a misdemeanor and liable to a fine of twenty-five dollars for each bird taken or possessed in violation thereof. The relator was in possession of the birds during the prohibited period, and, hence, was guilty of a misdemeanor, unless he is relieved from the penalties prescribed by the statute by the fact that the birds were imported from foreign countries. We shall not discuss at any length the claim of the relator that the statute contravenes the constitution of this state as depriving the relator of his property without due process of law. That question has been settled adversely to that claim by the decisions of this court in *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, and *People v. Bootman*, 180 N. Y. 1, 72 N. E. 506, in which it was held within the power of the legislature, in order to effect the preservation of game within the state, to enact not only a close season during which the possession of such game should be unlawful, but also to enact that the possession in the state during such season of game taken without the state should be equally unlawful. The *Phelps* case is cited by the supreme court of the United States in *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793, in which the validity of a statute of that state was upheld, not only on the ground that the original ownership <sup>131</sup> of wild game is in the state, but on the further ground that the preservation of such game is a valid exercise of the police power of the state. To the argument that the exclusion of foreign game in no way tends to the preservation of

domestic game, it is sufficient to say that substantially the uniform belief of legislatures and people is to the contrary, and that both in England and many of the states in this country legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded: *Whitehead v. Smithers*, L. R. 2 C. P. D. 553; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *Magner v. People*, 97 Ill. 320; *Missouri v. Randolph*, 1 Mo. App. 15; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468. The case of *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, has never been overruled by this court. In the opinion delivered in *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 58 N. E. 34, 52 L. R. A. 803, Judge O'Brien took two positions: First, that the exclusion of fish taken without the state was invalid as interfering with the power of Congress to regulate foreign and interstate commerce; and, second, that under a proper construction of the game law as it then stood the statute was applicable only to fish taken within the state. It was this second ground alone which received the assent of the majority of judges and on which the decision in the case proceeded. This ground has been removed by the amendment of the statute already cited, which makes it applicable to game taken without the state. *People v. Bootman*, 180 N. Y. 1, 72 N. E. 506, reaffirmed the doctrine of *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, and the validity of the legislation before us, at least so far as the constitution of this state is involved. In that case while we affirmed the decision below because the offenses for which the defendant was prosecuted were committed before the amendment to the statute, we felt called upon to express our opinion on the whole subject, so that the citizen might not be misled by the opinion rendered in the court below and thus unwittingly <sup>132</sup> subject himself to severe penalties. If, as is claimed, the views then expressed by the court on the subject now before us were obiter and not necessary to the decision made, it is sufficient to say that we adhere to them, not on the ground of *stare decisis*, because they command our approval. Therefore, if the act of Congress, passed May 25, 1900, commonly termed the "Lacey act," empowered the state to enact

the legislation before us, it is unnecessary for us to enter into any examination of the question of interference with foreign and interstate commerce, discussed, but not decided in *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 58 N. E. 34, 52 L. R. A. 803.

That Congress can authorize an exercise of the police power by a state, which without such authority would be an unconstitutional interference with commerce, has been expressly decided by the supreme court of the United States in *Matter of Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572. The question before us is merely the interpretation of the Lacey act, which the learned counsel for the respondents contend applies solely to interstate shipments and not to importations from foreign countries. The act is entitled: "An act to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes." The first section relates to the department of agriculture; the second prohibits the importation of any foreign wild animal or bird except under special permit from that department, providing that it shall not restrict the importation of natural history specimens nor caged birds, such as domesticated canaries, parrots and the like. It then forbids absolutely the importation of the mongoose, flying foxes, the English sparrow and such other birds as the secretary of agriculture may deem injurious to the interest of agriculture or horticulture. The third section forbids the delivery to a common carrier for shipment from one state to another of any wild animals or birds killed in the state in violation of its laws. The fifth section deals with the transportation into any state of animals killed without the state. It is as follows: "That all dead bodies or parts thereof, of <sup>133</sup> any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage, manufactured



from the feathers of barnyard fowl." It is contended that the title of the statute tends to show that the operation of section 5 is confined to shipment from other states and not to importation from foreign countries. If the title of an act could limit its effect, which it cannot (Potter's Dwarrris on Statutes, p. 102), still this claim is without foundation. The first two sections of the act deal with the department of agriculture, and the reference thereto in the title is appropriate. The third and fourth sections deal with interstate transportation of game killed in violation of local laws, and the reference in the title "prohibit the transportation by interstate commerce of game killed in violation of local laws" is equally appropriate. The fifth section, which is the one before us, deals with an entirely different matter, transportation into a state, not out of a state, and is embraced in the title of the statute only under the designation "and for other purposes." As to this subject, therefore, the title in no respect tends to limit the effect of the act. It is difficult to see any reason why Congress should have sought to discriminate between the bodies of game, song birds or wild animals brought into a state from other states and those brought from foreign countries. The object of the legislation was to enable the states by their local law to exercise a power over the subject of the preservation of game and song birds, which without that <sup>134</sup> legislation they could not exert. Every consideration that led Congress to think it wise to confer on the state of New York, as well as on other states, power (which is practically that of prohibition during the close season, at least for the purposes of sale) over the importation of partridges from New Jersey, Pennsylvania or Connecticut, is equally applicable to the importation of such birds from Canada. The obstacle to the successful enforcement of the game laws of the state would be as great in the one case as the other, and as Canada borders on the United States for a distance of three thousand miles the practical danger would be as great in one case as in the other, whatever it might be in the case of an importation from Europe. But it is said Congress permits the importation of foreign game and collects the duty thereon, and it cannot have intended to allow property thus imported to be confiscated. The proposition that Congress allows the importation of foreign game is true only in a restricted sense. By the "Lacey act" Congress determined to aid the states in the enforcement of their game laws, but did not deem it wise to enact a game law of its own, and this for the very obvious reason that the game laws of the different states vary greatly,

a variation justified in no small degree by varying climatic conditions. It would be unwise to entirely prohibit the importation of game into the country during a part of the year during which in some of the states the taking and consumption of such game is lawful. So Congress practically said to the citizen: We do not prohibit the importation of foreign game, but subject it to the local laws, and you must see to it, at your risk, that you do not violate those laws. The term "transported" is used in the Wilson act of Congress relative to intoxicating liquors (enacted August 8, 1890), as in the present act. Yet it seems incredible that Congress intended to suffer the state of Maine to seize liquor in original packages when brought from Massachusetts, but not when brought from Canada or Europe. The words of the section before us are sufficiently comprehensive to include all game brought into the state from whatever place, and we do not think it <sup>135</sup> profitable to enter into a verbal analysis save in one respect. It is urged that the concluding sentence of the section, "This act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl," excludes all birds from its operation. We think not. The qualification "manufactured from the feathers of barnyard fowl" applies as well to birds as to bird plumage. Birds mentioned in this sentence are plainly artificial birds, and so the treasury department of the United States has ruled.

The case of Silz is somewhat different. The affidavit on which the warrant in this case was issued creates a strong suspicion that the prosecution was instituted by collusion. It states not only that the defendant had in his possession the prohibited game, but also almost every fact by which the defendant's counsel hopes to relieve his client from the penalties of the law, facts which it is difficult, if not impossible, to see how they could have been within the affiant's knowledge. For that reason we should be inclined to refuse to entertain the cause had not the attorney general intervened and prosecuted the appeal. Substantially all the questions raised by the affidavit, save one, are disposed of by the views we have already expressed. The exception is the statement in the affidavit: "That said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the state of New York and from any birds native to America. They are different in form, shape, size, color and marking from the

game birds known as plover and grouse in the state of New York." Of course, if the birds, the possession of which is charged against the relator, are not grouse or birds of the grouse family, then no crime is stated in the affidavit and the relator should be discharged. But in view of the express allegation at the commencement of the affidavit that the defendant was possessed of one imported grouse, we are inclined to the view that the statement quoted should be construed as meaning not that the bird so possessed was not a <sup>136</sup> grouse, but that it was a different variety of grouse from that which is native to the state of New York. So construed this fact constitutes no defense, nor does the allegation that they are different in form, shape and color from native birds. It was for the legislature to determine, in the protection of native game, how far it was necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character, though differing in some respects. Of course, this statement is made within limits. To protect pigeons, turkeys could not be excluded. In the present case, however, we are clear that the legislature has acted within its power.

The order of the appellate division in each case should be reversed, that of the special term affirmed, and the relators remanded to custody.

Gray, O'Brien, Edward T. Bartlett, Werner, Hiscock and Chase, JJ., concur.

Order reversed, etc.

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**The Decision of the New York Court** in the principal case is supported by Ex parte Fritz, 86 Miss. 210, 109 Am. St. Rep. 700, 38 South. 722; State v. Schuman, 36 Or. 16, 78 Am. St. Rep. 754, 58 Pac. 661, 47 L. R. A. 153. This decision was affirmed by supreme court of the United States in *New York v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. Rep. 10, 53 L. ed. 528, the decision therein being rendered by Justice Day as follows:

"This case comes to this court because of the alleged invalidity, under the constitution of the United States, of certain sections of the game laws of the state of New York. Section 106 of chapter 20 of the Laws of 1900 of the state of New York provides:

"'Grouse and quail shall not be taken from January 1st to October 31st, both inclusive. Woodcock shall not be taken from January 1st to July 31st, both inclusive. Such birds shall not be possessed in their closed season except in the city of New York, where they may be possessed during the open season in the state at large.'

"Section 25 of the law provides:

"The close season for grouse shall be from December 1st to September 15th, both inclusive.' As amended by section 2, chapter 317, Laws of 1902.

"Section 140 of the law provides:

"1. 'Grouse' includes ruffed grouse, partridge, and every member of the grouse family.'

"Section 108 of the law provides:

"Plover, curlew, jacksnipe, Wilsons, commonly known as English snipe, yellow legs, killdeer, willett, snipe, dowitcher, shortnecks, rail, sandpiper, bay snipe, surf snipe, winter snipe, rinknecks, and oxeyes shall not be taken or possessed from January 1st to July 15th both inclusive.' As amended by section 2, chapter 588, Laws 1904.

"Section 141 of the law provides:

"'Whenever in this act the possession of fish or game, or the flesh of any animal, bird, or fish is prohibited, reference is had equally to such fish, game, or flesh coming from without the state as to that taken within the state: Provided, nevertheless, That, if there be any open season therefor, any dealer therein, if he has given the bond herein provided for, may hold during the close season such part of his stock as he has on hand undisposed of at the opening of such close season. Said bond shall be to the people of the state, conditioned that such dealer will not, during the close season ensuing, sell, use, give away, or otherwise dispose of any fish, game, or the flesh of any animal, bird, or fish which he is permitted to possess during the close season by this section; that he will not, in any way, during the time said bond is in force, violate any provision of the forest, fish, and game law; the bond may also contain such other provisions as to the inspection of the fish and game possessed as the commission shall require, and shall be subject to the approval of the commission as to amount and form thereof, and the sufficiency of sureties. But no presumption that the possession of fish or game or the flesh of any animal, bird, or fish is unlawfully possessed under the provisions of this section shall arise until it affirmatively appears that the provisions thereof have been complied with.' Added by chapter 194, Laws of 1902.

"Section 119 of the law makes a violation of its provisions a misdemeanor, and subjects the offending parties to a fine.

"The relator, a dealer in imported game, was arrested for unlawfully having in his possession, on the 30th of March, 1905, being within the closed season, in the borough of Brooklyn, city of New York, one dead body of a bird known as the golden plover, and one dead body of an imported grouse, known in England as blackcock, and taken in Russia. The relator filed a petition for a writ of habeas corpus to be relieved from arrest, and, upon hearing before a justice of the supreme court of the state of New York, the writ was dismissed, and the relator remanded to the custody of the sheriff. Upon appeal to the appellate division of the supreme court of the state of New York this order was reversed and the relator discharged from custody. The judgment of the appellate division was reversed in the court of ap-



peals of the state of New York: 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A., N. S., 163. Upon remittitur to the supreme court of the state of New York from the court of appeals the final order and judgment of the court of appeals was made the final order and judgment of the supreme court, and a writ of error brings the case here for review.

"The alleged errors relied upon by the plaintiff in error for reversal of the judgment below are: First, that the provisions of the game law in question are contrary to the fourteenth amendment of the constitution of the United States, in that they deprive the relator, and others similarly situated, of their liberty and property without due process of law. Second, that the provisions of the law contravene the constitution of the United States, in that they are an unjustifiable interference with and regulation of interstate and foreign commerce, placed under the exclusive control of Congress by section 8, article 1, of the federal constitution. Third, that the court below erred in construing the act of Congress, commonly known as the Lacey act, which relates to the transportation in interstate commerce of game killed in violation of local laws: 31 Stats. at Large, c. 553, p. 187; U. S. Comp. Stats. 1901, p. 290.

"The complaint discloses that the relator, August Silz, a dealer in imported game, had in his possession in the city of New York one imported golden plover, lawfully taken, killed, and captured in England during the open season for such game birds there, and thereafter sold and consigned to Silz in the city of New York by a dealer in game in the city of London. He likewise had in his possession the body of one imported blackcock, a member of the grouse family, which was lawfully taken, killed, and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York city by the same dealer in London. Such birds were imported by Silz, in accordance with the provisions of the tariff laws and regulations in force, during the open season for grouse and plover in New York. Such imported golden plover and imported blackcock are different varieties of game birds from birds known as plover and grouse in the state of New York; they are different in form, size, color, and markings from the game bird known as plover and grouse in the state of New York, and can be readily distinguished from the plover and grouse found in that state. And this is true when they are cooked and ready for the table. The birds were sound, wholesome, and valuable articles of food, and recognized as articles of commerce in different countries of Europe and in the United States. These statements of the complaint are the most favorable possible to the relator, and gave rise to the comment in the opinion of the court of appeals that the case was possibly collusive. That court, nevertheless, proceeded to consider the case on the facts submitted, and a similar course will be pursued here. While the birds mentioned, imported from abroad, may be distinguished from native birds, they are nevertheless of the families within the terms of the statute, and possession of which, during the closed season, is prohibited.

"As to the first contention, that the laws in question are void within the meaning of the fourteenth amendment because they do not constitute due process of law. The acts in question were passed in the exercise of the police power of the state, with a view to protect the game supply for the use of the inhabitants of the state. It is not disputed that this is a well-recognized and often-exerted power of the state, and necessary to the protection of the supply of game which would otherwise be rapidly depleted, and which, in spite of laws passed for its protection, is rapidly disappearing from many portions of the country.

"But it is contended that while the protection of the game supply is within the well-settled boundaries of the police power of a state, that the law in question is an unreasonable and arbitrary exercise of that power. That the legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts, and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court: *Lawton v. Steele*, 152 U. S. 137, 14 Sup. Ct. Rep. 499, 38 L. ed. 388; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780; *Dobbins v. Los Angeles*, 195 U. S. 236, 25 Sup. Ct. Rep. 18, 49 L. ed. 175.

"It is contended, in this connection, that the protection of the game of the state does not require that a penalty be imposed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. In other states of the Union such laws have been deemed essential, and have been sustained by the courts: *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Magner v. People*, 97 Ill. 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind, under the claim that they were taken in another state or country. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game, in the interest of the food supply of the people

of the state. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state, and, as such, to be declared void because contrary to the fourteenth amendment of the constitution.

"It is next contended that the law is an attempt to unlawfully regulate foreign commerce, which, by the constitution of the United States, is placed wholly within the control of the federal Congress. That a state may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But, while this is true, it has also been held in repeated instances that laws passed by the states in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws: *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, 42 L. ed. 878; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. Rep. 132, 48 L. ed. 268; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. Rep. 485, 52 L. ed. 778.

"In the case of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793, the plaintiff in error was convicted for having in his possession game birds killed within the state, with the intent to procure transportation of the same beyond the state limits. It was contended that this statute was a direct attempt by the state to regulate commerce between the states. It was held that the game of the state was peculiarly subject to the power of the state, which might control its ownership for the common benefit of the people, and that it was within the power of the state to prohibit the transportation of game killed within its limits beyond the state, such authority being embraced in the right of the state to confine the use of such game to the people of the state. After a discussion of the peculiar nature of such property, and the power of the state over it, Mr. Justice White, who delivered the opinion of the court in that case, said:

"'Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected: *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply: *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402, and *Magner v. People*, 97 Ill. 320, and the cases there cited. The exercise by the state of such power therefore comes directly within the principle of *Plumley v.*

Massachusetts, 155 U. S. 461, 473, 15 Sup. Ct. Rep. 154, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590. The power of a state to protect, by adequate police regulation, its people against the adulteration of articles of food (which was, in that case, maintained), although, in doing so, commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good.'

"In the case of *Plumley v. Massachusetts*, referred to in the opinion just cited, it was held that a law of the state of Massachusetts which prevented the sale of oleomargarine colored in imitation of butter was a legal exertion of police power on the part of the state, although oleomargarine was a wholesome article of food, transported from another state; and this upon the principle that the constitution did not intend, in conferring upon Congress an exclusive power to regulate interstate commerce, to take from the states the right to make reasonable laws concerning the health, life and safety of their citizens, although such legislation might indirectly affect foreign or interstate commerce; and the general statement in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, was quoted with approval:

" 'And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'

"It is true that in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49, it was held that a state law directly prohibiting the introduction in interstate commerce of a healthful commodity for the purpose of thereby preventing the traffic in adulterated and injurious articles within the state was not a legitimate exercise of the police power. But, in that case, there was a direct, and, it was held, unlawful, interference with interstate commerce as such. In the case at bar the interference with foreign commerce is only incidental, and not the direct purpose of the enactment for the protection of the food supply and the domestic game of the state.

"It is provided in the New York statutes that game shall be taken only during certain seasons of the year; and to make this provision effectual it is further provided that the prohibited game shall not be possessed within the state during such times; and, owing to the likelihood of fraud and deceit in the handling of such game, the possession of game of the classes named is likewise prohibited, whether it is killed within or without the state. Such game may be legally



imported during the open season, and held and possessed within the state of New York. It may be legally held in the closed season upon giving bond, as provided by the statute against its sale. Incidentally, these provisions may affect the right of one importing game to hold and dispose of it in the closed season, but the effect is only incidental. The purpose of the law is not to regulate interstate commerce, but, by laws alike applicable to foreign and domestic game, to protect the people of the state in the right to use and enjoy the game of the state.

"The New York court of appeals further held that the so-called Lacey act (31 Stats. at Large 187, c. 553; U. S. Comp. Stats. 1901, p. 290) relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson act was sustained by this court: *In re Rahrer* (Wilkerson v. Rahrer), 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. ed. 572.

"In the aspect in which the game law of New York is now before this court we think it was a valid exertion of the police power, independent of any authorization thereof by the Lacey act, and we shall therefore not stop to examine the provisions of that act. For the reasons stated, we think the legislature, in the particulars in which the statute is here complained of, did not exceed the police power of the state, nor run counter to the protection afforded the citizens of the state by the constitution of the United States.

"Judgment affirmed."

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## GASTEL v. CITY OF NEW YORK.

[194 N. Y. 15, 86 N. E. 833.]

### DANGEROUS SIDEWALKS—Evidence of Prior Accidents.—

In an action against a city for injuries received from an alleged dangerous sidewalk, evidence of prior accidents may be received to show that the sidewalk was in a condition calculated to occasion accidents, if the negligence of the city is debatable, but such evidence is not of itself sufficient to sustain a charge of negligence and to lay the foundation for damages. (pp. 541, 542.)

### DANGEROUS SIDEWALKS—Trivial Differences in Level.—

To maintain a sidewalk so that there is about an inch difference in the level of adjacent portions is not such negligence on the part of the city as will support an action by a pedestrian who trips thereon and falls. (p. 542.)

DANGEROUS SIDEWALKS.—The Tendency of the Law as evidenced by legislative enactments has been in the direction of making less rather than more stringent the rules of municipal liability in cases of accident to persons using sidewalks. (p. 542.)

Francis K. Pendleton, James D. Bell and James W. Covert, for the appellant.

Robert Stewart, for the respondent.

<sup>16</sup> HISCOCK, J. This action was brought to recover damages for the alleged negligence of the defendant in maintaining a defective sidewalk on Prospect Park West near the intersection of Sixteenth street, whereby plaintiff was tripped and injured by falling on the walk.

The evidence tends to establish that plaintiff did trip and fall at the point in question. It also establishes that for a considerable time prior to the date of the accident there had been a difference in level of the adjacent portions of the sidewalk maintained by the defendant at the point in question. This difference in level was about three-eighths of an inch at the curb and gradually increased to about one and three-fourths inches on the inner side of the walk, which was nineteen feet wide. The difference seems to have been occasioned by the construction of a new walk which met the old walk at this point and on a slightly different grade. The plaintiff was quite familiar with the locality, and it was reasonably lighted at the time of the accident. He seems to have been walking inside of the center line of the walk, but not at the inner edge, where the difference in level was the greatest. There was evidence that others had tripped and fallen at the same point and by reason of this difference in the level of the two sidewalks.

<sup>17</sup> The determination of this action would be controlled beyond debate by our decision in *Butler v. Village of Oxford*, 186 N. Y. 444, 79 N. E. 712, except for one feature which is claimed to distinguish it from that case. In the *Village of Oxford* case there was no evidence of prior accidents at the point where the plaintiff stumbled and fell, whereas in this case there is evidence that other people had been tripped by the alleged obstruction. It is true that some of this testimony is so extravagant as to create a strong and immediate distrust of its truthfulness and accuracy, but of course this question of veracity would be for the jury, and if the evidence is sufficient on its face to differentiate this case from the other and take it to the jury, the decision of the learned appellate division must be affirmed. We do not think, however, that it is thus sufficient.

<sup>18</sup> When an alleged defect or obstruction is of such a character that it possibly may be made the basis of an action for negligence, and the question is debatable which way the decision shall go, evidence of prior accidents very well may be received and utilized for the purpose of showing that tested by actual experience it has proved dangerous and naturally calculated to cause accidents. This evidence of prior acci-

dents cannot, however, be sufficient of itself to sustain a charge of negligence and to lay the foundation for damages because of the maintenance of some particular construction of pavements, sidewalks or buildings. There must be evidence of such a fundamental condition of the thing under scrutiny as will at least permit the inference that the party complained of has failed to discharge the duties reasonably and fairly imposed on him by law. If the full description of the alleged defect in a municipal case shows that it was of such a trivial character that it was not naturally dangerous, and must almost inevitably occur in the many street miles of a city unless a grievously burdensome degree of care and expense is to be exacted, a recovery will not be allowed even though witnesses have testified to prior accidents. The familiar rule of *damnum absque injuria* will be applied, and travelers' mishaps will be charged to their own carelessness or to unavoidable mischance rather than to the treasury of the city. We think that such is the present case. We have had a description of the sidewalk complained of. The difference in level was small, averaging for the entire width of the walk about one inch. There was no space under the upper edge in which the foot might catch, and the walk was not broken or otherwise out of repair. We think we may take judicial notice of the fact which ordinary observation discloses that there is scarcely a rod in the streets of any city in which there may not be discovered some little unevenness or irregularity in sidewalks, crosswalks, curbs or pavements. As the result of various causes, climatic and otherwise, they are constantly occurring and recurring. Ordinarily they cause no difficulties, and it would require a vast expenditure of money to remove them <sup>19</sup> all. The recent tendency of the law as evidenced by legislative enactment has been in the direction of making less rather than more stringent the rules of municipal liability in such cases, and directing our considerations to the precise facts here presented, we think that we should be disregarding those principles of liability which are justified by reason and public policy if we should permit a recovery.

The order of the appellate division should be reversed, plaintiff's exceptions overruled and judgment entered on the order of the trial term dismissing plaintiff's complaint, with costs to appellant in all the courts.

Cullen, C. J., Gray, Haight, Werner, Willard Bartlett and Chase, JJ., concur.

Order reversed, etc.

*Evidence of Prior Accidents* is admissible, in a proper case and for proper purposes, in actions to recover for personal injuries: *Baker v. Hagey*, 177 Pa. 128, 55 Am. St. Rep. 712; *City of Bloomington v. Legg*, 151 Ill. 9, 42 Am. St. Rep. 216. For limitations on this rule see *Cleveland etc. Ry. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 614; *McNally v. Colwell*, 91 Mich. 527, 30 Am. St. Rep. 494; *Florida Central etc. R. R. v. Mooney*, 45 Fla. 286, 110 Am. St. Rep. 73.

*A City is not Bound to Maintain* an even or perfect grade in its streets and pavements: *Teager v. City of Flemingsburg*, 109 Ky. 746, 95 Am. St. Rep. 400; but a municipal corporation is held liable in *Blyhl v. Village of Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, for injuries sustained by a pedestrian who falls over a step or drop some seven or eight inches high in the sidewalk.

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### KELLY v. BEERS.

[194 N. Y. 49, 86 N. E. 980.]

**BANK ACCOUNT—Joint Owners—Survivorship.**—A bank account may be so fixed that two persons shall be joint owners thereof during their mutual lives, and the survivor take the whole on the death of the other. (p. 547.)

**BANK ACCOUNT—Joint Owners—Survivorship.**—Where a mother, having a savings bank account in her individual name, has it changed so as to read "In account with Kate V. Beers or Sarah E. Kelly, daughter, or the survivor of them," the account on its face imports joint ownership during their lives, with right of sole ownership in the surviving daughter. But the mere form of the account does not sufficiently establish the intent of the mother to create such a trust or ownership, and her intent to this end may be further evidenced, and placed beyond question, by the circumstances surrounding the transaction and her declarations in respect thereto. (p. 547.)

**BANK ACCOUNT—Joint Owners—Survivorship.**—In creating a joint bank account with right of survivorship, it is a matter of no importance that the particular terms "joint ownership" and "joint account" are not used; the controlling question is whether the person fixing the account intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. No particular formula is required, and courts will be controlled by the substance of the transaction rather than by the name given it. (p. 550.)

Andrew J. Nellis, for the appellant.

William P. Rudd and Milton H. Merwin, for the respondents.

<sup>50</sup> **HISCOCK, J.** The action was brought to establish plaintiff's ownership of a deposit in the defendant Home Savings Bank payable to her or the deceased Kate V. Beers, or the survivor, and the following facts, amongst others, were established beyond dispute, most of them being found by the trial court.



The deceased and the plaintiff were mother and daughter, part of the time at least residing together, and the only other child was a son, Franklin. For some time prior to September 30, 1901, Mrs. Beers was the sole owner, in her individual name, of a deposit in the defendant bank amounting to \$1,829.34. Several weeks before said date she asked one of the bank officials if she could not have her account fixed so that either she or her daughter could draw the money at any time, and so that if anything should happen to her the daughter could get the money without any further trouble, and he told her to bring in her daughter and he would "fix it up." On the date mentioned she came to the bank with her daughter, whom she introduced to the treasurer, telling him that she had come to have the book fixed up as previously talked about between them, and the treasurer told her that he would close out the old account and open a new one and put it in the name of Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them, and that would fix it as she wished. He then filled out a check for the old account as it stood in the name of Mrs. Beers, who signed it and with it surrendered her old pass-book. The treasurer then said to the two: "This fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executors, administrator or either has no control whatever over the book." He then called his assistant to take the signatures of the mother and daughter in the depositors' signature book and filled out a new pass-book headed as follows: "The Home Savings Bank of Albany, N. Y., in account with Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them," and in this <sup>51</sup> pass-book he credited the sum of \$1,829.34 passed from the old account. After making her signature and seeing her daughter do likewise, Mrs. Beers asked the assistant "if the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble," and also if plaintiff should go to the bank "could she draw the money at any time," and the assistant in answer to both questions said, "Yes." The deceased took the new bank-book and handed it to plaintiff.

Substantially similar transactions occurred at other banks in which Mrs. Beers had accounts originally standing in her sole individual name. In the case of the Albany Savings Bank, where she had an account aggregating \$3,000, after asking and being advised "how she could arrange her book

so her daughter could draw the money the same as herself," in the presence of her daughter she signed and delivered a written order, filled out and explained to her, reading as follows: "The Treasurer of the Albany Savings Bank will please add the name of my daughter Sarah E. Kelly as owner and creditor with me of all moneys heretofore or which may hereafter be deposited in said bank under this account No. 112086, together with all the interest which has been or may hereafter be credited to the said account, with full authority for each or either of us or the survivor of us to draw out of said bank the whole or any part of such moneys or such interest." After executing this order her former pass-book and the books of the bank were so changed as to make the account read "Albany Savings Bank in account with Mrs. Kate V. Beers or Sarah E. Kelly, her daughter, or survivor."

In the case of the Albany Trust Company, Mrs. Beers executed and delivered to the bank an order similar in all respects to the last above set forth, and thereupon her pass-book and the books of the bank were changed so as to read "Albany Trust Company in account with Kate V. Beers, or Mrs. Sarah E. Kelly, payable to either, or survivor of either."

In the case of the National Savings Bank she caused her account to be so changed as to make it "in trust for Sarah E. Kelly, her daughter."

<sup>52</sup> The deceased at various times in 1897, 1902 and 1903 talked with various witnesses, apparently disinterested and credible, about her bank accounts, and to each one of them in substance said that she intended to have, or had had the money in the banks fixed so that the plaintiff could draw it out at any time during her life and would have it upon her death. She also upon one or more occasions spoke of the difference in the provisions for the plaintiff and her son respectively, and explained that the more favorable one in behalf of the former was due to the fact that she had no means, while the latter was in good circumstances.

The pass-books for all these accounts were kept locked up in a receptacle to which each party had a key. The mother died in 1903 and prior to such decease the account involved in this action had been increased to about \$2,400. No withdrawals were made from it and none appear to have been made on any of the accounts except of interest, and on two or three occasions such withdrawals were made by the plaintiff in her own name, and it does not appear that such moneys were by her turned over to her mother.

By will executed in December, 1889, the deceased gave a legacy of \$5,000 to plaintiff and also to her brother; in 1895 she revoked this will and made another one giving legacies of \$4,000 and \$3,000, respectively, to plaintiff and her brother; June 20, 1900, she made a codicil to the last will whereby she revoked the legacy to her daughter of \$4,000, and in lieu thereof gave her "All and whatever money I shall at the time of my decease have on deposit in the Albany Savings Bank."

In December, 1900, she made another will revoking former ones, whereby she gave her son a specific legacy of certain property amounting on its face to \$8,350, and gave to plaintiff "subject to the payment of my funeral expenses therefrom all and whatever money I shall have on deposit in any of the savings banks or other banks in the city of Albany, N. Y., at the time of my death, which amount I intend shall be about \$7,000," further providing, however, that in case <sup>53</sup> there should not be \$7,000 on deposit in said banks said sum should be made up from other moneys coming into the hands of the executors.

The total bank deposits standing in the name of deceased and plaintiff as above stated on the death of the former amounted to \$9,878, and her estate and the aggregate of said accounts amounted to about \$24,000.

The deceased, while quite aged at the time of her death, was active physically and in full possession of her mental faculties.

The trial court found that when the change in the form of the account herein involved was made, the deceased did not intend to create a joint ownership in herself and plaintiff or transfer the title or part with the right to control said account by will.

<sup>54</sup> The appellant claims that she is the owner of moneys originally belonging to and deposited in the sole name of her mother, the deceased, but later and at the time of the latter's death deposited in an account payable to "Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them." Her entire theory is that she was joint owner with her mother of these moneys during the latter's life and upon her death became entitled to the whole thereof as survivor. The trial court has found against her on the crucial question of the mother's intent in making and continuing the later deposit, and, therefore, she assumes the burden on this appeal of

establishing <sup>55</sup> her theory and claim as matter of law and beyond any question of fact. I think she has successfully borne this burden.

The possibility of so fixing a bank account that two persons shall be joint owners thereof during their mutual lives and the survivor take upon the death of the other is so well established that we may assume and need not discuss it.

I think also it is so apparent that it must be conceded that the account in question on its face imports such joint ownership by appellant and the deceased with final sole ownership by survivorship.

It has been written, however, in various decisions that the mere form of the account in such a case as this will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another or to give to such another joint interest in or ownership of the deposit: *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. 940, 6 L. R. A. 403; *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626; *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711.

Therefore it becomes proper to make brief reference to other facts already stated in full which tend to establish that the deceased did not intend to give to her daughter the interest claimed by the latter, and that this intent was consummated in the deposit which was made and aptly and faithfully expressed in the title and form of that account.

Such facts show the deceased frequently stating to outsiders that she desired to have her bank deposits fixed so that her daughter might have or draw them at any time during her life and have them at her death; then explicitly and formally asking an official of the defendant bank "if she couldn't have her bank account fixed so that either she or her daughter could draw the money at any time, and that if anything should happen to her that her daughter could get the money without any trouble"; then, in accordance with his instructions, going with her daughter to the bank to have this arrangement perfected, and, under the instructions of the official, closing up the old account and opening the new one <sup>56</sup> in the form stated, for the purpose of accomplishing her intent, being told as and after she performed the necessary acts that "this fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executor or administrator or either has no control whatever over the



book." and that "the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble, and . . . could draw the money at any time" if she "should come there to the bank." And after the signatures of both as depositors had been entered in the proper bank-book, the pass-book was taken by the daughter and placed in the joint and equal custody of both, and from that time to her death the deceased never did a thing which threw any shadow on her intent in making the new deposit, or indicated the slightest change in or abandonment or revocation of such intent. And further, and as illustrating the extent and absoluteness of the interest which she intended to give to her daughter in the bank accounts, we find that in the case of deposits in other banks by formal writing she made the daughter "owner and creditor" with her of all moneys deposited and authorized each or either of them or the survivor of them to draw out the whole of said deposits.

It seems to me that all of these facts demonstrate the purpose of the deceased to give to the appellant the interest which she claims with a clearness and force beyond that required by the authorities: *Mack v. Mechanics & Farmers' Sav. Bank*, 50 Hun, 477, 3 N. Y. Supp. 441; *Farrelly v. Emigrant Industrial Sav. Bank*, 92 App. Div. 529, 87 N. Y. Supp. 54; *Mabie v. Bailey*, 95 N. Y. 206; *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. 940, 6 L. R. A. 403; *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711; *Augsbury v. Shurtliff*, 180 N. Y. 138, 72 N. E. 927; 114 App. Div. 626, 99 N. Y. Supp. 989; affirmed, 190 N. Y. 507, 83 N. E. 1122; *West v. McCullough*, decided without opinion, January 5, 1909, 194 N. Y. 518, 87 N. E. 1130.

It is true that some of the foregoing cases simply decided that the evidence there presented authorized a finding as matter of fact of a gift such as is claimed here, that being the only question presented. But principles necessarily involved<sup>57</sup> or enunciated sustain the interpretation now placed on them as applied to the facts which have been discussed.

It remains to consider in some detail the respondents' argument that the foregoing view is incorrect or at least that there is other evidence which taken in connection with that especially referred to permits inferences sustaining the findings in their behalf.

While the counsel for respondents, in disputing that the deposit was made with the intent and for the purpose claimed by Mrs. Kelly, says that on the other hand it was made and

the power to draw moneys given as a matter of convenience, he very frankly admits that he does not mean any mere physical convenience. This element was not involved, for Mrs. Beers was so capable of taking care of herself and of her affairs that there was no necessity for conferring upon the daughter the power to draw money as a matter of convenience to her mother. This term of "convenience" seems rather to have been used by the court and counsel as a form of stating that the mother did not intend joint ownership but did intend something else.

In the first place it is said that Mrs. Kelly at the time of her mother's death made an admission to one of the defendants contradicting her present claim. Without quoting this admission it may be stated that it has been analyzed and that I see nothing in it which contradicts the present claim. It does not give a full history of all that was done, as actually found by the trial court, but so far as it does go it does not raise any issue with the other testimony.

In the second place, it is urged that the various wills and codicils made by the deceased are indicative of an intent on the part of Mrs. Beers to maintain her ownership and control of the bank accounts and, therefore, are contradictory of that which is claimed by appellant. There appear to be several answers to this proposition. If the deceased, having an intent to give joint and surviving ownership to her daughter, consummated that intent by the performance of the necessary acts, I suppose that the original nature and effect of these acts<sup>58</sup> would not be affected or destroyed even if subsequently her views changed, such mental change not being carried into any legal or effective revocation of that which had been done. In the *Mabie* case (95 N. Y. 206), the person making a deposit in trust which was the subject of litigation subsequently withdrew the same, and it was claimed that this indicated that he did not intend to create a trust, but Judge Andrews said, at page 211: "The fact that the deposits for the plaintiff and others were subsequently . . . drawn out by Dr. Bailey, is not legitimate evidence that he did not intend when the deposits were made to create a beneficial trust for the beneficiaries named. If the withdrawal was with intent on his part to ignore the trust and to convert the money to his own use, it might be competent evidence of a change of purpose, but it throws no light on the original transaction": See, also, *Scheps v. Bowery Sav. Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26.

But further than this, if it should be assumed that there was anything in the wills when executed which could be regarded as sufficient to negative the idea or counteract an intent of Mrs. Beers to create a joint ownership in a bank deposit, I do not think that it would affect this case. All of the wills and codicils admitted in evidence as bearing on this question were executed before the deposit involved in this action was changed into its present form. Those instruments, of course, if they bore on the subject at all, indicated the testator's intent at the respective dates when they were executed. Therefore, if this deposit subsequently made was at variance with any provisions in them it and not they must be controlling. Even though it be assumed that the deceased originally intended to dispose of her bank deposits by will, that would not interfere with or destroy a purpose subsequently formed and executed to dispose of them through the form of the deposits themselves as was done.

Lastly in somewhat general terms it is insisted that the deceased did not inquire about joint ownership or transfer of title; there was no idea or suggestion of a present gift or transfer; she did not part with the control of the title or <sup>59</sup> intend to create a new kind of ownership or intend to give Mrs. Kelly the right to have an equal share of the income or by means of the transfer obtain an absolute, immediate ownership of one-half of the fund; did not intend Mrs. Kelly should draw the moneys during her life.

It seems to me that these assertions are the expression of a theory unjustifiably evolved from assumptions rather than the statement of conclusions legitimately drawn from the evidence.

It has been held so many times that courts will be controlled by the substance of a transaction rather than by the name given to it, that it is a matter of no importance that the particular terms "joint ownership" and "joint account" were not used by Mrs. Beers. The controlling question for us has been and is whether she intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. If she did, that was sufficient even though she did not use any particular formula in doing it, Her acts and repeated declarations indicate that she did intend to do just that which is denied, give to her daughter joint ownership in and control over this account. It is true that her daughter did not draw any checks on it during the life of the mother, but it is also true that the mother herself did not draw any checks on it during the same time. It is true that

the mother did retain control over the account in that she had the right at any time to check out all of the moneys and destroy the account, but so did the daughter. For the sake of the argument we might assume that the primary purpose of the mother in creating the account was to pass the money on her death to her daughter, and that she did not expect under ordinary circumstances that the daughter would draw out the money during her life any more than that she herself would draw it out. But if we assume all of this, such assumption would simply go to the expected exercise by the daughter of her legal rights rather than to the existence itself of those rights.

In short, starting with the performance by Mrs. Beers deliberately and advisedly of certain acts legally calculated and sufficient to accomplish certain purposes, and charging her not <sup>60</sup> only as we must as a matter of law, but as we ought to as a matter of fact, with appreciation of the significance and consequences of what she did, we are unable to discover in this record any evidence of an intent not to effect that legal result which her acts naturally and presumptively did accomplish.

Some reference was made to the equities of the division of the mother's estate between the appellant and her brother, if the former's claim to these deposits should prevail. While such considerations might be helpful under some circumstances in helping us to decipher the obscure or uncertain intent of a deceased person, I do not think they are of consequence in this case in dealing with well-established acts which are not of doubtful or uncertain character. Moreover, it is possible that on the settlement of the estate of the deceased under her will such disparity as is now claimed between the provisions for the two children respectively will be avoided or be found not to exist.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

Cullen, C. J., Edward T. Bartlett, Haight, Vann and Werner, JJ., concur; Chase, J., not sitting.

Judgment reversed, etc.

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*Bank Deposits* are discussed in relation to their gift by the depositor in the recent cases of *Coolidge v. Knight*, 194 Mass. 546, 120 Am. St. Rep. 573; *Bailey v. New Bedford Inst. for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270; *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814. As to the effect of a joint bank deposit, see *Neiman v. Beacon Trust Co.*, 170 Mass. 452, 64 Am. St. Rep. 315.



*There may be Joint Ownership, with the incident of survivorship, in personal property: Johnson v. Johnson, 173 Mo. 91, 96 Am. St. Rep. 486, and authorities cited in the cross-reference note thereto.*

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## PEOPLE v. MORRISON.

[194 N. Y. 175, 86 N. E. 1120.]

**LARCENY.**—When Clams or Oysters are reclaimed from nature and transplanted to a bed where none grow naturally, and the bed is so marked out by stakes as to show that they are in the possession of a private owner, they are personal property and may become the subject of larceny. (p. 553.)

**CLAMS AND OYSTERS—Nature of Property.**—Clams and oysters in their natural state are in the nature of *feræ naturæ*; but when a person reclaims and transplants them they cease to be common property and become exclusively his, and whoever then takes them without permission is a trespasser and it may be a thief. (p. 553.)

**CRIMINAL TRIAL—Asking Defendant if He has been Indicted.**—The defendant cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt; and a general objection thereto is sufficient to raise reversible error. (p. 554.)

Hector McG. Curren and Martin T. Monton, for the appellants.

John F. Clarke, district attorney, and Peter P. Smith, for the respondent.

**176 VANN, J.** The charge against the defendants was that "On the eleventh day of March, 1906, at the Borough of Brooklyn, of the city of New York, in the county of Kings, (they) did willfully, knowingly and unlawfully steal, take and carry away five bushels of hard clams and one-half bushel of oysters, of the total value of ten dollars, of the goods, chattels and personal property of H. W. Schmelke and Company, against the form of the statute in such case made and provided." The issue joined by the plea of not guilty was tried before three justices of said court and resulted in the conviction of the defendants, with one dissenting vote. Thereupon the defendant Francisco was fined one hundred dollars or fifty days in jail and the defendant Morrison fifty dollars or twenty-five days in jail. Upon appeal taken by both defendants to the appellate division, the judgment of conviction was affirmed, and thereupon they appealed to this court.

Upon the trial evidence was given tending to show that the firm of H. W. Schmelke and Company for <sup>177</sup> twenty years had been in the possession of a plat of land two hundred feet long and fifty feet wide, under the waters of Jamaica bay. They had cleaned the ground "entirely up," and then transplanted upon it clams and oysters, which they had previously procured from other waters and planted on another plat belonging to them. The plat in question was staked out and marked according to custom, and the stakes replaced when shifted by ice or otherwise. There was no natural growth of clams upon it, although there was in other parts of the bay. Three days before the defendants are alleged to have taken the shellfish now under consideration, a member of said firm saw them taking clams from his plat, and when he told them to stop they promised they would. Three days later he found them digging clams and oysters from the same bed, and again told them to stop, but they said they would dig clams anywhere. They took away five bushels of hard clams and a half bushel of oysters worth about eight dollars. They did it openly and in the daytime, claiming they had a right to, but the good faith of the claim involved a question of fact.

The evidence for the prosecution was sufficient, if believed, to justify the conviction of the defendants. When clams or oysters are reclaimed from nature and transplanted to a bed where none grew naturally, and the bed is so marked out by stakes as to show that they are in the possession of a private owner, they are personal property and may become the subject of larceny. Although in the nature of *feræ naturæ*, to which a qualified title may be acquired by possession, when reclaimed and transplanted they need not be confined, for as they cannot move about they cannot get away, even when placed in the water, as they must be in order to live. They and their produce thus cease to be common property and belong exclusively to the one who transplanted them, and whoever takes them from the plat without his permission is a trespasser and it may be a thief: *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *McCarthy v. Holman*, 22 Hun, 53; *Sutter v. Van Derveer*, 47 Hun, 366; <sup>178</sup> *Lowndes v. Dickerson*, 34 Barb. 586; *Post v. Kreischer*, 103 N. Y. 110, 8 N. E. 365; *Vroom v. Tilly*, 184 N. Y. 168, 77 N. E. 24. It is a misdemeanor to take and carry away oysters so planted: *Laws 1866, c. 753*.

We think, however, that the judgment of conviction cannot stand, because an error was committed upon the trial which

requires a reversal. There was a strong conflict in the evidence, and several witnesses for the defendant, including the defendant Morrison, testified that the plat from which they took the clams and oysters was not staked out, and that there were no stakes surrounding it. Whether the plat was staked was a vital fact in the case, and, hence, the credibility of the witnesses who testified upon that issue was important.

After the defendant Morrison had testified that there were no stakes or boundary lines in the locality where he took the clams and oysters, he was asked during the cross-examination by one of the justices who presided at the trial certain questions, which, with the answers thereto given under objection and exception, are set forth in the record, as follows:

"Q. Are you under indictment for taking oysters and clams? A. Not for oysters.

"Q. Well, for clams? A. For clams.

"Q. Are you really under indictment for taking clams or oysters from this bed? A. I guess it is on the same question, but I never took an oyster in my life.

"Q. Did you or did you not say you are under indictment — do you know whether there is or is not an indictment pending against you, charging you with taking clams? A. Yes, sir, from this very bed."

We have recently held and the law was well settled before, that "The defendant in an action, either civil or criminal, cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt": *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287. See, also, *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302.

While the objection was general, still it is clear that if it had been specific it could not have been obviated and, hence, <sup>179</sup> we think the exception raised reversible error. The questions were asked by the court itself, and we cannot say what effect the answers had upon the minds of the justices who, but for this evidence, might all have believed, as one of them apparently did believe, the testimony of the defendant Morrison.

The judgment of conviction should be reversed and a new trial ordered.

Cullen, C. J., Gray, Edward T. Bartlett, Haight, Werner and Hiscock, JJ., concur.

Judgment of conviction reversed.

*The Right to Take Shellfish* is included in the common right of fishery. No one has any exclusive right to dig for clams between high and low water mark on tide waters, and one person is not liable to another in trespass for digging clams there: *Allen v. Allen*, 19 R. I. 114, 61 Am. St. Rep. 738; *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764.

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## HATHORN v. NATURAL CARBONIC GAS COMPANY.

[194 N. Y. 326, 87 N. E. 504.]

**SUBTERRANEAN WATERS—Right to Use and Divert.**—According to the earlier American decisions a land owner may not be enjoined from doing an act on his own premises which results in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's land. But the cases where this rule has been applied have invariably been those in which the person complained of had interfered with the enjoyment by another of percolating waters by some act directly and naturally connected with the improvement or enjoyment of his own land. (p. 560.)

**SUBTERRANEAN WATERS—Right to Use and Divert.**—In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. (p. 562.)

**SUBTERRANEAN WATERS—Whether Regarded as Minerals.** Subterranean waters are treated as a mineral in the decisions relating to their use and enjoyment. (p. 563.)

**SUBTERRANEAN WATERS—Mineral Properties.**—The right of a land owner to divert subterranean waters to the detriment of his neighbors is not modified by the peculiar character and quantity of the salts and gases which happen to be in solution. (p. 563.)

**SUBTERRANEAN WATERS—Right to Use and Divert.**—A land owner has no right by the use of pumps and other apparatus greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the country, and with the result of wasting great quantities of mineral waters and of destroying or impairing the natural flow of such waters and gas in and through the springs of other land owners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used. (pp. 559, 563.)

**SUBTERRANEAN WATERS—Right to Use at Will.**—A land owner has no absolute right to divert or waste subterranean waters at will, regardless of resulting injuries to neighboring proprietors. (pp. 563, 564.)

**SUBTERRANEAN WATERS—Extent of Right to Use and Divert.**—A person may by pumps or otherwise draw on the waters percolating under the surface of his lands for a purpose naturally and legitimately connected with the improvement and enjoyment of



his lands, even though it interferes with others, but an unreasonable attempt to force and increase the flow of such waters for the purpose of diverting them to some use entirely disconnected with such improvement and enjoyment, and whereby the flow of such waters under the lands of others is destroyed or diminished, may be restrained as unlawful. (p. 566.)

**SUBTERRANEAN WATERS—Validity of Statutory Regulation.**—A statute which forbids accelerating or increasing the flow of percolating waters or natural carbonic acid gas, such as are found at Saratoga Springs, from wells bored into the rock, by pumping or any artificial contrivances whatsoever: first, absolutely and without qualifications; second, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; third, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same—is constitutional as to the last prohibition but unconstitutional as to the first two; but each of the provisions is so complete and independent of the others that the last one may be upheld while the others are condemned. (pp. 565, 569.)

**CONSTITUTIONAL LAW.**—In Determining the Constitutionality of a Statute courts are bound to consider what may be, as well as what is presently being, effected under the statute. (p. 567.)

**SUBTERRANEAN WATERS—Right to Divert for Market.**—A land owner has no vested right unnaturally and unreasonably to force the flow of percolating waters for the purpose of marketing them, or for any purpose not connected with the use or enjoyment of his land. (p. 567.)

**SUBTERRANEAN WATERS—Statutory Regulation of Use.**—It is proper for the legislature to adopt a statute defining and regulating the rights of persons desiring to use mineral waters like those at Saratoga Springs, and calculated to prevent such use thereof as will either result in waste of the natural resources of the land to the injury of general and public interests, or in the unreasonable impairment of the rights of others to draw from a common source. (p. 567.)

**SUBTERRANEAN WATERS.—The Legislature in Restricting the Right to divert subterranean waters may classify wells so that the statute shall apply only to wells bored into rock and not to those sunk in the dirt.** (p. 570.)

**SUBTERRANEAN WATERS—Who may Protect.**—The legislature may authorize the people, or a person in their stead, to maintain an action looking toward the conservation of subterranean mineral waters, although the action is deemed to relate to private interests. (p. 571.)

**SUBTERRANEAN WATERS—Right of People to Protect.**—The people have the right to maintain an action to prevent the waste and secure the just distribution to collective owners of subterranean mineral waters. (p. 573.)

Alton B. Parker, for the appellant.

Edgar T. Brackett, for the intervening parties.

Nash Rockwood, Charles C. Lester and J. Newton Fiero, for the respondents.

**328 HISCOCK, J.** The action was brought by the respondents as owners of lands in the town of Saratoga Springs, New

York, whereon were springs wherefrom naturally flowed waters holding in solution natural mineral salts and an excess of carbonic acid gas, to restrain appellant from accelerating and increasing by means of pumps and other apparatus the flow of similar water and gas from their deep wells in said town, and whereby, as claimed, the flow from the springs of the respondents and others was destroyed or diminished.

A preliminary injunction was granted by the special term restraining appellant from performing the acts complained of, and this order, after a modification not substantially affecting its results, was affirmed by the appellate division.

The appellant demurred to the complaint, and under these circumstances the appellate division granted leave to appeal and certified to us the following questions:

1. Is chapter 429 of the Laws of 1908 a constitutional enactment? 2. Does the complaint state a cause of action under the statute of 1908, chapter 429? 3. Does the complaint state a cause of action other than that under the statute hereinafter mentioned? 4. Did the supreme court have power to grant the preliminary injunction?

The complaint which is involved in these questions contains but one count, and is claimed by its framers to set forth a cause of action both at common law and under the statute referred to. The substance of the material allegations purporting to set forth a cause of action at common law is as follows:

Aside from formal matters, they assert the ownership by plaintiffs of certain premises in the village of Saratoga Springs, <sup>329</sup> on which for about forty years there has been a spring of mineral water, holding in solution natural mineral salts and an excess of carbonic acid possessing great medicinal virtue and of high value, and that during all this time and until the commission by the defendant of the alleged wrongful acts complained of, said spring naturally and freely flowed to the surface in a continuous stream; that plaintiffs during many years have been engaged in bottling and marketing the products of said spring, incurring great expense therein and deriving great profit therefrom; that said carbonic acid gas is for various specified reasons a necessary and valuable element in said waters; that prior to the commencement of this action the defendant, being the owner of a tract of land situate in said village nearly a mile distant from plaintiffs' premises, drilled thereon several deep wells into the rock beneath the surface of its lands, and by means of

"powerful pumps, suction and other artificial contrivances," accelerated and increased the flow from said wells of mineral waters and carbonic acid gas similar to those produced at plaintiffs' spring, whereby they were enabled to and did draw and secure an unreasonable amount of water and gas; that in each case such waters and gas were drawn from a supply percolating through the rocks under the surface of the land, and that the waters and gas thus percolating under the respective tracts of the parties to this suit, as well as through a large additional area where other springs were located, were part of a single system and constituted one common source of supply for all the wells and springs; that the effect of defendant's acts in accelerating and forcing the flow of water and gas from its wells by such artificial means has been to seriously affect and decrease the flow of water and gas at the springs of plaintiffs and of other people throughout the town and to depreciate the character and quality of the water produced thereat; that defendant has not utilized the water and gas thus drawn by it from its wells in connection with or in increasing the enjoyment of its land or for any purpose connected therewith, but has extracted from the water the carbonic <sup>330</sup> acid gas which it has marketed generally throughout the country, turning the water containing the other minerals in great quantities to waste; that by reason of these various acts the plaintiffs have been greatly damaged.

In addition to these allegations there are various others which in connection with them are claimed to set forth a cause of action under chapter 429 of the Laws of 1908. This act is entitled "An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters." It contains in substance the following prohibitions:

1. Against pumping or by any artificial contrivance whatsoever in any manner accelerating the natural flow, or producing an unnatural flow of that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas from any well made by boring or drilling into the rock, or by any artificial contrivance whatsoever in any manner accelerating the natural flow or producing an unnatural flow, of natural carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock.

2. Against performing the acts enumerated in the foregoing provision when the effect will be to diminish, retard, impair, etc., "the natural flow from any mineral spring or

any mineral well belonging to any other person or corporation," or "the quality of its waters . . . or the quantity of its carbonic acid gas or mineral ingredients."

3. Against performing the acts enumerated in the first provision for the purpose of extracting, collecting, compressing, liquefying or vending the carbonic acid gas as a commodity otherwise than in connection with the mineral water.

4. Against "the doing of any act or thing whatsoever whereby the natural flow from any spring or well" of the character described is diminished, retarded, etc.

Said act further provides that any citizen of the state may maintain an action to restrain any person or corporation from committing any of the prohibited acts in any city or town in which said citizen is a taxpayer, etc.

331 The substantial allegations, in addition to those already summarized, by which the plaintiffs seek to make out a cause of action under this statute, allege, in substance, their qualifications as taxpayers; a violation in terms by defendant of each of the prohibitions of the statute above quoted; that there is a special pressure of gas in the rock strata into which defendant's wells are bored, causing water and gas to flow to the surface, which is not exerted in the soil above the rocks, and that the withdrawal of gas from such strata tends to destroy the flow of the springs and impair the quality of the water; that in consequence of the mineral springs of plaintiffs and other persons in said town a large amount of money has been invested in Saratoga Springs in the way of hotels and boarding-houses, hospitals and sanitariums for the accommodation of visitors seeking health from the use of said mineral waters, and employment has been given to a large number of people; that the people at large are interested in the maintenance and preservation of such springs; that by the unlawful acts of the defendant the flow of the plaintiffs' spring and that of other springs throughout the town has been injuriously affected and the quality and value of the waters flowing therefrom impaired and a large amount of water wasted; that by reason of these facts many persons have been injured and will continue to be injured unless said unlawful acts are stopped.

334 The object of this action is to restrain the appellant from using pumps and other apparatus for the purpose of accelerating and increasing the flow of subterranean percolating waters and gas through deep wells which it has sunk upon its premises in the town of Saratoga Springs.



The respondents insist that their complaint, which has been summarized in the foregoing statement, sets forth a cause of action both at common law and under the provisions of the statute entitled "An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters," being chapter 429 of the Laws of 1908. The appellant, on the other hand, by demurrer, challenges it as not setting forth a cause of action on either theory.

I shall endeavor first to apply to the pleading thus attacked the test of common-law principles, and the question whether measured by them it does set forth a cause of action may be stated in a more concrete form applicable to the specific facts involved in this action. Thus stated, it will be whether a land owner has the right by the use of pumps and other apparatus greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the 335 country, and with the result of wasting great quantities of mineral waters and of destroying or impairing the natural flow of such waters and gas in and through the springs of other land owners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used.

The earlier decisions in this and other states laid down the general rule that a land owner might not be enjoined from doing an act on his own premises which resulted in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's lands: *Ellis v. Duncan*, 21 Barb. 230; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Trustees of Village of Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Bloodgood v. Ayres*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Greenleaf v. Francis*, 18 Pick. 117; *Frazier v. Brown*, 12 Ohio St. 294.

In thus holding they but followed the rule laid down in the leading case of *Acton v. Blundell*, 12 Mees. & W. 324, wherein was approved the principle "which gives to the owner of the soil all that lies beneath his surface; . . . that the person who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and

pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

It will hardly be profitable to consider all of the different reasons which led the courts to adopt these principles, but it is important to bear in mind that they were invariably applying them to cases in each of which the party complained of had interfered with the enjoyment by another of percolating waters by some act which was directly and naturally connected with the improvement or enjoyment of his own land. Thus in the *Acton* case (12 Mees. & W. 324), the act which resulted in the interference complained of consisted in mining operations on a man's own land. In the case of *Ellis v. Duncan*, 21 Barb. 230, the person intercepting <sup>336</sup> the flow of percolating waters on his neighbor's land had done so by digging a trench or ditch and opening a quarry on his premises. No question was presented in these cases of a land owner depleting or exhausting a common supply of underground waters by artificial methods for purposes not in any way connected with the enjoyment or use of his own lands.

But with the increased demands upon natural resources such as water this question did begin to arise. It seems to have been first suggested in England in the case of *Chesmore v. Richards*, 7 H. L. Cas. 349. There the question arose whether the flow of percolating waters on another's land might be diverted or destroyed by pumping for purposes of supplying a municipality with water, and while it was finally held that this might be done it was only after the right had been seriously questioned.

In this state it was first discussed, though not actually involved, in *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, and it was there stated by Judge Hatch that the right in this state had never "been upheld in the owner of land to destroy a stream, a spring or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture or mining or by structures for business carried on upon the premises."

Finally, in the case of *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A.

695, the question reached this court and the necessity was recognized, not for an alteration of the rules which had been applied by earlier cases to the facts then presented, but rather for an enlargement and extension of such rules so that they would be applicable to new conditions. That case for the first time in this state at least laid down the rule of the reasonable use of percolating waters which I think is applicable to and controlling of the facts in this case. There the city of New York tapped waters percolating under some lands purchased by it and which were part of a connected <sup>337</sup> system or supply extending over a large area, and then by powerful apparatus so forced the flow of this water as to exhaust the supply which had formerly supplied plaintiff's land, and this was done for the purpose of furnishing a supply of water for the defendant. The court, reviewing many earlier cases passing upon the right of a land owner to enjoy the subsurface waters under his premises, said: "In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

"In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The principles thus adopted in the Forbell case (164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695) have been fairly upheld in the courts of other states:

Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; Richmond Nat. Gas Co. v. Enterprise Nat. Gas Co., 31 Ind. App. 222, 66 N. E. 782; Willis v. City of Perry, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.

The situation described by the complaint in this action is  
338 relatively of the same general character as that with which the court dealt in the case cited.

One proprietor by artificial and unusual methods has so increased the flow of percolating waters and gas upon its lands that it is obtaining a greatly increased proportion of a common supply at the expense of its neighbors, and it is doing this in order to supply a public market for a portion of these products while the others are wasted. The only important feature distinguishing the cases is the element of waste present in this one and absent in the earlier one.

If these facts, resting now merely on the allegations of a pleading, shall be established by evidence, the trial court will in my opinion be fully authorized to draw the conclusion that they disclose a case of unreasonable and improper conduct by the appellant in the premises, and make out in favor of respondents a sufficient cause for appeal to and relief by a court of equity.

It has been suggested that the Saratoga waters are of a peculiar character and more in the nature of minerals than waters and that, therefore, the use of them by the land owner should be governed by different rules than those which ordinarily apply to the use of subterranean waters. It may be answered to this suggestion that subterranean waters have always been treated as a mineral in the decisions relating to their use and enjoyment and that no distinction in this case can be predicated upon the peculiar character and quantity of the salts and gases which happen to be in solution: Westmoreland N. Gas Co. v. DeWitt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443.

The case of Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 63 L. R. A. 589, has been pressed on our attention by the appellant both as sustaining its right at common law to draw water and gas as it has been doing and also as denying the right of the legislature to pass the statute next to be considered. In that case the court was construing the constitutionality of a law providing in substance



that any owner or operator of an artesian well who permitted it to discharge more water than was reasonably necessary for <sup>339</sup> his use, thereby materially diminishing the flow of water in any other artesian well in the same vicinity, should be liable for damages. In the course of its consideration of this law it was stated: "So it seems inevitable that, in this state at least, the right of a land owner to sink wells and gather and use percolating waters as he will, . . . is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain, or by the police power," and it was then held that the statute was not a proper exercise of police power and was unconstitutional. It is to be said of this case as greatly distinguishing it from the present one that it was dealing with the natural flow of percolating waters and not with a flow unnaturally forced by artificial means. If, however, some of the broad statements made in the opinion should be deemed pertinent to such facts as are disclosed here and to sustain the right of a proprietor to use at will subterranean waters under the circumstances disclosed in this case, it must be said, as was intimated in the Wisconsin case itself, that the courts of this state and of that one disagree on this subject.

It also is especially urged that respondents have been forcing the flow of water through their springs and marketing the same, and that, therefore, under the doctrine of *Merrick Water Co. v. City of Brooklyn*, 32 App. Div. 454, 53 N. Y. Supp. 10, affirmed, 160 N. Y. 657, relief should be denied to them. It is a sufficient answer to the first branch of this contention to say that we are now measuring respondents' rights by the allegations of their complaint and that such allegations are to the effect that before the acts complained of they were enjoying a natural flow of waters through their springs to the surface of the ground and that it is this which has been interfered with. So far as the second branch is concerned, if they were seeking to restrain the mere marketing of the products of appellant's well, it might be a sufficient answer to say that they were doing the same thing, but I fail to see how the sale of waters naturally flowing in their springs fairly or equitably forbids them from restraining appellant from continuing by artificial means the <sup>340</sup> increased and wasteful flow of waters and gas, which is the thing complained of.

In conclusion on this branch of the case it may be added that we have not been concerned with the inquiry whether

the pleader originally intended to set forth a cause of action at common law or whether if he did he has burdened his statement thereof with many superfluous and inapplicable allegations. The sole question presented to us is whether between the beginning and end of the complaint there may be found those allegations which, taken together, make out a case for relief under common-law principles, and that question as already indicated should in my opinion be answered in the affirmative.

We are next led to a consideration of the question whether respondents' complaint sets forth a cause of action under the statute which has been referred to. Independent of the query whether the respondents as taxpayers have an interest which even under the authorization of the statute will enable them to maintain this action and which will be considered by itself, this question also largely resolves itself into a second one, and that is whether the statute is constitutional. If it be so aside from the special question suggested, it is not, as I understand it, seriously contended that the complaint does not state a cause of action. In brief and in addition to various facts already commented on, it alleges the situation of respondents as persons authorized by the statute to bring the action; the violation of each and all of the prohibitions of the statute, resulting waste of great quantities of mineral waters and impairment both of the quantity and quality of the supply of water formerly flowing in the wells of respondents and other persons throughout the Saratoga area and substantial and extensive injury, present and future, to property owners in that community and to the public.

The underlying contention of the appellant with respect to this branch of the case is that the prohibitions of the statute are unconstitutional, first, because they unlawfully deprive it and others of the use and enjoyment of their property, and, <sup>341</sup> second, because being applicable only to wells driven into the rock they create unlawful distinctions and disregard that equality of rights which should prevail amongst citizens and property owners. I shall consider these objections in the order stated.

As already stated, these prohibitions are four in number, and in effect they respectively forbid accelerating or increasing the flow of percolating waters or natural carbonic acid gas, such as are found at Saratoga Springs from wells bored into the rock by pumping or any artificial contrivances

whatsoever: first, absolutely and without qualifications; second, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; third, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same; and, fourth, prohibit the doing of any act whereby the flow or quality of the waters described or of the carbonic acid gas or other mineral ingredients therein in any spring or well is diminished, etc.

It was substantially admitted by the respondents that the last prohibition was so broad and unqualified as to be unconstitutional and inoperative, and that, therefore, may be eliminated from our consideration.

The constitutionality of the other provisions must substantially be tested by reference to the rights of a land owner in underlying percolating waters independent of this statute. Those rights have already been discussed, and if proper conclusions have been reached, we have it that such a land owner may by pumps or otherwise draw on the waters percolating under the surface of his lands for a purpose naturally and legitimately connected with the improvement and enjoyment of his lands, even though it interferes with others, but that an unreasonable attempt to force and increase the flow of such waters for the purpose of diverting them to some use entirely disconnected with such improvement and enjoyment, and whereby the flow of such waters under the lands of others is destroyed or diminished, may be restrained as unlawful.

<sup>342</sup> When these rules are applied it seems to me that the first two prohibitions of the statute must be condemned and the third one upheld.

The former not only prohibit pumping waters and gas described where the result will be to interfere with the spring of another person, but forbid such acts absolutely, even though they interfere with nobody. Their application is not limited to waste or commercial uses, but under them, as they are plainly and explicitly written, a land owner in any part of the state is prohibited from extracting by means of the simplest and most modest contrivance waters from a well bored on his premises for the most legitimate and natural purpose connected with the use of his premises, provided the well happens to strike rock, and provided the water contains mineral salts and carbonic acid gas, and this whether such act interferes or not in an infinitesimal degree with the sup-

ply of some other person. It seems to me that this is such a clearly unlawful interference with well-established property rights already discussed that amplification of the idea is unnecessary.

Of course, the principle is not overlooked that the presumption is in favor of the legislative act, although it must be admitted that this presumption is somewhat weakened at this point by the common concession that at least one unconstitutional prohibition has been incorporated into this statute. Nevertheless, applying this presumption to these provisions, and utilizing every reasonable rule of construction in furtherance of the presumption, I am unable to reach a conclusion favorable to them. It will not do to say that they simply contemplate and have reference to the particular conditions prevailing at Saratoga Springs and do not mean what they seem to, for the statute is general and applies throughout the state. But, even if we accept this view of legislative intent, there must be a limit to those processes of interpretation by which definite expressions may be squared with assumed purposes, and in my judgment this limit must be transgressed if we uphold what has been written here.

We are bound to consider what may be, as well as what is <sup>343</sup> presently being, effected under a statute: *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

The present one at best and under a reasonable construction may at times accomplish unexpected results, and it does not seem best at the outset to attempt to cure plain defects in it by amendments which are more properly a subject for legislative enactment than for creation by judicial interpretation.

The principles which lead to the condemnation of the two provisions just discussed lead to the approval of the third provision as constitutional and proper. As we have seen, the land owner has no vested right unnaturally and unreasonably to force the flow of percolating waters for the purpose of marketing them, or for any purpose not connected with the use or enjoyment of his land. This being so, it was entirely proper for the legislature to adopt the provision in question defining and regulating the rights of persons desiring to use mineral waters like those at Saratoga Springs and calculated to prevent such use thereof as would either result in waste of the natural resources of the land to the injury of general and public interests, or in the unreasonable impairment of the rights of others entitled to draw from a common source. The allegations of the complaint establish that both of these



injurious results have flowed from the use which appellant is making of its wells. But of course the right of the legislature to adopt such a provision as is now being questioned was not limited to a case of present demonstrated injuries from the acts prohibited. It had the power of discretionary and anticipatory legislation extending over a broad field, and the right within its limits to regulate such conduct of its citizens as being inherently of a more or less indeterminate character might still result in injury to the public.

With the light thrown by the allegations of the complaint on the matter to which this provision relates, I should have no doubt that the latter was within the powers of the legislature, even if it was a new step in the realm of police or regulative legislation. But it is not of a new order and for the purpose of maintaining this proposition I shall not <sup>344</sup> discuss a great variety of legislative enactments held valid which by analogy seem to sustain this one, but shall come immediately to authorities which directly sustain the present exercise of legislative power.

In Cooley on Constitutional Limitations, seventh edition, 829, it is said: "The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

This doctrine was quoted with approval in *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.

In *Commonwealth v. Alger*, 7 Cush. 53, it is said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."

In *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19, 37 L. R. A. 294, there was subject to consideration a statute forbidding "the use of natural gas for illuminating purposes in what are known as flambeau lights," as a wasteful and extravagant use thereof and dangerous to the

public good. The constitutionality of the statute was upheld, and it was said: "While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own happiness must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with equal right to the same thing in others it is not an inalienable right nor a right at all, but is a wrong."

<sup>345</sup> In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740, it was held that a statute making it unlawful for any person owning or controlling a gas or oil well to permit the flow of gas or oil from such well except under certain restrictions tending to prevent waste and depletion of the general supply was constitutional. Many things were said by Justice White in the discussion of that case which are applicable to the present one, but I shall only quote a single paragraph. After reviewing the many cases he says: "On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence, it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste."

Each of the provisions which have been discussed is so complete and independent of the others that there is no difficulty in upholding the statute in respect to one although we condemn the others.

The second constitutional objection to the statute is that it violates the provision of the federal constitution prohibiting

any state from denying "to any person within its jurisdiction the equal protection of the laws." This contention is based <sup>346</sup> on the fact that the provisions of the statute affect only wells bored or drilled into the rocks. It is not, and, of course, cannot be, urged that these provisions do not affect equally all wells of a certain general description. The statute simply makes a classification of wells, and it is conceded that this may be done, if such classification is based on some sufficient reason and not on mere caprice or arbitrary election. The rule on this subject, cited with approval by appellant itself, is laid down in *Gulf etc. Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666. Justice Brewer there says: "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of denial of equal protection. While, as a general proposition, this is undeniably true, . . . yet it is equally true that such classification cannot be made arbitrarily. . . . These (citing certain illustrations) are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Under the admitted allegations of the complaint it seems to me clear that a proper basis existed for the classification made by the legislature with respect to wells sunk in the rocks and prohibiting the pumping and forcing of water and gas to the surface through such wells. In the fifteenth and sixteenth paragraphs of the complaint are allegations that the excess of carbonic acid gas existing in and filling the cavities of the rocks underlying Saratoga Springs, by reason of its confinement therein, exerts a great pressure, which tends to expel the waters and gas from the cavities of said rocks and cause them naturally to flow to the surface, and that when the gas escapes from the rocks into the superincumbent soil its power to exert such pressure is gone and it ceases to possess any efficiency as an agent to effect the flow of said mineral water; that the mineral springs in said town are dependent <sup>347</sup> for their existence upon the pressure of carbonic acid gas confined in said rocks and the withdrawal of the gas from the latter tends to destroy the force which brings the water into the natural springs and to destroy the conditions upon which the existence of said springs depend.

It thus appears that the conditions prevailing in the wells bored into the rocks are very different from those prevailing in wells sunk into the dirt; that there is less need for pumping in the former than in the latter, and, conversely, that pumping in the former will be much more exhaustive and destructive of common rights than if applied to the shallower wells. The legislature was entitled to anticipate that the same conditions which apply to Saratoga Springs might be applicable to other wells tapping precisely similar springs in other parts of the state, and within the broad discretion conferred upon it to prevent not only existing but anticipated evils, it clearly was justified in making the distinction between different wells which it did make and the classification complained of. It may be suggested that it would have been legal and much safer to pass a special act dealing with known conditions at Saratoga Springs rather than a general act which may include unexpected situations elsewhere in the state. This was a question of policy to be settled by the legislature which may still prevent or cure any undesirable results by appropriate amendment of the present law.

I come next to that contention of the appellant which lies rather outside of the act itself and which is that the respondents as taxpayers have no such interest or standing as entitles them to maintain an action under it. They concededly are of the description of persons expressly authorized by the statute to maintain such an action, and I do not understand it to be questioned but that if the people themselves might maintain this action, they may authorize any person such as the respondents to maintain it in their place and stead. Therefore, the question becomes whether the people have a sufficient interest in these matters so that they might maintain an action to enforce observance of the statute which the legislature representing <sup>348</sup> them has passed. It seems to me that their right so to do must be affirmed on two grounds.

In the first place I understand it to have been held in *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, that the legislature by express provision may effectively authorize the people or a person in their stead to maintain an action like this in the absence of some restriction in the constitution, even though the action should be deemed to relate to private interests. That action was brought by the attorney general in the name of the people against a domestic business corporation and its trustees to remove the latter from their position for misconduct, and compel them to account for and pay over to the corporation the value of property belonging to it, by them



unlawfully transferred. One of the questions involved and discussed was whether the attorney general was authorized to bring the action in the name of the people in his discretion, and this question involved a construction of certain provisions of the Code of Civil Procedure for the purpose of determining whether they did expressly authorize such action. Judge Vann, writing the majority opinion, concluded: "That the legislature intended to authorize the attorney general to bring such an action (as has been described) whenever he was convinced not only that it could be maintained, but also that the interests of the public would be promoted thereby," and that this question of what the public interests required was committed to the absolute discretion of the attorney general. Judge Landon, writing for the minority, queried: "Is it reasonable to suppose that the legislature, by the statutes in question, intended to authorize such governmental intervention," and said: "I concede that it is within the legislative power, in the absence of constitutional restriction, to provide for governmental intervention in private affairs." It was held that the statute under review conferred upon the attorney general the absolute power, whenever he deemed it wise, to commence an action in the name of the people, although relating to the administration of the private business of a corporation and that this being so the action was well brought. <sup>349</sup> But, in the second place, if we should assume that an action may be brought by the people, or by some person authorized to act for it, only where it appears as stated by Judge Landon, "that the public interests are thereby to be protected, or in some substantial way promoted, apart from the mere private relief to be awarded to individuals," I think that the requirements of such rule would have been satisfied by the respondents under the admitted facts now before us.

Let us recall very briefly some of the things liable to result from the acts prohibited by the statute in question, as illustrated by experience at Saratoga Springs. The pumping of waters and gas for the purpose of extracting and vending the latter has resulted in the waste of great quantities of waters and of all the minerals held in solution therein, except some or all of the gas. Thus it has not only resulted in a waste of an important and valuable natural product, but because of the connected sources of supply underlying a large area, the rights of other persons than the violators desiring to draw from this common source have been unreasonably and unjustly destroyed or diminished and the value of a large amount of property imperiled. I have already endeavored

to point out that this situation was one of sufficient public interest so that the legislature might deal with it as it has done by statute. It seems almost necessarily to follow that this protection of public interests would so continue as to permit the people to enforce obedience to its statutes after the same have been passed. But as an independent proposition, as was pertinently asked by Judge Vann in the Ballard case, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737: "While the people have no pecuniary interests, . . . have they no interests that need protection?" Only one answer, in my judgment, can be made to this question when it is asked, and that is that they have a substantial interest in the enforcement of the statute furnishing an all-sufficient basis for the maintenance of this action. They have an interest in the preservation of natural products like these mineral waters, and it fairly may be said that they have a substantial and enforceable interest in preserving the just and <sup>350</sup> reasonable use by all the members of a community of a common supply of a natural product and in so curtailing the attempts of one or a few to get an unjust proportion thereof, that the rights of other members of the community will not be interfered with and that disputes and litigation shall not be precipitated and that large amounts of property shall not be endangered.

These principles do not seem to be novel, but on the other hand to be sustained by ample authority.

The case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740, has been referred to in other connections. It may be well here to call attention to the fact that the action was brought in behalf of the state by the attorney general, without any relator, to enforce a statute intended to prevent the waste of gas or oil. What was said, however, would amply sustain the right of the state, if questioned, to maintain an action both preventing waste and securing just distribution to collective owners of such mineral waters. Apparently no one doubted the authority of the state to maintain the action, for no such question seems to have been presented.

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. Rep. 529, 52 L. ed. 828, an action was brought by the attorney general of New Jersey to enforce a statute prohibiting the transportation of water into any other state. Again, the right of the state to maintain such an action does not seem to have been questioned by anyone, but to have been fully affirmed, when it was said: "It sometimes is difficult to fix boundary stones between the private right of property and the police power, when, as in the case at bar, we know of few

decisions that are very much in point. But it is recognized that the state as quasi sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."

If these views are correct a cause of action has been alleged under the statute.

Some argument has been made that causes of action have <sup>351</sup> been improperly joined in the single count of the complaint before us. No such question is presented to us for consideration or involved in the questions which are presented.

The fourth and final question which has been certified to us relates to the power of the supreme court to grant the preliminary injunction which issued herein. This order was granted on the pleadings, including the verified complaint and numerous affidavits. While some of the affidavits presented in behalf of the appellant doubtless denied and, therefore, raised an issue of fact with some of the allegations of the complaint, such questions of fact were purely for the consideration of the court granting the injunction. Resolving them in favor of the respondents, as it was entitled to do and manifestly did do, the court was fully authorized on the facts and within the principles which we have approved to grant the injunction in question.

These views lead to an affirmance of the order appealed from, with costs, and lead us to answer the second, third and fourth questions which have been certified to us in the affirmative, and the first one in the affirmative to the extent hereinbefore indicated.

**Haight, J., Dissenting.** The facts and history of this case are correctly stated in the opinion of Hiscock, J. This action was brought to restrain the defendant from pumping water from the wells upon its premises and extracting therefrom the carbonic acid gas which is contained in such waters.

At common law the owner of land is entitled to all of the solids that lie beneath the surface and all of the liquids, other than surface streams, including gas, that percolate or flow through the soil or rocks that he is able to reduce to possession, and to use the same for his own purposes, at his free will and pleasure; and if, in boring a well thereon, he intercepts an underground spring that destroys his neighbor's well no cause of action arises on the part of his neighbor: *Acton v. Blundell*, 12 Mees. & W. 324, 351; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Ellis v. Duncan*, 21 Barb. 230; affirmed, 26 How. Pr. 601; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Trus-*

tees of Village of Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; Huber v. Merkel, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354, 63 L. R. A. 589; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Greenleaf v. Francis, 18 Pick. 117; Davis v. Spaulding, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102; Frazier v. Brown, 12 Ohio St. 294; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; Westmoreland Nat. Gas Co. v. Dewitt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; Hague v. Wheeler, 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 22 L. R. A. 141; People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 16 L. R. A. 443; Ocean Grove Assn. v. Asbury Park Commrs., 40 N. J. Eq. 447, 3 Atl. 168; Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Brown v. Spilman, 155 U. S. 665, 15 Sup. Ct. Rep. 245, 39 L. ed. 304; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740; Angell on Watercourses, secs. 109-114.

It will be observed from the cases cited that the foregoing rule obtains not only with reference to water which is used for enriching the soil and for domestic purposes, but also to mineral waters, saline, alkaline and sulphuric, including petroleum oil and gas which percolates or flows through the earth beneath the surface, with but a single exception. In the case of *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695, the city of Brooklyn, before it became consolidated with the greater city of New York, had acquired two acres of land in the county of Queens, upon which it had constructed a station, in which was sunk a number of wells, through which, by means of powerful suction pumps, it had drawn the waters in the earth not only from its own land, but from a large territory surrounding it and by means of conduits conveyed the water to the city of Brooklyn where it was sold and distributed to the inhabitants thereof for domestic purposes. In that case it was found as a fact that the effect of the powerful suction pumps was to so lower the underground water-table in the lands surrounding that owned by the defendant as to render such lands unfit for cultivation and the growing of crops, thus resulting in great damage to the owners of such lands. This court held, and I think properly, that the facts of that case were so exceptional that they presented a situation not contemplated by the common law or the prior cases recognizing the rights of the land owner to make such use of the water under the soil of the land as he saw fit, and that, consequently, the owner was entitled to damages; but in so holding the court was careful to limit the exception to the peculiar facts of that case and to reaffirm the common-law rule as to other cases, in order that the owner may have "the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve."

Water, as it descends from the clouds, is nearly pure and consists of hydrogen and oxygen. It replenishes the earth, causes vegetation



to grow and becomes an essential part of animal life. It is evaporated by heat or the rays of the sun, becomes a part of the air we breathe, and when condensed it falls upon the earth enriching the soil and producing springs, brooks, creeks and rivers that flow upon the surface. Pure water is colorless, odorless, tasteless and a transparent liquid. These waters are distinguishable from those which are ordinarily known as mineral waters, which are impregnated with foreign ingredients such as gas, sulphur, iron and salt which give them a peculiar flavor. The mineral waters that are produced by the springs of Saratoga are impregnated with carbonic acid gas, and hold in solution salts which render them practically useless for domestic purposes, but which possess medical properties beneficial to health when taken in limited quantities. It, therefore, does not appear to me that the rule adopted in the Forbell case has any application to that presented by the complaint in this action. The fundamental difference is, that in the former case the land was dried up by reason of the suction of the water from it, and thus rendered incapable of producing vegetation, to the damage of the owner, while in this action the pumping of the water from the seams in the rock does not impair the usefulness of the soil for vegetation, but only tends to deprive the springs and wells upon the premises of the other owners of the gas necessary to make them flow. It is the gas, not the water, that is the bone of contention. It, like the natural gas and petroleum oil, has become of great commercial value and its production a prominent industry. If the rule in the Forbell case does apply to the facts presented in this case, and a person can be restrained from abstracting the gas from the waters which he pumps from his own premises, it would seem to follow that an owner might be enjoined from pumping salt water from his premises for the purpose of extracting the salt, or the pumping of wells for the purpose of extracting petroleum or gas. None of these products are beneficial to the soil, for they are destructive of vegetation, and their only value consists in their being separated from the soil, conveyed away and marketed for other purposes. To hold that any citizen may so restrain the owner of lands may result in the destruction of many of our great manufacturing establishments and operate to paralyze some of the most important industries of the country. I think that the rule which prevails with reference to salt water, petroleum oil and gas cannot be distinguished in principle from that which should control with reference to the mineral waters of Saratoga Springs. To my mind, the rule which obtains with reference to those commodities is settled by the authorities.

In the case of *Hague v. Wheeler*, 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 22 L. R. A. 141, the defendant had bored a well upon his premises for the purpose of obtaining gas, but had failed in obtaining it in sufficient quantities to obtain a purchaser thereof for commercial use. The plaintiffs, who were operating gas wells upon adjoining premises, entered upon the defendant's lands and shut in the gas by closing the well. The defendant threatened to remove the

cap and permit the gas to escape, and thereupon the plaintiffs brought action to obtain an injunction to prevent him from so doing. At that time there was no statute in Pennsylvania regulating the use that should be made of gas. The court held that, in the absence of such a statute, an injunction would not issue; that the owner could make such use of the gas that flowed from his well as suited his pleasure, and if he permitted it to waste, the plaintiff had no cause for complaint. Mr. Justice Williams, in delivering the opinion of the court, further says: "The owner of the surface is an owner downward to the center until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron and other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner and with the same results. He cannot estimate the quantity of gas or oil as he might of the solid minerals. He cannot prevent its movement away from him, toward an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock, or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute."

In the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740, the state of Indiana, through its attorney general, had filed a complaint against the Ohio Oil Company, charging it with the violation of a statute of the state which required the confining of natural gas within the pipes of the company and the prevention of its waste. The oil company claimed that the act was violative of the provisions of the constitution of the United States. Mr. Justice White, in delivering the opinion of the court, states the general rule quoted from the case of *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. Rep. 245, 39 L. ed. 304, to the effect that "petroleum, gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it,

so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property." He also quotes the rule from the case of *Hague v. Wheeler*, 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 22 L. R. A. 141, to which I have referred above, and numerous other cases, and reaches the conclusion that water, petroleum and gas flowing in subterranean currents are not the subject of property until they are reduced to possession, and then proceeds: "As to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste": 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740. It is thus apparent that, while the legislature may regulate the use by statute, in the absence of such statute an injunction will not issue under the common law, even though there may be a waste of the product. If, therefore, the mineral waters of Saratoga Springs are subject to the rules which obtain with reference to the other mineral liquids to which I have referred, it would follow that, in the absence of a statute regulating the use of such waters, an injunction would not lie at common law to restrain a land owner from taking, through his own wells upon his own premises, carbonic acid gas for the purposes of sale.

While the mineral waters of Saratoga Springs are not used for domestic purposes nor to aid vegetation, they, however, possess medical properties which are valuable, and the state, for the benefit of the whole people, may by statute regulate the production of such waters, to the end that the natural springs may be preserved from contamination or destruction. Take, for instance, the springs of Carlsbad, Wiesbaden, the Hot Springs of Arkansas and of Virginia, the springs of Mt. Clements, as well as those of Saratoga, which are visited annually by thousands of people and some of whose waters are bottled and shipped broadcast over the land and are used by thousands upon

thousands of our inhabitants for medicinal purposes. Surely, the state, under its police powers, may, in the interests of the people, protect such great gifts of nature to mankind. I am, therefore, fully in accord with the views expressed by Judge Hiscock in that portion of his opinion in which he discusses the police powers and reaches the conclusion that the legislature may, by statute, regulate the use.

I am not, however, able to sustain the validity of chapter 429 of the Laws of 1908. It does not attempt to regulate and preserve the production of the mineral waters of Saratoga Springs in order that the public may enjoy the medicinal properties contained in such waters; but the act, in most specific terms, absolutely prohibits throughout the entire state the pumping of waters from wells drilled into the rock for the purpose of extracting the carbonic acid gas contained therein, excepting only the salt reservation at Syracuse and the counties adjoining thereto. The industry is not regulated, but is absolutely prohibited, except as to the reservation mentioned. The defendant, as we have seen, is engaged in that business. It has purchased lands and constructed a plant thereon, and has bored wells into the rock thereunder, from which it extracts the gas. Its wells do not flow, and, consequently, a pail of water cannot be taken therefrom unless by the use of a pump or other artificial means. The water, after the extraction of gas, has no commercial value, and is, consequently, returned to the earth from which it was taken. If the defendant is prohibited from pumping water, it follows that it is also prohibited from extracting any gas therefrom or of deriving any benefit from the use of its wells. The gas is of great commercial value, and the industry is an important one. Until the passage of this statute the business was lawful and legitimate. It was neither immoral, a nuisance, nor detrimental to public health, as was the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, and other kindred cases; but was an absolute right of property, which the defendant in good faith had developed by constructing an expensive plant for the extraction of gas, from which, after its establishment, the right of extraction has been prohibited by legislative act without any provision for compensation. This, I am of the opinion, should not be tolerated. As was said by Mr. Justice White in the *Ohio Oil Company case* (177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 740), above referred to, "The surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property": See, also, *People v. Van De Carr*, 178 N. Y. 425, 102 Am. St. Rep. 516, 70 N. E. 965, 66 L. R. A. 189. Had the defendant's plant been located elsewhere than in the vicinity of Saratoga Springs, no court would have entertained, for a moment, the suggestion that it could be restrained of its right to extract the gas, but being located in that vicinity and upon the basin from which the springs of that place draw their waters and gas, each of the surface proprietors being entitled to convert a part of the common product to actual possession, presents a case in which, to again



use the language of Mr. Justice White in the Ohio Oil Co. case, "the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste." I, therefore, conclude that, while the legislature may regulate the use by surface proprietors of lands in extracting gas therefrom so as to preserve the rights of each proprietor of the common field in which the gas may be found to exist, without rendering compensation therefor, yet where the legislature takes from the surface proprietor, absolutely, his right to so produce gas, it is a taking of private property for which compensation must be made, and, inasmuch as the act in question does prohibit the defendant from the exercise of this right, it is violative of both the state and federal constitutions. I favor a reversal of the order appealed from.

Gray, Edward T. Bartlett, Werner and Chase, JJ., concur with Hiscock, J.; Cullen, C. J., concurs in result; Haight, J., reads dissenting opinion.

Order affirmed.

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*The Rights in Subterranean Waters* of the owner of the land are considered in the note to Katz v. Walkinshaw, 99 Am. St. Rep. 66. The use by the owner of land who searches therein, discovers, and produces percolating water, is limited to a reasonable and beneficial use of such water, where to use it otherwise would deprive the adjacent and neighboring lands of the enjoyment of the percolating or natural spring water therein: Pence v. Carney, 58 W. Va. 296, 112 Am. St. Rep. 963; Barelay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365; Stillwater Water Co. v. Farmer, 89 Minn. 58, 100 Am. St. Rep. 365; Gareelon v. Commercial etc. Assn., 184 Mass. 8, 99 Am. St. Rep. 541; Houston etc. R. R. Co. v. East, 98 Tex. 146, 107 Am. St. Rep. 620.

*The State by Statute may Prohibit the Abstraction from the Lakes,* ponds and streams of the state of waters to be used for any other purpose than to meet the lawful uses of riparian owners and vested rights under grants already made, and when a statute has forbidden its abstraction for a stated purpose, not within such uses, abstraction for that purpose becomes unlawful, and may be restrained at the suit of the attorney general: McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 118 Am. St. Rep. 754. A statute purporting to authorize a land owner to use all the spring water rising on his own land, and therefore destroying the right to use such water by a lower riparian proprietor, is unconstitutional as a taking away or destruction of property rights without due process of law: Nielson v. Spomer, 46 Wash. 14, 123 Am. St. Rep. 910.

**CASES**  
IN THE  
**SUPREME COURT**  
OF  
**NORTH CAROLINA.**

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**WOODS v. WESTERN UNION TELEGRAPH COMPANY.**

[148 N. C. 1, 61 S. E. 653.]

**TELEGRAPH CORPORATIONS—Negligence, Presumption of from the Failure to Deliver a Message.**—Where a telegraph corporation fails to promptly deliver a message, and offers no evidence to explain such failure or to show any effort at delivery, its negligence will be presumed. (pp. 582, 583.)

**TELEGRAPH CORPORATIONS—Failure to Deliver a Misdirected Message.**—Though the address of a message gives a street number different from the number at which the addressee resides, the corporation may be held guilty of negligence if it makes no effort to find him, his name being in the city directory and his correct address being there given. (p. 583.)

**TELEGRAPH CORPORATIONS, Duty of in Seeking to Deliver a Message.**—A telegraph corporation, though the message is not addressed to the correct street number, must make reasonable inquiry and exercise that degree of care which a prudent person would use under the circumstances in an effort to deliver a message. (pp. 583, 584.)

**TELEGRAPH CORPORATIONS—Message, Variation Between the Addressee's Name and the City Directory.**—Where the addressee's name was Jay Woods, and his name as appearing in the city directory was Jay Wood, this, while a variation, does not render such directory inadmissible for the purpose of tending to show that the corporation could have found the addressee by exercising ordinary care, and was therefore guilty of negligence in not attempting to deliver the message to him, though directed to the wrong number of the street on which he resided. (p. 584.)

**TELEGRAPH CORPORATIONS, Duty of to Inquire for a Better Address.**—If due search is made for the addressee at the place named in the telegram, and he cannot be found there, the corporation should wire back for a better address, and its failure to do so is evidence of negligence. (p. 584.)

**TELEGRAPH CORPORATIONS—Delay in Delivering Message Announcing Death.**—If a telegraph corporation is negligent in delivering a message informing the addressee of the death of his father, the fact that he, notwithstanding, saw the body before its burial, does not defeat the action. (p. 584.)

**THE LAW OF ANOTHER STATE** is Presumed to be the Same as that of the state where the action is commenced and tried. (p. 584.)

**THE STATUTORY and Constitutional Law of Another State are Facts to be Proved** as are any other facts in the case by the party who seeks to take advantage of any difference that may exist between them and the law of the forum. (p. 585.)

**TELEGRAPH CORPORATIONS—Death Message—Damages from Seeing the Body Only in a State of Decomposition.**—A plaintiff suing for negligence of a telegraph corporation in not delivering a message informing him of the death of his father cannot recover damages because he saw the body of such father only after decomposition had advanced so far that his features could hardly be recognized. (p. 585.)

Action to recover damages for failure to deliver a telegram received by the defendant corporation at Knoxville, Tennessee. It was addressed to Jay Woods, No. 38 Depot Street, Asheville, North Carolina, and read as follows: "Come at once, Grant Woods is dead. If not, let know. Leona Woods." The testimony was to the effect that the plaintiff owned his home in the rear of No. 83 Depot street, and had lived there ten years. The telegram was sent on October 14, 1905, and was received at the defendant's office in Asheville on the same day, but was not delivered. At about 6 o'clock in the evening of October 15th, it was delivered to one Robertson at No. 83 Depot street, and was turned over by him to the wife of the plaintiff later, on the same day. The plaintiff heard of his brother's death, and, by a telegram, succeeded in having the funeral delayed so that he could attend it, but by that time the body of the decedent had changed so as to be hardly recognizable.

The directory of Asheville, being offered in evidence at the trial, showed the name of Jay Wood as residing at 83 Depot street. The defendant offered no evidence, but, on the contrary, moved for a nonsuit. It was granted, and the plaintiff appealed.

Frank Carter and H. C. Chedester, for the plaintiff.

Merrick & Barnard, for the defendant.

<sup>4</sup> WALKER, J. The case should have been submitted to the jury, and the court erred in deciding as matter of law that there was no evidence of actionable negligence. The defendant <sup>5</sup> introduced no evidence, and it therefore does not appear that it made any effort, not even the slightest, to deliver the message, notwithstanding the mistake in the street address. This court, in *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543, held it as well settled by the authorities that when a telegraph company receives a message for delivery to the addressee and fails to deliver it, it becomes *prima facie* liable, and the bur-

den rests upon it of proving such facts as will excuse its failure. That case followed the principle as stated in *Sherrill v. Western Union Tel. Co.*, 116 N. C. 654, 21 S. E. 400, and it has been since approved in numerous cases: *Laudie v. Western Union Tel. Co.*, 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Rosser v. Western Union Tel. Co.*, 130 N. C. 251, 41 S. E. 378, and *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490, where the cases upon this question are collected. The court said, in *Rosser v. Western Union Tel. Co.*, 130 N. C. 251, 41 S. E. 378, that: "All the facts relating to the transmission of the message were within the possession of the defendant, and it did not choose to disclose them to the court and jury. From the very nature of telegraphy, neither the sender nor sendee could personally know what became of the message or why it was not received at its destination, or, if received, why not delivered."

In *Hinson v. Postal Tel. Co.*, 132 N. C. 460, 43 S. E. 945, the message was addressed to M. L. Hinson, in care of the Olympia Mills, Columbia, South Carolina, without giving any street number or address. The messenger was informed that Hinson was not at the mills. The agent of the mills refused to receive it for him, and this court said that the case stood as if the message had not been sent in care of the mills, and with no better information of the whereabouts of Hinson than if it had simply been addressed to him at the city of Columbia, South Carolina. It was nevertheless held to be the duty of the defendant to make every reasonable effort and to exercise due diligence to find the sendee and to deliver the message, and this is the doctrine as stated in all the decisions of this court where such a point has been presented: *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490; <sup>6</sup> *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543. In Hinson's case (132 N. C. 460, 43 S. E. 945) the defendant, as it appeared, had used due diligence to find the addressee. But the case of *Lyne v. Western Union Tel. Co.*, 123 N. C. 129, 31 S. E. 350, would seem to be directly in point and to charge the defendant with negligence, at least prima facie, as the facts now appear in this case. It was there held to be the duty of the defendant to inquire at the postoffice for the residence of the sendee, no street address having been given. The rule is that the defendant must make reasonable inquiry and exercise that degree of care which a prudent person would use under the circumstances in the effort to deliver the message. In this case it seems that the defend-



ant made no attempt to deliver the message. The misdirection did not excuse this omission on its part. If the messenger boy had inquired at No. 38 Depot street he would have been told, it is true, that Jay Woods did not live there, but he might have acquired information which would have led to the discovery of his residence, as he lived close by. The entry in the city directory was also some evidence to be submitted to the jury upon the issue of negligence. The slight variation from the true name—that is, Jay Wood for Jay Woods—was not sufficient to deprive it of its character as evidence, and was hardly sufficient to mislead a person of ordinary prudence: *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490. No inquiry was made at the postoffice: *Lyne v. Western Union Tel. Co.*, 123 N. C. 129, 31 S. E. 350. Indeed, the defendant, so far as the case shows, did not even send out a messenger boy with the telegram for the purpose of finding the sendee. If due search had been made for him and he could not be found, it was still required to wire back for a better address, which it did not do, and this was evidence of negligence: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 126 N. E. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490. In any view of the case there was evidence of negligence proper to be considered and passed upon by the jury, and the judgment of nonsuit was therefore erroneous.

7 The fact that the plaintiff did see his brother's body before the burial is no defense to this action. The defendant has failed to perform a plain duty which it owed to him, and this shows actionable negligence: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490; *Hocutt v. Western Union Tel. Co.*, 147 N. C. 186, 60 S. E. 980. Nor will the objection hold that the message was sent from Knoxville, Tennessee. There is no proof of the law of that state in respect to the recovery of damages for mental anguish in a case like this one. We have held that the breach of the duty of the defendant in delivering a message is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it: *Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 49 S. E. 165, 67 L. R. A. 985; *Cashion v. Western Union Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Cogdell v. Western Union Tel. Co.*, 135 N. C. 431, 47 S. E. 490. "In the absence of

proof to the contrary, the courts of our state will presume the common law to prevail in a sister state": 6 Am. & Eng. Ency. of Law, 2d ed., 282; Griffin v. Carter, 40 N. C. 413; Brown v. Pratt, 56 N. C. 202; Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Terry v. Robbins, 128 N. C. 140, 83 Am. St. Rep. 663, 38 S. E. 470; Bank v. Carr, 130 N. C. 479, 41 S. E. 876. "The statute and common law of our sister states are facts to be proven, as any other facts in a cause, by the party who seeks to take advantage of any difference that may exist between such laws and our own": Brimhall v. Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Peterson v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298. The rule upon this subject is well expressed in Carpenter v. Grand Trunk Ry. Co., 72 Me. 388, 39 Am. Rep. 340: "This brings us to the inquiry whether the ruling at the trial can be sustained upon the ground that there was no evidence of what the law of Canada was. We think not. Undoubtedly the case was to be tried in accordance with the law of this state, in the absence of proof of any other law. 'It is a well-settled rule,' says the court of appeals of New York, 'founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party appeals for redress, furnishes in all cases <sup>s</sup> *prima facie* the rule of decision; and if either party wants the benefit of a different rule or law (as, for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitae*), he must aver and prove it. The courts of a country are presumed to be acquainted with their own laws, but those of other countries are to be averred and proven, like other facts of which courts do not take judicial notice'": Monroe v. Douglas, 5 N. Y. 447. Wigmore, in his work on Evidence, paragraph 2536, says that in reality there is no presumption of what the law is in another state, but the true process is merely that of refusing to recognize a presumption that a foreign state has a law different from that of the *lex fori*.

The plaintiff cannot recover any damages because he saw his brother's body after decomposition had advanced so far that his features could "hardly" be recognized. We have held at this term that this is not a proper element of damages: Kyles v. Southern Ry. Co., 147 N. C. 394, 61 S. E. 278, 16 L. R. A., N. S., 405.

New trial.

CLARK, C. J., concurs in the opinion of the court on the additional ground thus stated in the two latest works on the subject:

Jones on the Telegraph, section 598, says: "Under the rulings of the courts in those states which permit a recovery of damages for mental anguish or suffering, such damages may be recovered for the negligent transmission or delivery of a message sent into these states from those which refuse to allow such damages: *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063, 56 L. R. A. 301n; *Western Union Tel. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526. The same rule applies where the messages are sent from the states which permit to those which do not permit such recovery, when the action is brought in the former states. So, also, damages may be recovered in the state where the message is sent, although it is to be delivered in a state which does not allow a recovery of such damages: <sup>9</sup> *Bryan v. Western Union Tel. Co.*, 133 N. C. 603; *Western Union Tel. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751; *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591, 69 S. W. 427. But if both the states from and to which the message is sent refuse to allow damages for mental suffering, such damages cannot be recovered, although the suit is brought in a state which does allow such damages, and is one through which the company has a line: *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501. It seems that the statutes in those states (and we may add, decisions) permitting a recovery of such damages raise the duty of these companies above that assumed in the contract of sending, and base their reasons upon the fact that a public duty has been violated, for which damages may be recovered, either at the place of sending or receiving," citing to sustain the view that this is a breach of public duty *Thompson on Electricity*, section 427. This ground of recovery has always been recognized in this state.

In 2 *Joyce on the Telegraph*, section 812c, it is said: "Under a South Carolina case, if a mistake occurs at the office in a state from which the telegram is sent, recovery may be had therein by the addressee for mental anguish, where it is a ground for recovery in such state, and it need not be shown that there has been a change in the common law of the state to which the message is sent: *Walker v. Western Union Tel. Co.*, 75 S. C. 512, 56 S. E. 38. It is also determined in that state that, although the telegram was received for transmission in another state, yet, if there was a failure to deliver in South Carolina, an action was maintainable there for the resulting mental suffering."

If there is breach of a public duty, and damages for mental anguish are recoverable therefor, it logically follows that

when the action is brought in this state such damages are recoverable, whether the message originated or was received here. And, for the very reason that permits either the sender, sendee or beneficiary of a message to recover upon showing injury to himself from a breach of such duty, this state has allowed damages for mental suffering, irrespective of whether <sup>10</sup> the message originated here or was received here. In *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427, such damages were allowed where the message was sent from Danville, Virginia, to Milton, North Carolina. In *Young v. Western Union Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044, 9 L. R. A. 669, the message was sent from Greenville, South Carolina, to New Bern, North Carolina. These were our two earliest cases allowing damages for mental anguish. And such damages have been frequently allowed since in regard to telegrams originating elsewhere. The sole case to the contrary is *Johnson v. Western Union Tel. Co.*, 144 N. C. 410, 119 Am. St. Rep. 961, 57 S. E. 122, 10 L. R. A., N. S., 256, in which the first paragraph in the headnotes requires us to overrule the second headnote.

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*A Presumption of Negligence Against a Telegraph Company* arises in case of failure to deliver a message, or a long delay in its transmission: *Kirby v. Western Union Tel. Co.*, 77 S. C. 404, 122 Am. St. Rep. 580; *Shepard v. Western Union Tel. Co.*, 143 N. C. 244, 118 Am. St. Rep. 796; *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66.

*If a Telegraph Company Fails to Deliver a Telegram* which is misdirected to a particular place, within delivery limits, but which address could be ascertained from the telegraph directory, the telegraph company does not use due diligence in attempting to deliver the telegram: *Klopf v. Western Union Tel. Co.*, 100 Tex. 540, 123 Am. St. Rep. 831. See, also, *Western Union Tel. Co. v. Cobb*, 95 Tex. 333, 93 Am. St. Rep. 862; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

*Damages Recoverable Against a Telegraph Company* in the case of negligence in transmitting or delivering a message are considered in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 305.



**HARPER FURNITURE COMPANY v. SOUTHERN EXPRESS COMPANY.**

[148 N. C. 87, 62 S. E. 145.]

**DAMAGES—Loss of Profits of a Manufacturing Enterprise.**—The current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and fluctuations of the market value of the products, are, as a general rule, too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant. (p. 589.)

**THE DAMAGES Recoverable for the Loss of Profits of a Manufacturing Enterprise** due to the breach of a contract must be ascertained on the basis of the capital invested which is unproductive for a time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed and some other incidental expenses, reasonably referable to the defendant's wrong, which may at times include outlay in the reasonable effort to reduce or minimize the loss. (pp. 589, 590.)

**CARRIERS, Damages Recoverable of for Delay in Shipment of Goods Ordered for a Special Purpose.**—When goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or use indicated. (p. 590.)

**CARRIERS—Notice to that Goods are Shipped for a Specific Purpose or for Present Use, When Implied—Damages.**—Where a company engaged in the manufacture and sale of furniture causes an engine shaft to be shipped to itself, which is a part by which the power of the engine is applied to carrying on its machinery and without which the engine and the machinery dependent upon it are for the time out of action, the carrier must take notice, especially when the shipment is in an unusual way and at a higher price than if shipped in the ordinary manner, that some unusual result may ensue from delay, and the damages recoverable for the delay in the transportation are not nominal only, but the amount must be submitted to the consideration of the jury. (p. 590.)

Jones & Whisnant, for the plaintiff.

W. C. Newland, for the defendant.

**88 HOKE, J.** There was evidence tending to show that plaintiff was a firm engaged in the manufacture of furniture, having its mill at Lenoir, North Carolina; that on or about the 21st of October, 1905, the Erie City Iron Works of Erie City, Pennsylvania, shipped to plaintiff, as consignee, at Lenoir, North Carolina, an engine shaft, of a given kind weighing something like six hundred and fifty pounds; that pursuant to the order of plaintiff company the shipment was made by express, over a line of connecting carriers between the two points, including the defendant, and the shaft was delivered at Lenoir, North Carolina, by defendant company on the 9th of November, 1905, indicating a wrongful delay in the shipment of something like two weeks. There was

further evidence tending to show that the furniture factory of plaintiff company for which the engine shaft had been ordered was necessarily closed down during the time of wrongful delay, and that by reason of this loss of time in operating the factory the plaintiff company suffered damages to the amount of two hundred dollars and more, arising from wages paid idle hands and other costs incident to the delay, and interest on the amount of capital invested in the mill and unproductive during said time. The character, capacity and amount invested in the mill were <sup>89</sup> shown as data for estimating the damage suffered, and it was proved that the full product of the mill had been already sold for the period and at a profit. It was further shown that, as soon as it was disclosed that the shipment was delayed, plaintiff company immediately duplicated the order, and both shafts were delivered at the same time, November 9th.

Plaintiff offered to show the amount of profit which the mill could have realized during the time of delay, but the evidence was held to be incompetent, and the plaintiff excepted. At the close of the testimony the court intimated an opinion that, on the evidence, if believed, only nominal damages could be recovered, and in deference to this intimation plaintiff submitted to a nonsuit and appealed.

The decisions of this state are to the effect that the current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. No doubt there are cases where the average rental value of a business building or a given machine may afford data for a correct admeasurement of damages, but in plants of the kind indicated this rental value is so connected with or dependent upon the fluctuation <sup>90</sup> of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest on the capital invested and unproductive for the time,

with other incidental costs, as the correct method of adjustment. The judge below, therefore, made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill: *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 584, 41 S. E. 797; *Sharpe v. Southern R. R. Co.*, 130 N. C. 613; *Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854; *Foard v. Atlantic & N. C. R. R. Co.*, 53 N. C. 235, 78 Am. Dec. 277; *Boyle v. Reeder*, 23 N. C. 607.

We are of opinion, however, that there was error in holding that, on the facts appearing from the evidence, the plaintiff could in any event recover only nominal damages. The plaintiff complains of, and offers evidence tending to show, a breach of contract of carriage, and, as in other cases of breach of contract, it should ordinarily be allowed to recover the damages naturally incident to the breach, and which may be reasonably supposed to have been in the minds of the parties at the time the contract was made. Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. Southern R. R. Co.*, 147 N. C. 503, 61 S. E. 381, and *Lee v. St. Louis etc. R. R. Co.*, 136 N. C. 533, 48 S. E. 809, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation<sup>91</sup> in making the contract, such special facts become relevant in determining the question of damages: *Moore on Carriers*, p. 425; *Hutchinson on Carriers*, sec. 1367.

In the citation from *Hutchinson*, after stating the general rule to be the difference in the market value of the goods, the author says: "But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which for special reasons the shipper may desire that the transportation of his goods may be hastened; and if with a knowledge of these circumstances

the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time or for a given purpose, he should negligently delay them beyond that time or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner."

The same principle is well stated by Bramley, L. J., in the case of *Hydraulic Engineering Co. v. McHaffie* (1878-79), 4 Q. B. Div. 670, an action for damages for delay in constructing a machine, as follows: "The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury following from a breach of it. The wrongdoer is *prima facie* only liable for the natural and ordinary consequences of the breach; but where, at the time of entering into the contract, both parties knew and contemplated that if a breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation or damages on the occurrence of the injury." This limitation on the general rule as to the amount of damages recoverable for wrongful delay in the shipment of goods, being itself an application of the third rule laid down in the case of *Hadley v. Baxendale*, Wood's *Mayne on Damages*, page 21, is frequently presented in cases involving the making and shipment<sup>92</sup> of machinery. In fact, these are the cases which usually call for the application of the principle stated. Many instances of such application are afforded in the decisions in our own state, as in *Boyle v. Reeder*, 23 N. C. 607; *Foard v. Atlantic & N. C. R. R.*, 53 N. C. 235, 78 Am. Dec. 277; *Rocky Mount Mills v. Wilmington etc. R. R.*, 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854; *Sharpe v. Southern R. R. Co.*, 130 N. C. 613, 41 S. E. 799. See, also, *Mace v. Ramsey*, 74 N. C. 11; *Neal v. Pender-Heyman Hardware Co.*, 122 N. C. 104, 65 Am. St. Rep. 697, 29 S. E. 96. And well-considered cases in other jurisdictions are to like effect: *Simpson v. London & N. W. Ry. Co.*, [1875-76], Q. B. Div. 274; *Cory v. Thames Iron Works*, 3 Q. B. 181; *Gee v. London & Lancashire R. R.*, 6 Hurl. & N. 211; *Die Elbinger v. Armstrong* (1873-74), 92 Q. B. 473; *Railway v. Ragsdale*, 14 Miss. 460; *Griffin v. Clover*, 16 N. Y. 489, 69 Am. Dec. 718; *Priestly v. Northern etc. R. R.*, 26 Ill. 205, 79 Am. Dec. 369; *Savannah etc. Ry. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261.



In *Simpson's Case*, [1875-76], Q. B. Div. 274, it appeared that plaintiff, a manufacturer of cattle-spice and other substances, was in the habit of making an exhibit of samples of his goods in the grounds of certain cattle shows going on in different sections of the country. On the trial, before Cockburn, C. J., at spring assizes, 1875, it was proved: "On the 18th of July, the Bedford show being about to end, and a similar show at Newcastle being about to be held on the 22d, 23d and 24th of July, where the plaintiff desired to exhibit his goods, the plaintiff, by his son, who was in charge of the show tent and samples, made with the defendants' agent a contract for carriage of the samples. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son, consigning the goods as 'boxes of sundries' to 'Simpson & Co., the show ground, Newcastle-on-Tyne,' and that he indorsed the note, 'Must be at Newcastle on Monday, certain,' meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle or as to the goods being samples. The goods did not arrive till several days after time and when the show was over." On the trial the undisputed damages were <sup>93</sup> paid into court, with verdict for twenty pounds additional to cover special damages, should the court be of opinion that such damages were recoverable. Rule No. 51 argued before Q. B. Div., before Cockburn, C. J., Mellor and Field, L. JJ. The reported case proceeds as follows:

"(Field, J., referred to *Watson v. Ambergate Railway Co.* [7].)

"Gates, Q. C., and C. H. Anderson, in support of the rule: 'The argument for the plaintiff goes further than any decided case. The defendants ought to have been told that the goods were samples: *Woodger v. Great Western Ry. Co.* (8).'

"(Field, J.: 'Must we not infer as a matter of fact that notice of their being samples was given?')

"Counsel: 'Great Western Ry. Co. v. Redmayne (1) shows that distinct notice must be given.'

"(Cockburn, C. J.: 'Knowledge of circumstances from which the purpose would naturally be inferred is sufficient without express notice of the purpose itself.')

"Counsel: 'As to the loss of profits, such profits as these have never been held recoverable.'

"(Cockburn, C. J.: 'Can it be disputed that these profits would have been recoverable if an express stipulation had been made that the goods should be delivered by a particular

day and the defendants had been told what the result of non-delivery would be?')

"Counsel: 'That might be disputed.'

"Cockburn, C. J.: 'I am of opinion that this rule must be discharged. The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is especially brought to the notice of the carrier or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The plaintiff <sup>94</sup> in the present case is in the habit of going about the country exhibiting his cattle-spice at shows to attract purchasers. The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line, and their agent must have known that the plaintiff had been exhibiting these goods and that they were being sent to Newcastle for the same purpose. I therefore cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.'

"Mellor, J.: 'I am of the same opinion. As a jurymen I come to the same conclusion that the clerk of the defendants had notice of the object for which the goods were being sent. As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves.'

"Field, J.: 'I am of the same opinion. I apprehend that for a breach of contract a plaintiff is entitled to recover for damages naturally following under circumstances known to both the parties. In this case, inasmuch as railway companies do not often bind themselves to deliver by a particular day, the defendants' attention would be attracted by the stipulation which was made to that effect. Then, where was the contract made? Upon a show ground. To what place was it the goods were to be sent? To a similar show ground. The inference from which would naturally be that the goods were being sent for the purpose of being shown there. Further, if the defendants' agent did not so understand the matter, he

might have been called to say so, but that was not done. Therefore I infer, as judge of fact, that both parties were aware of the circumstances with a view to which the plaintiff was contracting, and that they were made the basis of the contract.' "

<sup>95</sup> In the case of *Gee v. London & Lancashire Ry.*, 6 Hurl. & N. 211, shipment of cotton for use in a mill, special damages were disallowed, but the court held that, if it had appeared that defendant had knowledge of the purpose for which the cotton was required, and that stopping the mill would follow from delay, the special damages could be recovered.

In *Priestly's Case* (26 Ill. 205, 79 Am. Dec. 369), damages were allowed for the use of machinery during the time it was wrongfully delayed in shipment. On the trial below only nominal damages had been allowed. On appeal, Breese, J., for the appellate court, said: "The principle announced by the court in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment that, under a contract to deliver in a reasonable time valuable machinery, such as described in the declaration, the difference in the market value of such machinery at the time it was in fact delivered and when it should have been delivered is all the damages the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to carriers to perform promptly a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, as grain, live-stock and such like, this rule is doubtless the true one, and has been recognized by this court in the case of *Sangamon etc. R. R. Co. v. Henry*, 14 Ill. 156. Where the property to be carried and delivered is not of a perishable nature and is not a common or ordinary object of sale in market and subject to its fluctuations, but is designed for a special purpose in a special business, the rule is very different; but in both cases adequate indemnity should be offered the plaintiff for the loss he has sustained."

In *Savannah etc. Ry. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261, damages were allowed for injury caused by wrongful delay in shipping a still worm for a turpentine distillery. The elements of damages <sup>96</sup> recovered in this case are thus stated in the opinion: "During all the time (of the delay) their machinery and the hands employed in run-

ning it were idle, and the tree boxes from which the crude gum was gathered had run over and much of it was wasted for the want of barrels in which to deposit it, and such loss would not have occurred had the worm come to hand at the proper time and the plaintiff been enabled to use the still. The principal loss was in the crude turpentine, estimated at eighty-six barrels, worth four dollars per barrel. There was a verdict for the entire amount of damages, less sixteen dollars."

In Ragsdale's Case, 14 Miss. 460, wrongful delay in shipping a boiler required for the operation of certain machinery, profits of the enterprise were disallowed as a proper basis of damages, and it was held that the cost of hands necessarily kept unemployed by reason of delay, with interest on capital unproductive for the time, was the correct rule for award of the damages.

And in the case of our own court (*Neal v. Pender-Heyman Hardware Co.*, 122 N. C. 104, 65 Am. St. Rep. 697, 29 S. E. 96), damages were allowed for loss of a tobacco crop, on failure to furnish, as per contract, at the stipulated time, certain flues to use in curing tobacco. It was contended that no special damages could be recovered, inasmuch as plaintiff failed to show that defendant had knowledge that such damages would result from a failure to deliver the flues. But the court held that it was a matter of common knowledge in localities where tobacco is cultivated that if it is not cut and cured in apt time serious loss is the necessary consequence, and such knowledge would be assumed against defendant engaged in manufacturing the flues and his agent engaged in selling the same. A proper application of the doctrine declared and approved by these authorities will establish the position that, on the facts appearing in evidence, if the defendant's responsibility for this delay should be established, the plaintiff is entitled to recover compensatory damages, and <sup>97</sup> the question of the amount should be referred to the jury, on the principles heretofore indicated.

The plaintiffs were a firm engaged in the manufacture and sale of furniture; of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery; that it is essential and necessary for the purpose, and without



it the engine itself and the machinery dependent upon it are for the time out of action. The kind and size and weight of the shaft would give notice of at least the maximum capacity of the engine. As we said on the former appeal of this cause, "We may safely assume that the express companies are agencies organized for the purpose, at a higher price, of providing greater security and dispatch in the delivery of freight." And it would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than six hundred and fifty pounds, which under ordinary circumstances could and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price unless the call was urgent and some unusual result would follow by reason of delay. The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment, and require that amount of plaintiff's damages should be considered and determined by the jury in that aspect of the matter.

It is not practicable within the compass of this opinion, already extended to an undesirable length, to refer to the numerous authorities relied upon to sustain the defendant's position. There is no substantial difference in the general principles established by any of these decisions, and the question <sup>98</sup> of ever-recurring perplexity for the courts is the correct application of these principles to the varying facts of the different cases. To illustrate: In *Thomas etc. Mfg. Co. v. Wabash etc. Ry.*, 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827, where special damages were disallowed for delay in shipping a machine, for the reason that the machine was designed for present use and for a purpose that would afford data for allowance of such damage, there was not only no evidence indicating knowledge on the part of the carrier of the special purpose alleged to have caused the loss, but there was testimony tending to show notice of an entirely different purpose. Cole, C. J., in delivering the opinion disallowing the claim, said: "The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume, as we have no right to do, that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use."

As we have endeavored to show in the case before us, the style and title of the plaintiff firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of defendant's business, by which it undertook for a greater wage to give additional assurance, both of safety and dispatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay, in breach of defendant's contract. So in the case of *Sawmill Co. v. Nettleship*, shipment of a lot of machinery from Liverpool to Vancouver's Island. The machinery was in different boxes, and one of these, containing a portion of the machinery, was lost, preventing operations until it could be replaced by sending to England for another piece, causing a delay in operations for something like twelve months. Damages for cost of procuring another piece were allowed, including cost of additional <sup>99</sup> freight, but profits during the period of delay were disallowed. This was put in part on the fact that the machinery was boxed and the carrier had no knowledge of the relative importance of that contained in the box lost, or that stopping of the mill would likely follow from such loss. Some stress was laid, too, on the fact that, owing to the length and uncertainty of a voyage of that kind, it would be unreasonable to suppose that the parties, in that mode of shipment, contemplated that the additional damages could be recovered; and the case, in both of these respects suggested, is clearly distinguished from the one we are considering.

We are not inadvertent to the fact that, in the case of *Hadley v. Baxendale*, 9 Ex. 341, itself, the implement was the crank shaft of an engine, for lack of which the plaintiff's mill was stopped for the time. Without adverting to the distinctions that could be suggested between the two cases, it may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly ascertained than as a decision on the facts of the particular case. In evidence of this it may be noted that as a matter of fact the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear; possibly because the notice referred to was given the day before the shaft was delivered for shipment, which is not, it seems, a very satisfactory explanation. While this does not at all impair the

value of the case as making notable declaration of the general rules applicable to such causes, it does, perhaps, weaken it to some extent as a decision on any given state of facts. In any event, we are of opinion that, on the facts presented here, the case comes within the third rule of *Hadley v. Baxendale*, 9 Ex. 341: "That where the special circumstances are known or have been communicated to the person who breaks the contract, and where the damages complained of flow naturally from the <sup>100</sup> breach of contract under those special circumstances, then such special damages must be supposed to have been contemplated by the parties to the contract and are recoverable."

It may be well to note that the cases of *Foard v. Atlantic & N. C. R. R. Co.*, 53 N. C. 235, 78 Am. Dec. 277, and *Sharpe v. Southern R. R. Co.*, 130 N. C. 613, 41 S. E. 799, go farther, perhaps, than the facts as they are made to appear in the cases on appeal would seem to justify in holding the carrier liable for unusual damages by reason of special circumstances; certainly they go much farther than is required to support the disposition we make of the present appeal. It is more than likely, as the question chiefly presented in those appeals was as to the correct rule for ascertaining compensatory damages as between current profits and interest on the amount of capital unemployed, that some of the evidence tending to fix the carrier with notice was omitted, as no point was made as to notice. This is certainly true in the case of *Rocky Mount Mills v. Wilmington R. R. Co.*, 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854. The writer presided at that trial, and there was evidence, both direct and from the character and quality of machinery shipped, tending to show notice, and it was omitted in the statement of case on appeal for the reason suggested, that no point as to notice was made on the trial.

On the former appeal of this cause (144 N. C. 639, 57 S. E. 458), we held that there was evidence to be considered by the jury on the issue as to defendant's responsibility; and in this appeal we hold, in case such responsibility is properly and correctly established, that on the testimony there is evidence which requires that the question of the amount of compensatory damages shall be referred to the jury, and there was error in the ruling that, on the facts as they now appear, only nominal damages can be recovered.

Judgment below reversed and new trial awarded.

New trial.

Walker and Brown, JJ., dissenting.

*A Consignee of Machinery cannot Recover Damages from the carrier for losses due to the idleness of his mill in case the carrier negligently delays the transportation of the machinery, unless the carrier is chargeable with notice of the use for which the machinery is to be put by the consignee: American Express Co. v. Jennings, 86 Miss. 329, 109 Am. St. Rep. 708; Traywick v. Southern Ry. Co., 71 S. C. 82, 110 Am. St. Rep. 563, and cases cited in the cross-reference note thereto. But when a threshing-machine is consigned in June to an implement dealer in Kansas, the carrier will be deemed to have notice that the machine, if not already sold, is intended for immediate sale, and that a delay until the close of the threshing season will defeat the purpose of the shipment: Missouri Pac. Ry. Co. v. Peru-Van Zandt Co., 73 Kan. 295, 117 Am. St. Rep. 468. The rule that damages of a special or exceptional kind for delay in the shipment of goods cannot be recovered, in the absence of notice to the carrier at the time of making the contract of carriage of the particular condition under which damages are likely to arise as the result of delay, is not an unbending rule nor applicable to every case: Bourland v. Choctaw etc. Ry. Co., 99 Tex. 407, 122 Am. St. Rep. 647.*

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## DAVENPORT v. NORFOLK AND SOUTHERN AND SUFFOLK AND CAROLINA RAILROAD COMPANIES.

[148 N. C. 287, 62 S. E. 431.]

**RAILWAY, Liability of for Injury to Real Property Due to Negligent Construction of Its Roadbed.**—Damages incident to the negligent construction of a railroad may be recovered though the right of way has been purchased or regularly acquired by condemnation. (pp. 603, 605.)

**RAILWAYS, Liability of for Crossing Drainage Ditches Without Leaving Sufficient Means for the Escape of Water.**—If a land owner through whose premises a railroad passes maintains certain lead and tap ditches, and the railway company, in constructing and maintaining its road, crosses all these ditches and provides openings only for the lead ditches, it is answerable to the land owner for the damages accruing to him by its failure to provide as adequate means for the drainage and escape of water as if the small or tap ditches had been left open. (pp. 603, 604.)

**RAILWAYS, Right of to Cut and Maintain Ditches.**—If it is necessary in order to drain a railway track to cut ditches over adjacent lands across the lands of a particular proprietor, the railway company has the right to make a continuous ditch through such adjacent lands to the other side, but it is the duty of the company to have the ditches of sufficient capacity to carry off this water in addition to that which would be on the land without such change. (pp. 603, 604.)

**RAILWAYS—Water, Damages Arising from Accumulating Without Providing Means of Escape.**—A request for an instruction that a railway company in constructing its roadbed had the right to accumulate all waters which would naturally flow upon the plaintiff's land and convey them by ditches in and upon his lands "and for damages incident to this right, no recovery can be had," is properly modified by striking out the words within quotation marks, where



the evidence tends to show that the defendant had not provided any sufficient culvert or drainage to carry off such water. (p. 605.)

**DAMAGES, Question Respecting Amount of, When not Improper Because Calling for an Opinion.**—In an action to recover for damages alleged to be due to ponding water on the plaintiff's land, the question, "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906? is properly allowed. The answer does not involve a mere opinion, but an estimate by the witness, from personal observation and view and knowledge of the conditions, and it should, therefore, be considered as the statement of a fact. (p. 605.)

Aydlett & Ehringhaus, for the plaintiff.

Small, MacLean & McMullen, for the defendants.

**288 HOKE, J.** Action to recover damages for alleged negligent construction of the roadbed of defendant companies, tried before Cooke, J., and a jury, at spring term, 1908, of Tyrrell.

There was evidence tending to show that defendant companies, having condemned a right of way, proceeded to construct their roadbed through the lands of plaintiff, and that such roadbed crossed a number of lead ditches made by plaintiff for the proper drainage of his lands, and also a number of tap ditches conveying the water of said land to the lead ditches at various points below the defendants' roadbed; that defendants constructed culverts or put in pipes at the points where these lead ditches had passed under the roadbed, but did not **289** make any such drainage for the tap ditches, but, in constructing their roadbed, by lateral ditches the water which had been carried by these tap ditches, and also some water from adjacent lands, was conveyed along the side of the roadbed into the lead ditches, and by reason of the increase of water the culverts were not sufficient to carry off the waters of the usual and ordinary rains falling in the vicinity, and by reason of this defect these waters were ponded back upon the lands of plaintiff, causing much damage and injury to plaintiff's lands and the crops growing thereon.

The plaintiff, testifying to his alleged injury and the cause thereof, among other things, said: "The water on the north side of the railroad drains southwardly to a swamp. My land lies between the letters 'A' and 'D' on the map. Before the railroad was constructed my ditches ran just as they do now. The railroad cut ditches on each side of the track and threw up an embankment or roadbed, and that caused all the tap ditches to fill up, only leaving open the lead ditches at 'A,' 'B' and 'C.' The water before that time went south-

wardly and was carried off by the lead ditches and tap ditches which drained my land. I cleaned out these ditches in 1893. My father and myself were renters of the land, and I purchased it in 1897. From 1897 we made good average crops for that time. Before the railroad cut the ditches none of the water east of 'D' or west of 'A' came down on my land, but since then the water for a distance of half a mile east of 'A' has come down on my land, and when there has come a big rain it would come down from east of 'D.' I think the roadbed is from two to three feet high. The land on both the east and west sides of my land is higher than mine, and the fall of the land is from the north. The conditions, as changed by the railroad, have greatly increased the flow of water on my land, and, the culverts not being sufficient to take it off promptly, the water ponded on my land, and on the south side the ditch would not be sufficient to hold the water.<sup>290</sup> I have seen the water so high that it flowed over the top of the railroad. In 1906 I had in cultivation about one hundred and eighty acres of corn, cotton, peas and sweet potatoes. There were sixty-eight acres of cotton, eighty in corn, five in potatoes and the balance in peas."

Witness was here asked: "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" To this question and the testimony in response thereto defendants objected; objection overruled; exception. (Exception 1.)

The witness answered: "I would have made a quarter of a bale of cotton per acre, and I only made seven bales on the sixty-eight acres. Cotton was worth ten to eleven cents per pound, and the bales weighed five hundred pounds each. I would have made three barrels of corn per acre, and only made fifty barrels on about eighty acres. Corn was worth four dollars per barrel. The stock peas were not damaged so much. The potato crop was a failure."

Issues were submitted, and responded to by the jury, as follows:

1. "Was the railroad of defendants negligently constructed, and if so, was water thereby ponded on the lands of plaintiff, as alleged?" Answer: "Yes."

2. "If so, what damage to his lands and crops has plaintiff sustained thereby?" Answer: "Fifteen hundred dollars."

3. "Has the cause of any injury to plaintiff's land in respect to drainage and as complained of by plaintiff been removed, and if so, when?" Answer: "Yes; January 28, 1908."

Motion for new trial by defendants for error of the court in its ruling on the question of evidence as above indicated, and for errors in the charge. Motion overruled, and defendants excepted. Judgment on verdict for plaintiff, and defendants excepted and appealed.

<sup>291</sup> In *Mullen v. Lake Drummond Canal & W. Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833, a case concerning chiefly the rights acquired by condemnation proceedings. Douglas, J., delivering the opinion of the court, on page 503. said: "It is well settled that no damages are contemplated in the original condemnation, except such as necessarily arise in the proper construction of the work." And in *Adams v. Durham & N. R. R. Co.*, 110 N. C. 325, 14 S. E. 857, Mr. Justice Avery, in declaring the same doctrine, page 330. said: "Whether an easement passed by private sale or condemnation, the estimate of its value is presumed to be made in contemplation of the observance on the part of the corporation of the golden maxim of the law, by so exercising its privilege as to inflict no unnecessary injury on the servient owner: *Lewis on Eminent Domain*, 571; *Angell on Watercourses*, 95, 95a, 97; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Embry v. Owens*, 6 Ex. 369; *Pugh v. Wheeler*, 19 N. C. 50; *Walton v. Mills*, 86 N. C. 280; *Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590; *Gould on Waters*, 209, 214, 401, 405; *Hosher v. Kansas City etc. R. R. Co.*, 60 Mo. 329; *Curtis v. Eastern R. R. Co.*, 98 Mass. 428; *Lawrence v. Railroad*, 71 C. L. 643; *Mills on Eminent Domain*, 81 (p. 220); *Munkres v. Kansas City etc. R. R. Co.*, 72 Mo. 514; *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220." And, further, on page 331: "It being admitted as a general rule that such injuries to the servient tenement as are necessarily incident to a skillful construction of the road are considered as included in the compensation for the easement, it is clear that the skill is not to be measured by the cost of the structure alone, but by its completion upon such a location and in such a manner as to provide for the public safety and convenience with unnecessary injury to the land subject to the servitude. When the attempt is made to draw and define the line of legal right between two such conflicting claimants, it is essential always to recur to the rule. *Sic utere, ut non alienum laedas*, as the touchstone by which the culpability of conduct is to be determined. The persons who fixed the <sup>292</sup> cost of the easement contemplated the building of the structure with an eye to the safety and convenience of the public and subject to this

controlling purpose, with a proper regard for the rights of the servient as well as dominant owner."

Applying these principles, it is generally held that, for damages incident to negligent construction of a company's road, recovery may be had, though a right of way has been purchased or regularly acquired by condemnation proceedings. The judge below, having properly informed the jury of this general principle and framed the issue, so as to enable them to determine the precise question, among other things and on this issue, charged the jury: "If the jury believe the evidence, there were certain lead ditches upon the plaintiff's land indicated at 'A,' 'B,' 'C,' 'D' on the map, and there were also a number of smaller ditches, called tap ditches, which emptied into the lead ditches. The railroad crossed all these ditches and provided no opening for the tap ditches, but did leave openings for the lead ditches, in which openings they placed pipes and cut ditches on each side of the railroad on its right of way for the purpose of carrying off the water that was brought by the small ditches into the lead ditches, as well as the other water; and, this being the scheme of the defendants, it must have been in full compensation for the stoppage of the small ditches and as effective as if said small ditches had been left open, and the opening for the passage of the lead ditches must have been sufficient to allow the water to pass through, and the piping put in them must have been sufficient for the purpose and the ditches properly opened for the passage of the water." And, in reference to the water which the evidence tended to show the lateral ditches had carried into the lead ditches from adjacent lands, the court further charged the jury on the issues as follows: "If the water before drained toward the plaintiff's land, and if it was necessary in order to drain the railroad track to cut the ditches from the adjacent <sup>293</sup> lands across the plaintiff's land, then the defendants had the right to make a continuous ditch from the said adjacent land on one side across the plaintiff's land and upon the adjacent lands on the other side; but if the jury shall find that this was done, then it was the duty of the defendant companies to have the ditches, both lateral and lead, of sufficient capacity to carry off this water, in addition to that which would be upon the land without this change. And if the jury shall find that the defendants failed to perform their duty, as explained to you above, and as a consequence of such failure the plaintiff's lands were flooded and damaged, then



the jury should answer the first issue 'Yes'; if they shall not so find, they should answer the first issue 'No.' "

This, we think, is a just rule by which the rights of these parties should be determined, and is in accord with numerous decisions of this court on the subject: *Mullen v. Lake Drummond Canal & W. Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833; *Parker v. Norfolk & C. R. R. Co.*, 123 N. C. 71, 31 S. E. 381; *Parker v. Norfolk & C. R. R. Co.*, 119 N. C. 677, 25 S. E. 722; *Fleming v. Wilmington & W. R. R. Co.*, 115 N. C. 676, 20 S. E. 714; *Staton v. Norfolk & C. R. R. Co.*, 109 N. C. 337, 13 S. E. 933; *Emery v. Raleigh & G. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139; *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220; *Porter v. Durham*, 74 N. C. 767.

In *Emery's Case* (102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139), it was held: "6. It is the duty of a railroad company to so construct its culverts that they will carry off the water of the streams over which they are built under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although of only occasional occurrence. But it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls." And in *Wicker's case* the principle was held to apply both to "natural and artificial drainways."

A perusal of these authorities fully sustains the charge of the court and the principles applied by him in the trial of the cause.

<sup>294</sup> Defendants in apt time presented several prayers for instructions, embodying the position, as we understand them, that if the lands of plaintiff were lower than the adjacent lands on either side of same the defendants would have the right to accumulate the water which would naturally flow on plaintiff's lands and convey the same by lateral ditches in and upon the lands of the plaintiff, and for damages incident to the exercise of their right no recovery could be had. The court gave the first part of the prayer, but declined to give the latter part of the instruction, to the effect "that no recovery could be had," and this was as favorable to defendants as they had any right or reason to expect. Conceding that the defendants, if the proper construction and safety of their roadbed required it, had the right to convey the water in question by lateral ditches to the lead ditches of plaintiff, the grievance is not that they carried it there.

but that no sufficient culvert or drainage was made to carry it off. And this being a duty incumbent on the defendants, under the authorities cited, for damages arising from the negligent breach of such duty, recovery could be had, notwithstanding the acquisition of the right of way.

The exception urged for error, that the plaintiff, Davenport, testifying on his own behalf, was allowed to answer the question, "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" cannot be sustained. This, though often expressed in the form of opinion, is an estimate given by a witness who had personal observation and cognizance of the conditions, and should be considered as the statement of a fact. It is the witness' impression, from conditions actually observed and noted by him. Even if it should be regarded as more strictly "opinion evidence," when it comes from a source of this kind, from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely <sup>295</sup> to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. McKelvey speaks of it with approval as "expert testimony on the facts": McKelvey on Evidence, p. 230.

The testimony offered and admitted comes, we think, within this principle, and its admission is sustained by well-considered decisions in this and other jurisdictions: *Wade v. Carolina Teleph. & T. Co.*, 147 N. C. 219, 60 S. E. 987; *Britt v. Carolina N. R. R. Co.*, 148 N. C. 37, 61 S. E. 601; *Taylor v. Security L. & A. Co.*, 145 N. C. 383, 59 S. E. 139, 15 L. R. A., N. S., 583; *Sikes v. Paine*, 32 N. C. 280, 51 Am. Dec. 389; *Eldridge v. Smith*, 95 Mass. 140.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be affirmed.

No error.

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*The Liability of a Railroad Company for Interfering*, by the construction of its roadbed or embankments, with the flow of waters to the injury of adjoining proprietors, is discussed in the note to *Mizell v. McGowan*, 85 Am. St. Rep. 707. The failure of a railroad company to make culverts in its embankments of sufficient capacity to permit the overflow water from an adjacent river to rise and fall with the stream is negligence, creating a liability to property owners thereby injured: *Uhl v. Ohio River R. R. Co.*, 56 W. Va. 495, 107 Am. St. Rep. 968. And a railroad company has no right to collect surface water on its right of way and discharge it in a body on the land of an adjoining owner; the damages thereby caused are not included

in the price paid for the right of way: *Baltimore etc. R. R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. Rep. 183.

*If a Railroad Company Fails to Provide a Sufficient Drain or outlet through its right of way to afford a reasonably prompt passage for the surface water seeking outlet there in times of heavy or long-continued rainfall, it is liable to adjoining land owners for the overflow of their property resulting therefrom: Harvey v Mason City etc. R. R. Co.*, 129 Iowa, 465, 113 Am. St. Rep. 483, and see the cases cited in the cross-reference note thereto. But it has been held that a railroad corporation does not owe to adjoining proprietors the duty of providing ditches sufficient to collect and carry off all surface water that comes down from the land above in its natural flow: *Greenwood v. Southern Ry. Co.*, 144 N. C. 446, 119 Am. St. Rep. 967.

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### HUGHES v. CROOKER.

[148 N. C. 318, 62 S. E. 429.]

**EVIDENCE, Parol of Collateral Agreement, When Admissible.**—Evidence is properly received that certain promissory notes were executed because of an agreement between the payee and the maker that the latter would do certain acts, and that until they were done, the transaction should not be deemed complete, nor the notes enforceable. This is not a varying by parol of the terms of a writing, but amounts to a collateral agreement postponing the legal operation of the writing until the happening of a contingency. (pp. 607, 608.)

**EVIDENCE—Agreement not to Use Promissory Notes Until the Happening of a Contingency, When Sufficiently Proved.**—In an action to recover damages sustained by the plaintiff by the wrongful negotiation of notes executed by him, testimony to the effect that the payee said that the maker was absolutely safe and that the contract was not finished until he had signed a certain expression of his satisfaction with the performance of another and collateral agreement between the maker and the payee, is sufficient to sustain the action. (p. 608.)

**NEGOTIABLE INSTRUMENTS—Damages Recoverable by Their Wrongful Negotiation by the Payee.**—If, at the time of the negotiation of negotiable instruments by the payee named therein, he could not have recovered thereon against the maker because of a collateral, unfulfilled agreement between them, the payee is liable to the maker if the latter has been compelled to pay to an innocent indorsee. (p. 608.)

Action to recover the amount which the plaintiff, N. C. Hughes, was compelled to pay by reason of the wrongful and fraudulent negotiation of certain promissory notes executed by him to the defendant. The evidence showed that the defendant was the agent of a clothes washer company and proposed to sell certain rights to the sons of the plaintiff, and, as inducement to procure plaintiff to sign notes, agreed to train such sons in the use and sales of the machines, and that, until they had been trained to the plaintiff's satisfac-

tion, the transaction was to be incomplete and open, but the defendant, without complying with his agreement, negotiated the notes, and the plaintiff had been compelled to pay them. The jury found in favor of the plaintiff. Judgment was entered accordingly, and the defendant appealed.

Ward & Grimes, for the plaintiffs.

W. C. Rodman, for the defendant.

320 CONNOR, J. The exceptions to the admission of testimony are based upon the theory that the plaintiff is endeavoring to contradict the written contract. This is a misapprehension. The cause of action in no way draws into question the terms and provisions of the notes or the contract made between the sons of the plaintiff and the washer company. The basis of plaintiff's complaint is that, collateral to the written or printed parts of the transaction and as an inducement to the signing of them, the defendant agreed that he would perform certain obligations in regard to training the purchasers in the handling and selling of the machines and right to act as agent, etc., and that until the plaintiff, or his sons, to whom the sale was made, should sign a paper, which he produced at the time, signifying that he had performed his obligation, the entire transaction was in fieri, or, in the language of the plaintiff, "unfinished until I signed my satisfaction." That such collateral agreements are enforceable and may be proven by parol, notwithstanding the rule excluding parol evidence to contradict or vary the terms of a contract reduced to writing, has been frequently decided by this and other courts. The latest case in which the principle was enforced is *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768. Then the written order for certain goods was signed with a collateral parol agreement that it should not be binding until approved by one of the partners. An action was brought to enforce payment for the goods, which were shipped, but not accepted. The same objection was made to the introduction of evidence of the parol collateral agreement, as here. We do not think it necessary to repeat what was said in that case or do more than refer to the authorities cited. The language of *Shepherd, C. J.*, quoted from *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698, so clearly and accurately states the principle upon which plaintiff's <sup>321</sup> case and the admissibility of his testimony rest that we could add nothing of value to it. He says: "This does



not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of the contingency": *Aden v. Doub*, 146 N. C. 10, 59 S. E. 162. The testimony was clearly competent. The defendant, at the conclusion of the evidence, moved for judgment of nonsuit and, by several prayers for instruction, presented the contention that in no aspect of the evidence was plaintiff entitled to recover. We think that there is evidence competent to be considered by the jury to sustain plaintiff's allegation. He testified: "I can't say definitely whether or not he said he would not negotiate the notes, but I can say that he said I was absolutely safe, for the contract was not finished until I signed my satisfaction; that there was no finishing of the contract and that was my security. He said: 'This contract that we work under obliges every agent in engaging a subagent to promise him that before he will leave him he signs a contract saying he is satisfied. Now,' he says, 'that is your security,' and then he produces a written blank saying something, I don't remember what. He said he could not leave me; that the contract obliged him, before I sold five machines, because he was not allowed to do it, and then he says: 'I cannot leave you until you say that you are satisfied.' He showed at that time a blank paper to be signed when the work was done." There was much other testimony on the part of the plaintiff to the same effect. Defendant did not testify.

It was not denied that defendant negotiated the notes or that they were paid by plaintiff. His honor instructed the jury in every phase of the case, putting his instructions in writing. The jury having found that the plaintiff's testimony was true, it was manifest that defendant was guilty of a breach of his contract in negotiating the notes before <sup>322</sup> he had trained the sons and plaintiff had signed the paper expressing his satisfaction. This was a condition precedent to the validity or closing of the transaction. Plaintiff was negligent in trusting the negotiable notes in the custody of defendant until he had complied with his agreement. He has paid for such negligence and is entitled to be reimbursed by the wrongdoer. While the mere breach of such a contract may not be a fraud, when, as in this case, under the charge of his honor, the jury, upon considering the circumstances and conditions surrounding the transaction, find that the defendant did not intend at the time he made the contract to perform his promise, his conduct in negotiating the notes,

being a nonresident, and taking the proceeds out of the state, justify the verdict of the jury. It is difficult to understand, in the light of the experience as shown by numerous decisions of this court, why men will make such contracts. The only way, it seems, to protect them against their folly is to demand fair, open dealing on the part of nomadic salesmen of patent rights. There is but little substantial difference between plaintiff's case and many others in which overcredulous citizens, thinking that there were "millions in it," have found that the amount invested in the purchase of patent rights measured the extent of their loss. Eliminating the element of fraud, the allegations and proof are sufficient to sustain the verdict and judgment, upon the theory that the plaintiff had not, until the performance by the defendant of his obligation, come under an absolute liability to defendant. That defendant could not have recovered on the notes at the time he negotiated them is manifest. If by negotiating them he imposed an obligation on the plaintiff to the purchaser, it is equally manifest that he is liable for such amount as plaintiff was thereby required to pay. Any other conclusion would put a premium upon the violation of duty by defendant, to his enrichment and plaintiff's loss. Taking the <sup>323</sup> evidence to be true as found by the jury, there can be no doubt that a wrong has been done by the defendant to the plaintiff, for which the law will afford him a remedy. The case was fairly submitted to the jury by his honor, and we find no error in the judgment based upon the verdict.

No error.

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#### PAROL EVIDENCE OF CONDITIONS IN NOTE AND BILLS.

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##### I. Scope.

We shall not attempt to discuss in this note all of the exceptions to the familiar rule which excludes parol evidence tending to vary

or contradict the terms of a written instrument, but confine our attention to the one point raised in the principal case, namely the admissibility of parol evidence, in a suit on a note or bill, of a contemporaneous oral agreement between the parties thereto, to establish a condition precedent to delivery of the instrument. Our discussion is also limited to actions between the original parties to the note or bill or holders having no superior equity, and therefore does not touch upon the rights of bona fide holders without notice.

Agreements and conditions which destroy the negotiability of a note are the subjects of discussion in the monographic note appended to *Kimpton v. Studebaker Bros. Co.*, 125 Am. St. Rep. 192, and the admissibility of parol evidence to show oral agreements made subsequent to the delivery of a written instrument is fully considered in the note appended to *Harris v. Murphy*, 56 Am. St. Rep. 659.

## II. Introductory Statement.

The general rule of evidence that parol testimony of what was said between the parties to a valid instrument in writing, at the time of its execution, cannot be admitted to contradict or substantially vary its legal import, is too well settled to be a proper subject of discussion. It is taken from the common law, and is intended to guard against fraud and injustice by not permitting the solemn agreements of parties to be overthrown by the uncertain words and memory of witnesses. But in order to prevent this rule from being invoked as a shield to the very purpose it was intended to prevent, and from being so applied as to work injustice, the courts have, from time to time, laid down so many exceptions and modifications of the rule that it now has full application in very narrow limits. To reconcile and harmonize all these decisions would be a very difficult task, and some of them have been so loosely applied in practice as to seemingly threaten the integrity of the rule itself. Many of the exceptions, however, are quite as well settled as the general rule and require only a mere statement. It will not be denied, for example, that, as between the parties to an instrument parol evidence is competent to show fraud, mistake, illegality, want of consideration, to explain an ambiguity when such explanation is not inconsistent with the written terms, or to show that the writing is only a part of an entire oral contract between the parties, or that its obligation has been fully discharged by an oral collateral agreement. But there is still another exception, or, more properly speaking, another rule, which admits parol testimony to show that a note was delivered upon an unperformed oral condition; in other words, a condition precedent to the legal existence of the instrument—thus restraining the general rule in its application without in the least questioning its inflexibility or its wisdom. An excellent illustration of this exceptional rule is afforded by the principal case (*Hughes v. Crooker*, 148 N. C. 318, ante, p. 606, 62 S. E. 429), and it is to the doctrine there announced that our attention is here directed. So far as possible, we have selected for illustrations those cases where parol evidence was offered to show

a condition precedent to delivery, but it has been found very difficult to tell whether the condition sought to be proved was that the note was not to be delivered until a condition precedent was performed, or whether it was delivered with an agreement that the condition was to be performed—in the former case the evidence would be admissible, in the latter it would not—and this will be seen from the illustrations showing how the rule has been applied under the particular circumstances of each case.

### III. Parol Evidence to Show Conditions.

**a. General Rule.**—No general rule of law is better settled or of more importance than that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties made before or at the time of such contract. This doctrine is so elementary as to require nothing more than a mere statement.

That this rule is the same in equity as in law, and applies as well to notes and bills of exchange as to any other classes of written instruments, is also well established. "In the absence of fraud, accident or mistake the rule is the same in equity as at law—that parol evidence of an agreement alleged to have been made at the time of drawing, making or indorsing a bill or note cannot be permitted to vary, qualify or contradict, or to add to or subtract from the absolute terms of the written contract": *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508. This language of Mr. Justice Clifford but reaffirms the rule previously laid down by the same court in *Forsyth v. Kimball*, 91 U. S. 291, 23 L. ed. 352. The same doctrine is also announced in *Hutchins v. Langley*, 27 App. Cas. D. C. 234, and in *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; and indeed, as we shall hereafter see, all the courts recognize that the rule excluding parol evidence applies to notes and bills as well as to any other class of written instruments.

**b. Exception to General Rule—Condition Precedent.**—While the rule above stated is so universally upheld as to be no longer a moot question, there are many exceptions to it, some of which are quite as important as the rule itself and seem to be quite as well settled. One of these exceptions or qualifications is, that conditions relating to the delivery of a note or bill may be shown by parol evidence. This exceptional rule has been very clearly stated by the supreme courts of Massachusetts and New York, thus: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect": *Wilson v. Powers*, 131 Mass. 539; and "Parol evidence is admissible to show that a written paper which in form is a complete contract, of which there has been a manual tradition, was nevertheless not to become a binding contract until the performance of some condition resting in parol": *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127. The principle upon which this exception to the general rule rests, as appears from the principal case, *Hughes v. Crooker*, 148 N. C. 318, ante, p.



600, 62 S. E. 429, that parol evidence showing contemporaneous oral agreements relating to the delivery of a note does not contradict or vary the terms of the note, but only goes to show that the note never had any vitality as a contract, and this principle has been several times sanctioned by the supreme court of the United States; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563; *Burke v. Dulancy*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698; and the reasons why the general rule excluding evidence of parol negotiations and undertakings, when offered to contradict or vary the legal import of a written agreement should be restrained in its application by the foregoing limitation are pointedly given in the case last mentioned. The district court of Idaho had refused to permit the defendant in a suit on a note to show by parol evidence a contemporaneous oral agreement that if he did not like the mines, for payment of an interest in which the note was given, he could rescind the contract. Justice Harlan said: "The evidence offered by the appellant and excluded by the court did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulancy, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is undoubtedly *prima facie*, indeed, should be deemed strong, evidence that the instrument came to the hands of the payee as an obligation of the maker, enforceable according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing as the promissory note of the maker, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract."

The reasons thus given by Justice Harlan why a condition precedent resting in parol may be shown by oral testimony to avoid a note

absolute in terms are the same as those given by all the courts, and certainly seem founded on the plainest principles of justice. But it is not always easy to determine when the contractual relations begin by delivery of the note and when not. As has been said by a distinguished jurist, "conditions have no idiom," and whether a condition resting in parol is to be regarded as a condition precedent or subsequent is a matter of great difficulty, depending as it must upon the intent of the parties to be gathered from the circumstances surrounding each particular case. While, therefore, the exceptional rule that a note absolute in terms can be avoided by parol evidence of a condition precedent resting in parol is thoroughly established, its application to the facts in each particular case is most difficult and has resulted in such close distinction that, as was said by Judge McCay of the supreme court of Georgia (*Boynton v. Twitty*, 53 Ga. 214), "one mind sees the case on one side of it, and another mind sees it on another." It follows that the best practical method of determining when parol evidence can be admitted of an alleged contemporaneous oral agreement, the effect of which would be to avoid the note, is by a review of the cases themselves showing when such evidence has been admitted or rejected.

#### c. Illustrations Showing How Exceptional Rule has been Applied.

1. **As to Makers.**—In *Pearson v. Dancer*, 144 Ala. 427, 39 South. 474, the complainant had made to defendant an absolute conveyance of certain land on which defendant held a mortgage, in settlement of the principal named in the mortgage, and had given his notes to defendant for a specified amount to cover the accrued interest, the notes being payable at a certain time, but the notes were delivered upon a condition resting in parol that if the property enhanced in value at any time within the maturity of the notes, the notes should be canceled and delivered to the maker. This bill was filed to compel performance of the alleged verbal agreement. A demurrer to the bill was held to have been properly sustained upon the ground that the complainant could not prove by parol evidence that at the time of the execution of the notes there was a parol agreement to the effect that if a certain event transpired before the notes matured they were not to be due at all.

Another illustration of a condition subsequent, and therefore incapable of proof by parol evidence, is afforded by *Beecher v. Dunlap*, 52 Ohio St. 64, 38 N. E. 795, where it was held that evidence of a parol agreement made at the delivery of a note, by which it is not to be operative unless, within a given time, the makers realize a given sum from property purchased, and for which the note was given, is not admissible.

Likewise in an action by the payee against the maker of a negotiable note in common form, the defendant cannot give in evidence, by way of defense, a parol agreement that upon his giving a deed of real estate to the plaintiff the note should be given up: *Spring v. Lovett*, 28 Mass. (11 Pick.) 417; or that it should not be payable

unless the promisor should have certain funds in his hands: *Adams v. Wilson*, 53 Mass. (12 Met.) 138, 45 Am. Dec. 240; or that it should be given up in a certain event which has happened: *Tower v. Richardson*, 88 Mass. (6 Allen) 351.

But in *Schindler v. Muhlheiser*, 45 Conn. 150, plaintiff sued defendant on a note given by the latter to the former for the purchase price of real estate conveyed by plaintiff to defendant by an absolute deed. It was held that parol evidence was admissible on the part of defendant to show that the conveyance was not intended as a sale, but was made by plaintiff for a purpose of his own, and upon condition that the land was afterward to be conveyed back, and that the note was given upon condition that it was not to be paid.

And in *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274, suit was brought by the payee on a note to which was attached a condition, "That the said A. hath this day bargained his Starr farm, so called, to B. Now, if A. stands to the bargain, the note is to be void; if not it is to stand in full force." The defendant pleaded: 1. Non-assumpsit; 2. That he had performed the foregoing condition. It was held that plaintiff could show by parol that the note was delivered as an escrow, and what the conditions were upon which it was to take effect, and their performance on his part and nonperformance on the part of defendant, even though such conditions include a parol agreement for the sale of land.

In *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546, the note sued on was given to plaintiff by defendant for the purchase price of a horse. The defendant was allowed to prove by parol, over plaintiff's objection, that the note was executed and delivered to plaintiff upon condition that defendant should take the horse into his possession and use him until he was satisfied he was all right in every way, and if he was not satisfied with him, he could return him, and receive back his note. In upholding the admission of this testimony the supreme court said that plaintiff's objection "proceeds upon the assumption that the note in suit, when handed to the plaintiff, became a binding contract, and that the defendant was seeking to show that the absolute promise contained in it was, in fact, a conditional promise. On this assumption the objection was well taken; for, to state this matter in the ordinary way, the law will not permit you to prove by parol evidence, for the purpose of contradicting or varying the terms of a binding written instrument sued upon, that an absolute promise contained in it was, and was intended to be, in fact, a conditional one. In such a case it is, perhaps, more correct to say that the law does not permit the defendant to avail himself of such a defense to the writing sued upon, and therefore excludes evidence of such defense as of no importance, rather than to say that such a defense cannot be proved by parol evidence. On the other hand, if the averments in the third defense were such as to justify the defendant in making the claim that the paper which it calls a 'note' never was a binding contract at all, but was delivered on condition that it should

not become a binding contract until he became satisfied 'that the horse was what it was warranted to be, or until a reasonable time for him, if dissatisfied, to return it had elapsed without any such return, then evidence in support of such claim was properly admissible. It would go to show, not a parol agreement that an absolute promise contained in a binding note was in fact a conditional one, but that the note sued upon was delivered upon certain conditions which had not been fulfilled; and so it never became operative as a note—its obligation never commenced. These facts, if true, constitute a complete bar to an action upon the note, for they show that it never became a promissory note binding upon the defendant. The parol evidence objected to, in this view of the case, did not contradict or vary the terms of the note in suit. It merely went to show that although the note sued upon was in form a complete note, and had been delivered to the plaintiff, nevertheless, as the delivery was conditional, the note never became binding upon the defendant. Such a defense is always available to the defendant in a case like this, and he is at liberty to prove it by parol evidence. In such cases the so-called 'parol evidence rule' invoked by the plaintiff has no application." A judgment for the defendant was reversed, however, on other grounds.

A case somewhat similar in its essential features to the one just quoted, and in which a different ruling was made, is that of *Lunsford v. Malsby*, 101 Ga. 391, 28 S. E. 496. The notes sued on in this case were absolute and unconditional in terms, but had been given for the purchase price of machinery, and the defendant was not allowed to show by parol that the notes were executed and delivered upon condition that if the machinery would not do a specified amount of work within a given time, the notes should not be paid. "The notes sued on," said Judge Little, "contained no such stipulations. They were unconditional contracts to pay money at a given time, for a certain consideration, and the conditions sought to be ingrafted on them by this parol evidence would have varied and changed the terms of the contract. . . . No fraud or mistake being shown, the force and effect of these notes, being absolute and unconditional on their face, could not be destroyed or affected by such conditions resting merely in parol."

But in *Mehlin v. Mutual Reserve Fund Life Assn.*, 2 Ind. Ter. 396, 51 S. W. 1063, in a suit on a note given for a certain sum as premium for a policy on the life of the maker, which had been placed in the hands of the company's agent, it was held that parol evidence was admissible to show that it was placed in the agent's hands to be held by him till the maker could look into and become satisfied with the insurance proposed, as such proof showed a condition precedent to a legal delivery; and to the same effect is *Graham v. Remmell*, 76 Ark. 140, 88 S. W. 899.

But in *Aultman, Miller & Co. v. Hawk*, 4 Neb. (Unof.) 582, 95 N. W. 695, defendant had given the note sued on in renewal of certain notes previously given as the purchase price of a harvester and



binder. The machine had not proved to be as represented, and defendant sought to prove by parol that the renewal note on which the action was brought was executed and delivered to plaintiff only on the condition that he would make the harvester run and do good work, otherwise the note was to be returned to defendant. It was held that such proof was inadmissible as varying and contradicting the terms of the note.

Again, parol evidence is not admissible to show that a note absolute by its terms was in fact conditional, and only to be enforced in case persons for whom the payees were acting in a sale should claim interest on other notes previously given: *Penny v. Graves*, 12 Ill. (2 Pick.) 287; or that the payee of a note assented to an agreement between the maker and a third person, and that the note was not to be operative nor collected until after the payee had exhausted certain security afforded by that agreement: *Moore v. Prussing*, 62 Ill. App. 496; affirmed 165 Ill. 319, 46 N. E. 184.

But in a suit on a note, parol evidence is admissible on the part of the maker to show that there was an agreement between him and the payee that the said note should be substituted for a note on which the maker of this note was surety, and to show a breach of such agreement: *Rawlings v. Fisher*, 24 Ind. 52.

In *De Long v. Lee*, 73 Iowa, 53, 34 N. W. 613, the note sued on was given for an interest in a patent washing machine, and defendant sought to show by parol that it was executed upon condition that it should not be paid, except from money realized from a sale of the machines. Such evidence was held inadmissible, as altering the terms of the note, and tended to show an entirely different contract than was therein expressed.

And the maker of a note given in payment of railroad bonds cannot show in defense to an action on the note that, at the time it was given, plaintiff agreed to have the bonds indorsed by another railroad company before its maturity and has failed to do so: *Stanton v. Maynard*, 89 Mass. (7 Allen) 335. But parol evidence is admissible to show that at the time a note complete on its face was delivered by the maker to the payee, there was an agreement that it should not take effect until some other specified party should have signed it: *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; and to the same effect is *McCormick Harvesting Machine Co. v. Faulkner*, 7 N. D. 363, 58 Am. St. Rep. 839, and note, 64 N. W. 163; *Merchants' Nat. Bank v. McAnulty* (Tex. Civ. App.), 31 S. W. 1091, and *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, where it was said: "It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in praesenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract till the condition shall have been satisfied; and that proof of

such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract." While it is said in the language just quoted that there is some conflict of authority regarding the views there expressed, the only cases we have observed which squarely hold that parol evidence is not admissible to show that the delivery of a note to the payee was made conditionally—i. e., as a condition precedent to its becoming a binding obligation—come from the state of Missouri. The courts of this state seem to make no distinction in this respect between instruments under seal and those not under seal, and therefore hold that upon the voluntary delivery of a note to the payee by the maker, it takes effect absolutely—that the doctrine of escrow can apply only when the delivery is made to a stranger.

Consequently in *Massman v. Holscher*, 49 Mo. 87, the defendant in an action on a note complete in form was not allowed to show that he had delivered the note to the payee upon condition that it was to be signed by another named party, and if not so signed, to be inoperative and void, as such evidence tended to vary the effect of the note, and to the same effect is *Henshaw v. Dutton*, 59 Mo. 139, 67 Mo. 666. The same question was again before the court in the more recent case of *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823, and the rule laid down by the previous cases from this court were reaffirmed.

Again, in *Elliott v. Elliott's Admr.*, 79 Ky. 277, it was held that oral evidence was competent to prove that notes due at a specified time were by agreement not to bear interest after maturity, the court saying that the rule that parol evidence is not admissible to vary a written instrument "ought not to apply to mere legal presumptions, which in effect add new terms to the contract as expressed between the parties."

In *Bush v. Robinson*, 15 Ky. 492, 26 S. W. 178, the action was brought against a corporation and the stockholders therein, upon a note executed by the corporation. The stockholders pleaded that the note was delivered to plaintiff upon an oral waiver of their statutory liability, but parol evidence in support of this plea was not allowed at the trial and judgment was entered against the company and the stockholders individually. This judgment was reversed on appeal, and it was held that evidence of the oral waiver of the stockholders' statutory liability was admissible.

But in *Central Savings Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, and note, 94 N. W. 11, plaintiff brought the suit against the maker and indorser of the notes. The defendants offered to show by parol that the notes were given for the amount of a chattel mortgage which plaintiff held upon certain property which the defendant maker of the note had purchased, and that the notes had been delivered to the plaintiff upon the express understanding and condition that if the mortgagor of the property should thereafter be forced

into bankruptcy by his creditors and adjudicated a bankrupt, the notes sued on were to be null and of no effect. Evidence of this agreement was admitted on the trial and verdict went for defendants. Afterward a judgment was entered in favor of the plaintiff non obstante veredicto, which was reversed on appeal upon the ground that, in the absence of a special verdict inconsistent with the general verdict, a judgment non obstante veredicto was improper. On the question of the admissibility of the evidence as to the alleged conditional delivery, however, the appellate court said: "It is doubtless true, as contended by the appellants' counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event. . . . On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, or to take effect presently as the obligation of the defendant's parol evidence to introduce conditions or modifications of the terms is not admissible (citing cases). We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument."

But in an action by a client to recover money paid to his attorneys for certain bonds, parol evidence was admissible to show that the notes given for the bonds before the money payment was made were given merely as a memorandum of the amount to be due in case the client sold the bonds, and were not to be paid unless the bonds were sold: *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831.

So, too, parol evidence is admissible to show that a writing signed by defendant as follows: "Due O. [plaintiff] \$1,200," was delivered as a mere memorandum, and was not intended as a due bill for money loaned, it being claimed by plaintiff that the money was paid by him to defendant as his contribution to a partnership between the parties: *Ostrander v. Snyder*, 73 Hun, 378, 26 N. Y. Supp. 263.

Likewise in an action on a note against the maker and a surety, while the latter can show that he signed the note only as a surety, parol evidence showing an agreement between him and the plaintiff at the date of the note that plaintiff would proceed promptly to coerce payment is not competent: *Coats v. Swindle*, 55 Mo. 31.

And evidence is inadmissible in an action on a note given by a guardian to show an oral agreement that the note was not to be paid unless property of the minor sufficient to pay such note came into the hands of the guardian: *Wren v. Hoffman*, 41 Miss. 616.

Also, where the note sued on is absolute on its face, parol evidence is not admissible to show an oral agreement that in a certain event only one-half of the amount was to be paid: *Cheatham v. Hill*, 29 Mo. 311.

But where a note payable unconditionally has been given in consideration of an absolute assignment of a claim against third parties,

evidence of an oral agreement that payment of the note should be enforced only out of the proceeds of such claim is competent for the purpose of proving that the note was made in pursuance of a contract, and to show what the contract was: *Isaacs v. Jacobs*, 8 N. Y. Supp. 344, 15 Daly, 490.

Likewise, in a suit on a demand note it may be shown by parol that the note was given on the distinct understanding that it should not be presented or payment demanded until a certain event had taken place, and that such event had not yet occurred: *Rosenstock v. Montague*, 28 Misc. Rep. 483, 59 N. Y. Supp. 500 (affirming judgment of city court of New York, 27 Misc. Rep. 844, 58 N. Y. Supp. 1148).

So, too, a note absolute on its face may be shown by parol evidence to have been given as collateral security only: *Kelly v. Ferguson*, 46 How. Pr. (N. Y.) 411.

In *Pratt & Whitney Co. v. American Pneumatic Tool Co.*, 50 App. Div. 369, 63 N. Y. Supp. 1062, the suit was brought to recover the amount of a note. The answer admitted the execution and delivery of the note, but defended upon the ground that plaintiff had agreed when the note was given that it should not affect defendant's right to have deductions made for overcharges, and that the note was not to be paid until the adjustment had been made. It was held that this defense did not show any condition attached to the delivery of the note; the court, however, said: "Conditions relating to the delivery of a note may be shown, but not conditions which modify or change the character of the obligation itself. The former goes to the existence of the contract, while the latter, conceding its existence, seeks to vary the terms of it by parol evidence, and such evidence cannot be received."

Likewise, where a note, payable at a fixed time and place, for a sum certain, was delivered at the date thereof, and accompanied by a written contract showing that it was given for a scholarship in a business college—the maker to enter into the course of study when the note became due, and such scholarship to be transferable after payment therefor—parol evidence was not admissible to show that the note was not to be binding if the maker should decide not to take instruction at the school and could not sell her scholarship, in which event it was to be canceled: *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952 (reversing judgment of the supreme court, 59 App. Div. 627, 69 N. Y. Supp. 1137). But in *Western Nat. Bank v. Wood*, 64 Hun (N. Y.), 635, 19 N. Y. Supp. 81, it was held that parol evidence is admissible to show that an accommodation note was given only as collateral security, and was not to be paid until certain buildings had been completed, and then only out of loans obtained on the buildings.

And in an action on a note parol evidence is admissible to show that it was given, not to secure the maker's debt, but as a bond to secure performance by a third person of a contract between him and plaintiff: *Landrum v. Stewart* (Tex. Civ. App.), 111 S. W. 769.



But in *J. P. Byrd & Co. v. Marietta Fertilizer Co.*, 127 Ga. 30, 56 S. E. 86, in a suit by the payee of a note against the maker, it was held that the defendant could not show by parol evidence that the note was executed with the understanding that it was simply security for payment of the proceeds of certain guano, which plaintiff had delivered to defendant, plaintiff claiming to have sold the guano to defendant, and the latter claiming he held it simply to be sold for plaintiff's account, there being no allegation of accident, fraud or mistake.

In *Quin v. Sexton*, 125 N. C. 447, 34 S. E. 542, defendant admitted the execution of the note sued on (which was under seal), but alleged as a defense that plaintiff and defendant had bought land under mortgage as a speculation, and sold the same, taking a note from the purchaser payable to the defendant, expecting to pay off the mortgage out of the proceeds when collected, and that the note in suit was given to plaintiff by defendant to represent the amount of plaintiff's share in the purchase note, with the distinct understanding and agreement that it was to be paid only out of the purchase note when collected and not otherwise, that the purchase note had never been paid, and the land was sold under the mortgage and brought nothing over. Plaintiff objected to any parol evidence in support of the defense as contradicting and varying the terms of the note sued on, but it was held that evidence in support of the alleged agreement was admissible.

So, also, parol evidence is admissible to show a contemporaneous agreement at the time of the making of a note secured by mortgage that the security should first be exhausted before proceeding against the maker of the note: *Clinch Valley Coal & Iron Co. v. Willing*, 180 Pa. 165, 57 Am. St. Rep. 626, 36 Atl. 737.

But in *Phillips v. Meily*, 106 Pa. 536, it was held that parol evidence is inadmissible in a suit on a note to show that the note was executed and delivered with the understanding between the parties thereto that it should be enforceable by the payee only in case of his failure to collect another note held by him.

Again, in a suit on a check, parol evidence is admissible to show that it was given with the express understanding that it was to be returned to the drawer, if he should find that a note which the check was intended to purchase could not be used as a setoff in a certain suit: *Sweet v. Stevens*, 7 R. I. 375.

And where the note sued on was given for the purchase price of two clocks, parol evidence was admissible to show an agreement that one of the clocks might be returned, if disapproved of, since such evidence tended to establish a setoff and did not go to alter the terms of the note: *Barnes v. Shelton*, Harp. (S. C.) 33, 18 Am. Dec. 642.

Likewise, where an unconditional note is given for the purchase price, parol evidence as between the parties is admissible to show an option on the part of the purchaser to rescind the sale: *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280.

But where a note given for legal services performed and to be performed in regard to a certain criminal charge against the maker contains an absolute promise to pay a certain amount in a specified time, without condition, it cannot be shown by parol that the agreement was that a less amount was to be paid if the maker was not indicted: *Ablowich v. Greenville Nat. Bank*, 22 Tex. Civ. App. 272, 54 S. W. 794; though a parol agreement by which purchase notes for land were to be deposited with an attorney, and from the proceeds of such notes outstanding liens against the land deeded to the maker of the notes were to be taken up and discharged, may be shown in defense of an action on such notes: *Thomas v. Hammond*, 47 Tex. 42.

In *Holmes v. Crossett*, 33 Vt. 116, the defendant in an action on a note gave in evidence a written agreement, signed by plaintiff and others purporting to be defendant's creditors, promising not to sue defendant previous to the expiration of a certain period, which had not elapsed when the suit was brought. It was held competent for plaintiff to show by parol that he signed the agreement on condition that it should not be binding unless all defendant's creditors signed it, and that they had not all done so. Said the court: "It was simply an agreement as to the terms and conditions upon which the paper was to become a contract. And whether these conditions are complied with or not, the terms and stipulations of the contemplated agreement are the same; nothing is added to or taken from its terms. The only effect of a compliance is to make that a contract which before was not a contract. When it becomes a contract between the parties, it speaks for itself, as to its terms and conditions, and cannot be varied by parol testimony. But it is no violation of the rule to show by parol evidence the conditions by which it was to become a contract, and that those conditions have not been complied with, so that no contract in fact exists."

Likewise in *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980, the controversy was whether the defendants were liable to the creditors of an insolvent school corporation upon certain notes. The defendants were permitted, over plaintiff's objection, to show by parol that the notes had been given as subscription notes to raise a fund to enable the school to continue as a going concern, upon the oral condition that the notes were not to become binding until subscriptions of a certain amount were secured, and that when such sum was raised, it was to be used to pay off the bonded indebtedness of the institution and the surplus to be used for its general benefit; and that these conditions had not been complied with. The evidence was held admissible. The court, after saying that the rule was well settled that a written contract cannot be varied by parol testimony of an oral agreement between the parties, continued: "The object of the evidence introduced in this case was not, however, for the purpose of contradicting or varying the writings in question, but to show that the conditions upon which they were to become operative never occurred."

That the exceptional rule which permits parol evidence of conditions precedent vesting in parol to destroy the effect of an unconditional note or bill depends on its application to the circumstances of each particular case is well illustrated in *Gillman v. Henry*, 53 Wis. 465, 10 N. W. 692. The action in this case was brought by the executors of one G. on a note complete in form, given by the defendant to plaintiffs' intestate. The answers of defendant alleged that defendant as broker negotiated a sale of G.'s land for twenty-seven thousand five hundred dollars to one L., and that L. having only twenty-two thousand five hundred dollars in cash to pay for the land, by mutual agreement between G., L. and defendant, G. deeded the land to defendant and received from L. the twenty-two thousand five hundred dollars in cash, his, defendant's, commission, and also received from defendant the note in suit for five thousand dollars, secured by defendant's mortgage on the land. That defendant then conveyed the land to a party designated by L. subject to the payment of the said five thousand dollar note and mortgage. That all of these writings were contemporaneous, and were executed upon a distinct verbal agreement between G. and defendant that in no event was payment of the note to be demanded of defendant, but that G. was to look solely to L. and his security by mortgage on the land for payment of the note. It was held that construing all the instruments together as a single transaction defendant was absolutely liable to G. on the note, and could not set up the contemporaneous oral agreement by which G. was to collect the five thousand dollars by foreclosure of the mortgage without holding defendant liable on the note. The court was of the opinion that while the rule excluding parol evidence of contemporaneous oral agreements to vary or contradict the effect of a note did not preclude the court from looking at the relative position of the parties and the nature and object of their transactions, it could not give effect to any intention not expressed by the language of the instrument when looked at in the light of such facts as are properly before it; and that as the note in this case was "the principal thing" and the mortgage merely collateral and incident to the note, if the note could be wiped out by a parol agreement there would be no reason why the mortgage could not be wiped out by a similar parol agreement. "This may work a hardship to Henry (defendant), even if, on payment, he is entitled to be subrogated to the benefits of the mortgage. But the contract evidenced by the writings is one of his own choosing, and the court must be content to apply to it the rules of law which are clearly applicable."

In *Brown v. Wiley*, 61 U. S. (20 How.) 442, 15 L. ed. 965, it was held that, where a bill of exchange was drawn in regular form, and protested for nonacceptance, proof of a parol contract between the drawer and the party in whose favor it was drawn that it should not be presentable till a distant and undefined period is not admissible.

But in *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698, a case often referred to by all the state courts, it was distinctly held that the maker of a note may show in defense to a suit therein by the payee, by parol testimony, that the note was given on condition that it was to become a binding obligation only on a certain contingency, which never happened.

Likewise in the recent case of *Bloch v. Nevins*, 162 Fed. 129, the action was on a note given by defendant for the price of certain shares of stock in a mercantile company for which defendant had made a written subscription. It was held that parol evidence on the part of defendant was admissible to show that the note was given upon an oral agreement between him and the secretary of the company that the certificates of stock for which the note was given were to be delivered to defendant on a certain day, or the note to be returned to defendant, and that the certificates were not delivered until some time thereafter, when defendant refused to accept them. In answer to plaintiff's contention that proof of the alleged oral agreement changed the written contract, Judge Gray of the circuit court said: "The contemporaneous oral agreement was applicable to it (the note), as tending to prove a conditional delivery of the same. . . . To so hold does not contravene the general rule against contradicting or varying the terms of a written contract by parol testimony. What was the intent of the parties to the written contract becoming operative may in such a case be inquired into, and evidence considered, tending to show that in accordance with that intent, it never did become operative; that its obligation was nonexistent."

2. **As to Indorsers, Sureties and Guarantors.**—In *Kinsel v. Ballow*, 51 Cal. 754, 91 Pac. 620, the defendant had indorsed the note in suit: "With recourse to me," but sought to show by parol that at the time he transferred the note to plaintiff it was understood and agreed that plaintiff should have no recourse to defendant should the note not be paid when due, but should rely solely upon the security of a chattel mortgage by which the note was secured. The court said that it was true that as between himself and his immediate indorsee, the indorser may sometimes show that the indorsement was made merely for the purpose of transferring the instrument, especially in case of a simple indorsement, not inconsistent with the alleged verbal agreement. "But we are cited to no case holding that, in the absence of fraud or mistake, oral evidence may be introduced to show that an indorsement 'with recourse' was intended by the parties to be 'without recourse.'"

So, too, when the note sued on is an absolute promise to pay, a special plea by a surety that he signed the note to encourage the principal to pay the debt, and that it was well understood by the payee and the surety that the latter was not to be liable on the note, is not a defense to the action and may be stricken on demurrer: *Dendy v. Gamble*, 59 Ga. 434.

But parol evidence is admissible to show that an indorsement on a note was made for a special purpose, such as an authority to col-



lect: *Goette v. Sutton*, 128 Ga. 179, 57 S. E. 308; and to same effect is *Carhart v. Wynn*, 22 Ga. 24; *Scammon v. Adams*, 11 Ill. (1 Peck.) 575; and *Barker v. Prentiss*, 6 Mass. 430.

Likewise parol evidence is admissible to show that the liability of one who indorsed a note before delivery to the payee was intended to be that of a maker or surety, and not merely that of an indorser: *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101.

And parol evidence is admissible to show an agreement between the indorser and indorsee of a note that he should not sue the maker until requested by the indorser, and that he should remain liable as such without suit until he gave such notice, since the evidence does not vary the effect of the indorsement, but merely fixes the degree of diligence required by the indorsee in order to bind the indorser: *Schmied v. Frank*, 86 Ind. 250.

Also in a suit against the payees and indorsers of an accommodation note, it was competent for the defendants to show by parol that at the time they indorsed it it was agreed that before the maker should sell it, he should obtain the name of another party as payee and that the latter should also indorse it, and that the maker should execute a mortgage to indemnify the payees against loss, plaintiff having knowledge of such agreement: *Candle v. Ford*, 24 Ky. Law Rep. 1764, 72 S. W. 270.

Likewise one sued on a note as indorser may show by parol that the note was delivered as an escrow, or that it was delivered to plaintiff to be held on a condition to be performed before the interest of the holder could attach: *Ricketts v. Pendleton*, 14 Md. 320.

But as a person who signs a note at its inception as a surety is liable as an original promisor, oral testimony that he was to be liable only in case the other maker failed is not competent: *Hunt v. Adams*, 7 Mass. 518.

And where one sued as surety on a note alleged that he signed as surety on the express condition, known to plaintiff, that the note was to run only for a short time, it was held that, since this condition appeared neither in the note nor any other writing, it could have no effect, and the allegation might be disregarded: *Huey v. Pinney*, 5 Minn. (Gil. 246) 310.

Also, it was not competent for the sureties on a note to prove in defense to an action thereon that they were induced to sign as such by reason of the agreement of the creditor to whom the note was given that a mortgagee should be taken of the debtor's effects, sufficient to secure the payment: *Concord Bank v. Rodgers*, 16 N. H. 9.

In *Washington Sav. Bank v. Ferguson*, 43 App. Div. 74, 59 N. Y. Supp. 295, defendant was sued as one of the indorsers of a promissory note. The note had been made by a publishing company payable to its own order and indorsed by it and defendant. The note had been discounted by plaintiff. Defendant was vice-president of the plaintiff bank at the time the notes were discounted and his defense was that at the time he indorsed the notes and as an inducement to procure his indorsement, plaintiff agreed that in default of pay-

ment of the note, it would look in the first instance to certain collaterals and then to the personal liability of the company, and that defendant should be liable on his indorsement only for whatever balance might remain unpaid after the sale of the collaterals and the exhaustion of legal remedies against the maker of the note. It was held that the facts thus stated constituted no defense. In reply to the contention of defendant's counsel that the defense was within the rule permitting parol evidence to show conditional delivery of a note, Judge Barrett, speaking for the court, said: "Conditions relating to the delivery of the note may be shown, but not conditions affecting the character of the delivered obligation. The one goes to the existence and vitality of the contract. The other, conceding its existence and vitality, would annex a parol condition thereto, varying its contract essence. Here the defendant admits the delivery of the note, and that it was so delivered for value. It is immaterial, under the circumstances, whether that value went to him or to the Arkell company (maker of the note). When the note was so delivered for value, it had upon it the defendant's indorsement, given for the accommodation of the Arkell company. He even admits that that accommodation indorsement imported a qualified liability. The case is thus clearly reduced to an attempt by parol to vary and minimize the contract obligation."

Views not entirely in harmony with those quoted from the New York case last cited are found in *Wright v. Latham*, 7 N. C. (3 Murph.) 298. In this case the indorsee of a note brought suit against the payee and indorser in two counts. In the first count the declaration alleged the execution and delivery of the note by the maker to the defendant, the indorsement thereof by defendant to plaintiff, demand on the maker and notice to defendant of nonpayment. The second count alleged that at the time of the indorsement by defendant to plaintiff, it was agreed between plaintiff and defendant that plaintiff should endeavor by legal coercion to obtain payment of the note from the maker; and if such endeavors should prove unavailing, defendant should pay the amount of the note to plaintiff; and that plaintiff had used all legal means to coerce payment from the maker, but was unable to procure satisfaction of the note, of which fact the defendant was given notice. The defendant pleaded the general issue and the statute of limitations. No proof of demand on the maker or of notice to defendant of nonpayment was made except testimony in support of the allegations in the special count as to the verbal agreement and notice of plaintiff's failure to collect from the maker by legal proceedings. The question in the case, therefore, depended upon the admissibility of this evidence. In holding it admissible Judge Hall said: "The testimony of Pearce is objected to because it is said it goes to establish the special count, and form a contract variant from that set forth in the indorsement, which is in writing. Without at all impugning the rule, or believing that it ought to be impugned, which forbids the introduction of parol testi-

mony to alter a written agreement, I think the testimony was properly received. A contract in writing contains, in express terms, or by natural inference, the stipulations into which the parties have thought proper to enter. What is an assignment? It is a name written on the back of a bill or note, in blank or in full, when it is expressed to whom the indorsement is made. Now, who would understand anything more, even from an indorsement in full, than the indorser had parted with his interest in the bill or note, and transferred it to the indorsee? There are no words to this effect, that if the indorsee use diligence to get the money from the drawer or maker and fail, and then give timely notice to the indorser that the indorser shall be liable. How then does the indorser stand in that predicament, when there is nothing like it stipulated in the indorsement? The law merchant has placed him in it, and fixed that liability upon him, which he has not subjected himself to by an express contract. If the law has imposed this obligation upon him, it must be for reasons founded in good policy; but when the reasons cease, the obligation loses its force." The learned judge then referred to a case where the drawer of a bill has no effects in the hands of the drawee, which fact does not appear from the indorsement, but can be ascertained only by parol evidence, and continued: "If the objection to Pearce's testimony in this case be good, as altering a written contract, it would be equally as good against the parol evidence in the case just put, where a question was never raised about it."

Likewise in *Hill v. Ely*, 5 Serg. & R. (Pa.) 363, 9 Am. Dec. 376, it was held that, in an action by an indorsee against the indorser of a note indorsed in blank, parol evidence is admissible to show that at the time of the indorsement the indorsee agreed that he would not hold the indorser; and the note attached to this case (9 Am. Dec. 381) gives other cases supporting the same doctrine.

So, also, where the payee of a note indorsed it "I assign the within note to H. for value received of him," and was sued as guarantor by the assignee, the latter could show by parol that at the time of the assignment, and for the new consideration then passing between them, the assignor agreed to pay the note if it could not be made out of the maker: *Hall v. Rodgers*, 26 Tenn. (7 Humph.) 536.

And in an action by a remote indorsee against the payee on his indorsement, parol evidence is admissible to show an agreement of the intermediate indorsee to erase the indorsement, and that the purchaser of the note knew of such agreement: *Gregg v. Groesbeck*, 11 Utah, 310, 40 Pac. 202, 32 L. R. A. 266.

Also, parol evidence is admissible to prove that at the time when the owner of a note, who was not a party to it, indorsed his name in blank thereon, it was agreed that he was not to be liable unless the purchaser should return it on failure to collect it at maturity: *Brewer v. Woodward*, 54 Vt. 581, 41 Am. Rep. 857.

But in *Watson v. Hurt*, 6 Gratt. (Va.) 633, it was held in an action by the holder against the guarantor of a note, payable on de-

mand, that the plaintiff cannot, for the purpose of avoiding a bar by limitations, show a parol understanding that the note was not to be paid except on a future contingent event.

In *Susquehanna Bridge & Bank Co. v. Evans*, Fed. Cas. No. 13,635, 4 Wash. C. C. 480, however, in an action against the payee of a note on his indorsement, it was held that parol evidence was admissible to show that the plaintiff bank verbally agreed at the time it discounted the note that when the note came to maturity it would charge the amount to the maker, if it should then be indebted to him in a sum equal to the amount of the note, and not look to defendant for payment. "The reasons which forbid the admission of parol evidence," said circuit justice Washington, "to alter, or explain written agreements, and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note in hand."

3. **As to Acceptors.**—The exceptional rule which, in an action against the maker or indorser of a bill, permits evidence to show conditions precedent resting in parol, results as we have seen in many close distinctions. But even nicer distinctions must be drawn in applying the rule with reference to the acceptor of a bill; for the question then is whether the condition sought to be annexed by parol to an unconditional acceptance is to be regarded as a conditional oral acceptance or as a conditional delivery of an acceptance, and this is often a matter of the greatest difficulty. Thus, in *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483, defendant was sued on an unconditional and unqualified acceptance of a bill of exchange. The answer alleged that defendant had accepted the bill upon the express condition that only upon his becoming indebted for services to the drawer of the bill should he be called upon to pay or be made liable on the bill, and that the drawer never performed services for defendant after the acceptance of the bill. In support of this answer defendant was allowed to show by parol, over plaintiff's objections, that the drawer of the bill was engaged in building a house for defendant under a written contract, by the terms of which the drawer was to be paid a certain sum in three payments, due at stated stages in the progress of the work, the last payment being due when the house was completed. That the house was not completed when he accepted the bill, and that no money was due the drawer of the bill under the contract at the date of acceptance, and that the bill was accepted upon the express condition that it should not become obligatory upon him to pay the same until the drawer of the bill completed the house and the money became due him. That the drawer of the bill abandoned the work when the bill was accepted, and the house was completed by another at an expense to defendant in excess of what would have been due the drawer had he completed it. It was held on appeal that this evidence was improperly admitted, and a judgment in favor of defendant was set aside. Said Judge Torrance: "The acceptance sued upon is in writing, and is an absolute and unqualified one, as distinguished from a conditional one."



It is well settled that, in an action at law, such an acceptance cannot be cut down to a conditional one by the clearest proof of a contemporaneous oral agreement to that effect. . . . But if the written acceptance was delivered to the plaintiff upon an oral condition, assented to by the plaintiff, that it was not to become operative, or have any existence at all as an acceptance, until the cottage was completed and the money become due to Mills (the drawer of the bill), that condition, if proved, would avail the defendant, and under proper pleadings, evidence of such a conditional delivery would be admissible. . . . We think the answer sets up a conditional oral acceptance and not a conditional delivery of an acceptance." It would seem that the evidence was held improperly admitted in this case because not justified by the answer; but it is difficult to see how the defense could have been differently stated so as to make parol evidence to sustain it admissible under the views expressed by the supreme court.

The case of *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408, is, in its material aspects, quite similar to the Connecticut case last cited, but it does not draw the sharp distinction there made between conditional oral acceptance and a conditional delivery of an acceptance. In this case, like the other, the action was on an unconditional acceptance for the payment of money to become due on a building contract, and it was held that parol evidence was admissible to show that at the time the defendant accepted the order it was agreed between him and plaintiff that he was to pay it only in case he became indebted to the drawer on such contract, and that the drawer abandoned the contract, and nothing became due thereon.

The court, after stating that the rights of the plaintiff against the defendant were the stronger than if defendant had given them his promissory note for the amount in suit, and that in such case he could have proved by parol in a suit on the note that there was a collateral agreement between them to the effect that he should not be required to pay except upon the happening of certain events, said: "A fortiori was it admissible for the defendant to show that there was a collateral agreement between himself and plaintiffs when he wrote the word 'accepted' on the order and signed his name thereto, for, if the writing be considered as a draft drawn by Mooney on defendant in favor of plaintiffs, the legal relation of the parties when it had been accepted was that of indorser, maker or payee of a promissory note."

Again, in an action by the payees against the acceptor of a bill of exchange, defendant cannot prove that he accepted the bill under a verbal agreement with the payees to the effect that, if the bill was not paid at maturity, the "payees should not call on him until they had prosecuted the drawers to judgment or insolvency, and used all proper and lawful means to collect the same": *Cowles v. Townsend*, 31 Ala. 133.

But in an action on an accepted draft, defendant may show by parol, in support of his counterclaim alleged to have existed prior to the acceptance, that it was agreed between the parties that the acceptance should not operate as a waiver of the claim, as such evi-

dence does not vary the terms of the written instrument, but only rebuts the presumption of waiver: *Bohn Mfg. Co. v. Harrison*, 13 Mont. 293, 34 Pac. 313.

In *Meyer v. Beardsley*, 30 N. J. L. (1 Vroom) 236, an indorsee brought suit against the acceptor of a bill of exchange. The acceptance was unconditional. The defendant offered to prove that he had repeatedly refused to accept the draft when requested to do so by plaintiff and had given plaintiff as a reason therefor that the security offered by the drawer was not satisfactory as an inducement for the loan which the draft if accepted was intended to represent; but that he finally accepted it to be paid on condition that defendant received from the drawer satisfactory security for the loan. It was held that the proffered testimony was rightfully overruled, as falling within the rule excluding parol evidence tending to convert an absolute into a conditional contract.

Also, in an action by the indorser of a bill of exchange, who has been compelled to pay the same, the drawer and acceptor cannot defend on the ground that the bill was given and accepted on an unfulfilled parol condition, as that the payee would surrender a note held by him against a third person: *Foster v. Clifford*, 44 Wis. 569, 28 Am. Rep. 603.

For other cases relating to the admissibility of parol evidence to show conditions of acceptance, see page 137 of the note appended to *Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 134.

#### 4. Concerning Payment of Note.

**A. In General.**—In applying the qualifications or limitations to which the general "parol evidence" rule is subject to alleged verbal agreements concerning payment of a note, we find the same close distinctions which have been made with respect to other conditions sought to be proved by parol in avoidance of the express terms of the writing.

Thus, in *First Nat. Bank v. California Nat. Bank (Cal.)*, 35 Pac. 639, the complaint contained two counts, one on a promissory note and the other for money loaned, both for the same debt, though defendant claimed that the alleged loan was not a loan by plaintiff, but a purchase of the promissory note in suit. It was held that proof on the part of plaintiff regarding the negotiations between plaintiff and defendant for a loan, and that the latter received the funds, was not incompetent as varying the terms of the note, but tended to support the count for money loaned.

In *Pierpont v. Longden*, 46 Conn. 499, the action was upon a note given to a widow for her right of dower in certain lands. The note was for a fixed sum and payable at a certain time with annual interest. It was held that defendants could not show by parol evidence that it was agreed at the time of the execution of the note that they were to pay the widow the interest on the principal stated in the note, during her life, for the use of the dower land, and that on her death the note was to be surrendered.

But where notes and a bond of indemnity given on the purchase of a partner's interest in a firm were based on an agreement that the purchaser was to assume and pay all the selling partner's share in the debts of the firm, and indemnify him against all liability and damages, and the basis of this arrangement was a schedule of debts and assets, and it was agreed that, if the purchaser paid debts beyond what occurred on the date she should be entitled to a corresponding deduction on the notes, parol evidence is competent to show such agreement in a suit on one of the notes: *Bowker v. Johnson*, 17 Mich. 42.

**B. Time of Payment.**—Parol evidence is inadmissible to vary the date of maturity of a note or to ingraft a provision for an extension of time thereof: *Crooker v. Hamilton*, 3 Ga. App. 190, 59 S. E. 722.

But in an action by the holder against the indorser of a note negotiated after it became due, parol evidence of a stipulation by the indorser at the time of the transfer that the maker should be indulged as to time by the holder is admissible to show the degree of diligence to which the holder was bound.

**C. Place of Payment.**—Parol evidence of an agreement made at the time of the execution of a note, that the note should be payable at a place other than where payable on its face, if not paid at maturity, is admissible: *Logan v. Hartwell*, 5 Kan. 649.

So, too, in an action on a note payable in lumber at a certain time and place, parol evidence is admissible to show an agreement of the parties as to the place when the article should be delivered: *Wyman v. Winslow*, 11 Me. (2 Fairf.) 398, 26 Am. Dec. 542.

**D. Medium and Manner of Payment.**—Parol evidence is admissible to prove a contract entered into at the time of the execution of a note, whereby the payee agreed to receive in part payment thereof a debt of another: *Murchie v. Cook*, 1 Ala. 41.

Likewise in *Blinn v. Chester*, 5 Day (Conn.), 359, the defendant in a suit on a note pleaded an accord and satisfaction after the date and execution of the note. This plea was traversed and on the trial of the issue defendant offered to prove that at the time of the execution of the note plaintiff agreed that certain services should be performed by defendant, and accepted by plaintiff in full satisfaction of the sum due on the note. It was held by a majority of the court that the evidence was admissible, but three of the judges were of the opinion that such evidence varied and contradicted the terms of the note and was therefore inadmissible; and to same effect as the majority opinion is *Hagood v. Swords*, 2 Bail. (S. C.) 305, and *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100.

In *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80, it was held that evidence of a parol agreement made at the time of the execution of the notes sued on, that the maker should have the right to offset an account then existing in his favor, is not a variance from the contract embodied in the note.

So, also, where notes were given for money, parol evidence is admissible to show that the payee, at the time of their execution, agreed to surrender them on the maker's assigning to him a judgment and a certain mortgage for its security: *Braswell v. Pope*, 82 N. C. 57.

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## SUTTLE v. WESTERN UNION TELEGRAPH COMPANY.

[148 N. C. 480, 62 S. E. 593.]

**TELEGRAPH CORPORATIONS—Duty of to Deliver Message After Office Hours.**—If a telegraph corporation receives a message from the sender and undertakes to deliver it to the addressee at a time not within its office hours, this is a waiver of the benefit of such hours. (pp. 632, 633.)

**TELEGRAPH CORPORATION—Notice of Nature of Message and of Necessity of Prompt Delivery.**—If a husband, having been in a railroad wreck, delivered to a telegraph corporation a message to his wife stating that he had not been hurt, and was assured by the operator that the message would be delivered that evening, the husband stating that if it would not be so delivered he would drive home, because otherwise he knew she would hear of the wreck and spend a miserable night, this is a sufficient notice to the company that mental anguish will naturally result from the failure to deliver the message, and it is liable to her if it is not delivered, through negligence, though the message was not received until after office hours at the station to which it was addressed. The delay in delivering the message until the following morning was clearly the proximate cause of her injury. (pp. 633, 634.)

Pou & Brooks, for the plaintiff.

R. C. Strong, for the defendant.

**480 WALKER, J.** This action was brought to recover damages for failing to deliver a telegram, and was heard below on a case agreed, which is as follows:

It is admitted by counsel on both sides that the telegram set out in the complaint was delivered to the agent of the defendant, at Raleigh, N. C., at 7:27 o'clock P. M., May 19, 1903, and was received by the operator at Smithfield, agent of defendant, at 8:25 P. M. on the same night; that the message was delivered to Mrs. Suttle at 9 o'clock A. M. the <sup>481</sup>next day, to wit, May 20, 1903, and that the business hours of the Western Union Telegraph Company at Smithfield are from 8 A. M. to 8 P. M.

The court, by consent of the parties, found the following facts from the depositions submitted:

1. The plaintiff's husband, J. W. Suttle, left Smithfield on the morning of May 19th to spend the day in Raleigh, ex-



pecting to return to Smithfield on the afternoon train, and he so told his wife before leaving home that morning.

2. The plaintiff's husband, J. W. Suttle, did not return to Smithfield on the afternoon of May 19th, because the train on which he was returning to Selma was wrecked, but he returned to Raleigh from the wreck, and at 2:27 P. M. filed with the defendant's agent at Raleigh the telegram set out in the complaint and addressed to his wife, Mrs. J. W. Suttle, Smithfield, North Carolina, which was as follows: "Esta and I were in wreck; not hurt; will be home to-morrow."

3. In addition to the notice of the importance of the prompt delivery of said telegram appearing from the face of the message, the said J. W. Suttle, at the time of delivering the message, asked the operator if the message would be delivered to his wife that evening, and was told by the operator that it would. J. W. Suttle said to the operator that if he thought it would not reach her that evening he would be compelled to drive home through the country, because he knew his wife would hear of the wreck and would spend a miserable night, not knowing whether he was hurt or not in the wreck.

4. By reason of the failure to deliver the telegram promptly on the evening of May 19, 1903, the plaintiff, Mrs. Suttle, suffered great mental anguish, as described by her. If the telegram had been promptly delivered upon its receipt at Smithfield, to wit, 8:30 o'clock P. M., May 19, 1903, the feme plaintiff would not have suffered the mental anguish, as testified to by her.

<sup>482</sup> 5. Notwithstanding the facts set out in the telegram, Mr. Suttle did receive certain hurts by the wreck, which are set forth in the evidence.

Upon the admission of counsel for plaintiff and defendant, and the finding of facts by the court, it is considered by the court that the defendant was guilty of negligence in failing to promptly deliver the telegram set out in the complaint to the feme plaintiff, and that the plaintiff recover of the defendant the sum of one hundred and seventy-five dollars, together with the costs of this action, to be taxed by the clerk.

It was agreed that if the plaintiff is entitled in law to recover, the damages should be assessed at one hundred and seventy-five dollars.

The defendant excepted to the judgment of the court and appealed.

It is too late now to question the proposition that if a telegraph company receives a message from the sender and

undertakes to deliver it to the sendee at a time not within its office hours, it is its legal duty to do so, because of the special undertaking, which constitutes a waiver by it of the benefit of office hours. It may prescribe office hours when they are reasonable, but it may also waive them if it sees fit to do so: *Bright v. Western Union Tel. Co.*, 132 N. C. 317, 43 S. E. 841; *Kernodle v. Western Union Tel. Co.*, 141 N. C. 436, 54 S. E. 423; *Carter v. Western Union Tel. Co.*, 141 N. C. 374, 54 S. E. 274; *Dowdy v. Western Union Tel. Co.*, 124 N. C. 522, 37 S. E. 802. In this case the company, by its operator and agent, expressly agreed that the message would be delivered to Mrs. Suttle that evening, and he was specially and fully advised of the importance of a speedy delivery to her. There could hardly be more detailed information of the nature and importance of the message or of the reason why an early delivery to the sendee was desired. <sup>483</sup> The company was fully aware of the fact that if the delivery of the message was delayed until the next morning the object for sending it would be defeated, and, too, that the sendee, Mrs. Suttle, would suffer mental anguish. The sender informed the operator that he would drive to his home that evening if the message could not be delivered at once, and thereby relieve his wife's anxiety, as she would be sure to hear of the accident; that he expected to return home that afternoon, and his failure to do so, together with the knowledge of the accident by his wife, would be sure to cause her mental distress. The case is a plain one for the application of the rule laid down in the cases cited. Indeed, it is much stronger against the company than were the facts in any one of them.

The defendant's counsel contends that, as the information contained in the message was false, the delayed delivery was not the proximate cause of the injury, and that the meaning or import of the message did not appear on its face and was not communicated to the operator. He reasons from this that the damage to the feme plaintiff was not within the contemplation of the company and the plaintiff when they entered into the contract for the transmission of the message. We have held, it is true, that the company must be notified in some way that mental anguish will naturally and reasonably follow as a result of its negligence, and this information must be imparted to it by the contents of the message itself or by facts within its knowledge at the time, or brought to its attention at the time of receiving the message for transmission:

*Williams v. Western Union Tel. Co.*, 136 N. C. 82, 48 S. E. 559; *Crawford v. Western Union Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597. But in this case the evidence is plenary that the company was fully informed as to the nature of the message, its meaning and import, and could easily have inferred, if it was not directly and explicitly told, what the consequence of delaying the delivery until the next morning would be. It cannot close its mind to the knowledge of facts which are <sup>484</sup> apparent, and thus plead its own ignorance as an excuse for its failure to deliver the message. If it carelessly disregarded the information it received, and its evident import, its fault in this respect is not to be imputed to the plaintiff, so as to bar her right to damages. The operator was told by Mr. Suttle what his purpose was in sending the message and in asking for a prompt delivery that evening. It was to avoid the very thing that has occurred, and which every reasonable man, mindful of his obligation to others, should have known would occur. The delay of the company was clearly the proximate cause of the injury. The case of *Dayvis v. Western Union Tel. Co.*, 139 N. C. 79, 51 S. E. 898, seems to be a direct authority sustaining the ruling of the court. In that case it is said by Justice Hoke: "This message was sent to prevent anxiety in the plaintiff's mind, and but for the defendant's default would have fulfilled its mission."

We have carefully examined the objections to the testimony, and find no error in the rulings of the court upon them. They seem to be fully answered by what we have said on the merits of the case.

There is no error in the decision upon the admissions of counsel and the facts found by the court.

Affirmed.

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*Notice to a Telegraph Company*, or want of notice, that a failure promptly to transmit a message will probably be attended with special damages, as affecting its liability for negligence in the transmission or delivery of the message, is discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 316. A telegram reading, "Your mother is dead. Come to-night," has nothing on its face to put the telegraph company on notice that if it is not delivered promptly the addressee will be deprived of the convenience of a comfortable conveyance to her destination. Therefore the telegraph company is not liable for causing such deprivation: *Kirby v. Western Union Tel. Co.*, 77 S. C. 404, 122 Am. St. Rep. 580.

*If a Telegraph Company fails to deliver a telegram which is misdirected to a particular place, within delivery limits, but which address can be ascertained from the telegraph directory, the telegraph company does not use due diligence in attempting to deliver the*

telegram: *Klopf v. Western Union Tel. Co.*, 100 Tex. 540, 123 Am. St. Rep. 831; and though the address of a message gives a street number different from the number at which the addressee resides, the corporation may be held guilty of negligence if it makes no effort to find him, his name being in the city directory and his correct address being there given: *Woods v. Western Union Tel. Co.*, 148 N. C. 1, ante, p. 581.

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## MASON v. NELSON COTTON COMPANY.

[148 N. C. 492, 62 S. E. 625.]

**CONSIGNOR AND CONSIGNEE, Rights of the Holder of a Draft and Bill of Exchange, with the Bill of Lading Attached.**—When a vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order upon drawing a draft payable to his own order upon the vendee, and attaching the bill of lading and indorsing such draft to a third person for value, the title to the goods vests in the indorsee, at least to the extent of the amount advanced. (p. 640.)

**INDORSEE of Draft or Bill of Exchange with a Bill of Lading Attached, Nonliability of.**—When the shipper of goods draws a draft or bill of exchange on the purchaser for the purchase price and obtains a bill of lading, and then indorses the draft or bill of exchange and assigns the bill of lading to a third person for value, this does not make the latter liable on the original contract of sale nor for any breach of warranty on the part of such vendor, though the purchaser was compelled to pay the draft or bill of exchange before he could inspect or get possession of the goods. (*Overruling Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679.) (pp. 648, 650.)

**RIGHTS OF PURCHASER of a Draft with a Bill of Exchange Attached.**—One who purchases a draft with a bill of exchange attached, by reason of the consideration moving from him as such purchaser, acquires a position superior to that of the drawee, and has the right to insist on the drawee's recognizing this position before delivering to him the bill of lading. (p. 648.)

**STARE DECISIS, Refusal of the Court to be Controlled by.**—Though the court will, as a general rule, adhere to a decision found to be erroneous, when it has been acquiesced in for so great a length of time as to become accepted law constituting a rule of real property, it will not adhere to a decision found to be clearly erroneous which affects injuriously the general business law and which has been generally disapproved by all commentators upon it. (p. 649.)

**STARE DECISIS, Contract Made After an Erroneous Decision and Before It was Overruled.**—The fact that the contract in question was made after an erroneous decision had been pronounced by the highest court of the state does not preclude that court from overruling that decision and applying to the contract what it conceives to be the correct rule upon the subject. (p. 650.)

**STARE DECISIS—Retrospective Effect of an Overruling Decision.**—The decision of the court of supreme jurisdiction overruling a former decision is retrospective in its operation, because it, in effect, declares that the former decision never was the law. This rule will be applied to an erroneous decision in general mercantile law which is contrary to accepted doctrine and recognized business methods. (pp. 650, 651.)



Burwell & Cansler and W. F. Harding, for the plaintiffs.

Tillett & Guthrie and W. A. Trice, for the defendants.

**493** HOKE, J. Action heard on demurrer to complaint, before Ward, J., at fall term, 1907, of Mecklenburg.

The facts stated in the complaint, considered material to a proper understanding of the cause, are:

1. That in August, 1906, defendant A. E. Nelson, doing a cotton business in Texas, contracted to sell and deliver to plaintiff, resident and doing business in Charlotte, North Carolina, fifty bales of cotton, at the price of eight and three-fourths cents per pound, and guaranteed that said cotton, in grade, texture and quality, was according to samples exhibited.

2. That on August 6, 1906, the said defendant A. E. Nelson, in pursuance of said contract, delivered at Houston, Texas, fifty bales of cotton, marked "L. O. N. G.," to the Texas and New Orleans Railroad Company, a common carrier, and took and received from said railroad company a bill of lading therefor in the usual form, stipulating that said cotton was deliverable to the order of the said A. E. Nelson at Charlotte, North Carolina, with instruction to notify plaintiffs, R. E. and C. E. Mason, upon its arrival at said point; and thereafter, upon the same day, the said Nelson drew his draft for the said sum of \$2,176.14, the price agreed to be paid for the said cotton, upon the plaintiffs, payable to the order of one W. A. Trice, and attached to the said draft, as security for the payment of same, the aforesaid bill of lading, and thereupon indorsed the said bill of lading, and sold, assigned and transferred the same to the defendant Trice for full value, and the said Trice thereby became the owner of the cotton described in and covered by said bill of lading.

**494** 6. That thereafter the said Trice indorsed the said draft and bill of lading to T. W. House, banker, of Houston, Texas, for collection, who forwarded the same to the First National Bank of Charlotte, North Carolina, for a like purpose.

7. That plaintiffs were unable to get said cotton from the railroad company, when it arrived in Charlotte, without presenting the bill of lading therefor, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain whether or not said cotton was of the same grade, texture and type contracted for; and plaintiffs, relying on the representations and

guarantee of said A. E. Nelson that said cotton was of the same grade and type as the "E. V. A." samples, paid said draft to the First National Bank of Charlotte, North Carolina, to wit, \$2,176.14, and took up and surrendered the bill of lading to the Southern Railway Company and took into their possession the said fifty bales of cotton.

8. That immediately or as soon thereafter as practicable plaintiffs examined said cotton and found that said cotton was not of the same grade as the "E. V. A." samples, in type or texture; on the contrary, said cotton was much inferior to said samples, in grade and texture and type, and was what is known as threshed cotton, worth in the market a little more than one-half the value of cotton of the grade and texture of said "E. V. A." samples, although said defendant A. E. Nelson had represented and guaranteed to plaintiffs that said fifty bales should be the same grade, type and texture as said "E. V. A." samples.

9. That by reason of the low grade and texture and inferior quality of said cotton, plaintiffs were compelled to sell said cotton at a great loss, and were put to great expense in storing and reselling said cotton.

10. That by reason of the failure of said cotton to be of the same grade, texture and type as the "E. V. A." samples, as defendant A. E. Nelson represented, warranted and <sup>495</sup> guaranteed it to be, and by reason of the breach of the warranty and the expense incurred by reason of such breach, and failure of said cotton to come up to the grade, texture and type of the "E. V. A." samples, plaintiffs have been damaged in the sum of seventeen hundred and ninety-five dollars and sixty-two cents.

11. That plaintiffs are informed and believe, and are so advised, that by reason of the assignment of said bill of lading by the indorsement of said A. E. Nelson to W. A. Trice, and the indorsement of said draft by said W. A. Trice, and the assignment of said draft and bill of lading to said House, and by the indorsement of said draft and bill of lading by said House, banker (unincorporated), and the payment of same by these plaintiffs, said W. A. Trice became liable to plaintiffs for all damages they have sustained by reason of the failure of said cotton to come up to the grade, texture, and type guaranteed to plaintiffs by said A. E. Nelson, as hereinbefore set out.

12. That plaintiffs have demanded payment from the defendants, and payment has been refused.

Defendant W. A. Trice demurred to said complaint, for "that same does not set" forth any fact whereby this defendant became liable to the plaintiffs, and it appears in and by said complaint that said W. A. Trice is in no way liable to account for the alleged breach of contract set out against his said codefendants.

There was judgment overruling the demurrer and allowing said defendant to answer over, whereupon he excepted and appealed.

In the case of *Finch v. Gregg*, reported in 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, this court held in effect that when a purchaser and consignee of goods has accepted and paid a draft drawn on himself by the consignor for the <sup>496</sup> purchase price to a holder of the draft, "in due course," said holder, having taken an assignment of the bill of lading, attached or otherwise, as security for the amount paid in obtaining the draft, and this bill of lading is turned over to the consignee on the payment of the draft, who thereby obtains possession of the goods, the said consignee can recover of the holder receiving such payment damages for breach of warranty given by the consignor in the original contract of sale; and this, though the holder of the draft had no interest ultra in the goods and took no part in the bargain. The present writer, who presided at the trial of *Finch v. Gregg* in the superior court, first made this ruling in the court below, following with much hesitation a decision of the Texas court of civil appeals, then recently made (*Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48), and the position was sustained on appeal. The purport of this Texas decision, cited with approval in the opinion of our supreme court, on the question chiefly considered here is thus stated in *Southwestern Reporter*, volume 46, page 48:

"1. A consignor of wheat delivered to a bank a bill of lading, with draft, drawn upon his consignee, attached. The bank cashed the draft and paid the consignor. The consignor had contracted to furnish sound wheat, but the wheat furnished was of inferior quality. Held, that the bank purchasing the bill of lading became the owner of the wheat and was responsible to the consignee for the failure to furnish sound wheat."

"3. A bank cashing a draft attached to a bill of lading drawn on the consignee of goods becomes a purchaser of the goods, and must at its peril exercise care to see that the goods are of the quality that the consignor contracted to furnish."

These cases, and the principle upon which they are made to rest, apply to the facts presented here, and if they are to be regarded as the law governing the rights of these parties the judgment of the court below overruling the demurrer <sup>497</sup> must be affirmed. Trice, the appellant who demurred to the complaint, was the holder of the draft, in due course, with a bill of lading attached and assigned to him as security for the amount paid in discounting the draft. So far as appears, he had no interest in the goods, except what belonged to him by reason of these papers, took no part in the bargain and sale and had no knowledge or notice of its terms, and he is sued by the consignee, who accepted and paid the draft, for breach of warranty given by the consignor to the consignee in the contract of sale. After giving the question our best consideration, with a due sense of the great importance of adhering to decisions when formally announced as law by the court, we feel constrained to overrule the case of *Finch v. Gregg*, being of opinion that the decision is based on an erroneous principle, or rather on the erroneous and unwarranted extension and application of an admitted principle, and is contrary to the great weight of well-considered authority. The case excited much comment at the time it was announced, was the subject of adverse criticism in a learned and intelligent note by the editor of *L. R. A.*, in volume 49, page 679, and the principle upon which it was made to rest was likewise condemned in a well-considered and instructive note to the case of *Hall v. Keller*, 91 *Am. St. Rep.* 209, the case being taken from 64 *Kan.* 211, 67 *Pac.* 518, 62 *L. R. A.* 758. Another comment of like purport will be found in a note to an Alabama case of *Haas & Co. v. Citizens' Bank of Dyersburg*, 144 *Ala.* 562, 113 *Am. St. Rep.* 61, 39 *South.* 129, 1 *L. R. A., N. S.*, 242, citing additional authorities in support of the editor's position.

The opinion in *Finch v. Gregg*, 126 *N. C.* 176, 35 *S. E.* 251, 49 *L. R. A.* 679, delivered by our supreme court at February term, 1900, was referred to at the same term in *Sloan v. Carolina Central R. R. Co.*, 126 *N. C.* 487, 36 *S. E.* 21, as announcing a correct principle of law, and again at fall term, 1902, in the case of *Perry v. Bank of Smithfield*, 131 *N. C.* 117, 42 *S. E.* 551, in this last case only to say that it had no application to the cause then being <sup>498</sup> considered; and with these two exceptions, so far as the writer can discover, no other reference was made to the case until fall term, 1903, in *Willard Mfg. Co. v. Tierney*, 133 *N. C.* 630,



45 S. E. 1026, when it was cited in the opinion in support of this principle: "It is well settled that when the vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order, and thereupon draws a draft payable to his own order upon the vendee, attaching the bill of lading, and indorses to a third party such draft for value, the title to the goods vests in the indorsee, at least to the extent of the amount advanced: Daniel on Negotiable Instruments, sec. 1734 (a). The law is thus stated and cited with approval by Mr. Daniel: 'When the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, at the same time drawing upon the purchaser for the price and delivering the bill of exchange, with the bill of lading attached, to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor': Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Bows v. Exchange Bank, 91 U. S. 618. This court, in Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, recognized this almost elementary principle, carrying it to its fullest extent."

To the extent indicated in this citation from Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026, the principle contained in Finch v. Gregg is sound. The holder of a draft or bill of exchange, who takes an attached bill of lading by assignment or otherwise as security for the amount advanced on the draft, does become the owner of the goods as against the acceptor to an extent sufficient to secure and protect his claim. And it is in extending this wholesome and very generally accepted principle of mercantile law to an unwarranted length that the error in <sup>499</sup> Finch v. Gregg consists. That decision not only makes the holder of a negotiable instrument, who has taken an assignment of the bill of lading only as security, the owner outright of the goods, but imposes on him the burden and obligation of a contract concerning the property made between the consignor and consignee in which the holder took no part and of which he had no notice. And in no aspect of the matter, as we view it, can such a position be sustained. Since the noted case of Lickbarrow v. Mason, Smith Lead. Cas., 9th Am. ed., p. 1045, and before that time it has been accepted doctrine that the holder of a bill of lading

by assignment will under certain conditions be regarded as the absolute owner of the goods; but, as pointed out by the American annotator of this decision in Law Library edition, volume 43, page 543, this is only true when by the terms of the contract between the assignor and the assignee the entire title was to pass to the assignee. That decision was made on a question not at all relevant to this inquiry, and is therefore not further pursued; but there is nothing in the case or the principle therein announced which prevents the assignee, when the contract so provides, from taking a restricted interest under such an assignment, and of having his rights protected and enforced according to the stipulations of his contract. And, so far as we can discover, until these decisions were made which we are now reviewing, it was a doctrine universally recognized that the holder of a negotiable instrument with bill of lading attached, under the circumstances indicated, was by right superior to that of a consignee who had accepted and paid a draft drawn on him for the purchase price of the goods; and whether such consignee accepted and paid, as in this case, or paid the draft on presentation, as in Finch's case, the result was the same. In either event the consignee thereby took a position in recognition of the holder's rights under his contract, whatever they were.

<sup>500</sup> In accordance with this doctrine, the case of Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026, correctly holds: "4. Where a bank, for a valuable consideration, takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor."

This principle is entirely inconsistent with the doctrine announced in Finch v. Gregg, and, as stated, is in accord with the general current of authority on the question in this country and in England: Robinson & Cherry v. Reynolds, 42 Eng. Com. L. 634; Hoffman v. National City Bank, 79 U. S. 181, 20 L. ed. 366; Goetz v. Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. Rep. 318, 30 L. ed. 515; S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292, 62 L. R. A. 968; Arpin v. Owens, 140 Mass. 144, 3 N. E. 25; Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa. 706, 84 N. W. 930, 50 L. R. A. 777; Lewis Leonhardt & Co. v. Small Co., 117 Tenn. 153, 119 Am. St. Rep. 994,

96 S. W. 1051, 6 L. R. A., N. S., 887; Hall v. Keller, 64 Kan. 211, 91 Am. St. Rep. 209, 67 Pac. 518, 62 L. R. A. 758, with a large number of additional authorities applying the same principle cited in the notes above referred to; Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679; Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; Haas & Co. v. Citizens' Bank, 144 Ala. 562, 113 Am. St. Rep. 61, 39 South. 129, 1 L. R. A., N. S., 242; Hall v. Keller, 64 Kan. 211, 91 Am. St. Rep. 209.

In Robinson's case, *supra*, Tindal, C. J., for the court, said: "The sole ground on which the defendant relies is that the acceptance was not binding on account of the total failure or insufficiency of the consideration for which it was given, the document on the delivery of which the acceptance was given having been forged and there never having been any other consideration whatsoever for the acceptance of the defendants. And this would have been a good answer to the action if the bank had been the drawer of the bill. But the bank is indorsee, and indorsee for value, and the failure or want of consideration between it and the acceptors constitutes no defense, nor would the want of consideration between the drawer and acceptors (which must be considered as <sup>501</sup> included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea."

The exact case is presented in Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777, where it is held: "(1) The purchaser of a draft with bill of lading attached is not liable on a warranty made by his assignor of the goods represented by the bill of lading. (2) Payment by the drawee to the payee of a negotiable draft with bill of lading attached cannot be recovered back by the drawee on the ground that the payee has received money which it cannot equitably retain because of a breach of warranty made by the drawer to the drawee on the sale of the goods for which the bill of lading was given, since any equities arising therefrom do not affect the payee when he has secured an acceptance or payment."

In Hoffman v. National City Bank, 79 U. S. 181, 20 L. ed. 366, it was held: "A consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lad-

ing attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. Held, that there was no recourse by the consignee against the bank."

And the doctrine, and the reason upon which it rests, is well stated in the opinion, as follows: "Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payee or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. Different rules apply between the immediate parties to a bill of exchange, as between the drawer and the acceptor, or between the payee and the <sup>502</sup> drawer, as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of the fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where, if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

The opposing principle that maintained in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, is not only contrary to this great array of well-considered authority, but is against the real facts of the transaction, bringing the holder of a negotiable instrument under the burdens of a contract which he never made, and in which, so far as appears, he had no interest. The allegations in the complaint, made by



the plaintiff himself and admitted by the demurrer, are to the effect that one Nelson, of the Nelson Cotton Company, sold the cotton to plaintiff. He or one of them owned the cotton, made the bargain, gave the warranty and got all the profits, if there were any.

<sup>503</sup> Trice, the defendant and payee, took the draft for full value in the regular course of mercantile dealing, and, as heretofore stated, so far as the facts show, he had no interest in the cotton, took no part whatever in the bargain and had no knowledge or notice of its terms. He simply received what was due him under his contract, and this being true, it would be a hard measure of justice to hold him responsible for the assurances and stipulations given by the vendor to the purchaser in the contract between them from which he derived no benefit. This case of *Finch v. Gregg* and the two or three others of like import profess to find support in *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. ed. 214, and *Columbian Nat. Bank v. White*, 64 Mo. App. 677, but neither of these decisions is authority for their position. In *Dows v. Bank* the precise question we are now discussing was not presented, but the case in its principal feature held that where a bank had discounted a draft in due course for the purchase price of certain wheat, and had taken bills of lading as security for the amount, these bills making the wheat deliverable on account of the cashier of a correspondent bank, the bank discounting the draft (holder of the same in due course) would be the owner of the wheat to the extent necessary to protect its claim, and could recover the same from one who had purchased the wheat from the drawee of the draft, to whom it had been delivered, but who had received it as a warehouseman, subject to instructions not to deliver until the drafts were paid. The drawee of the draft had neither accepted the same nor paid it on presentation, and the question was simply one of title between the bank, the holder of the draft with bill of lading attached, and the purchaser from the drawee, who had received the wheat as warehouseman, with instructions not to deliver; and the rights and obligations of the respective parties after acceptance or payment of the draft by the drawee were in no way considered. So far as this decision bears on the question, it favors defendant's position in holding, <sup>504</sup> as it does, that a person discounting a draft in due course for the purchase price of goods, and taking a bill of lading attached as security, can enforce his claim according to the terms of his contract. The case on this point being properly digested as follows: "2. A

party discounting a draft and receiving therewith, deliverable to his order, a bill of lading of the goods, against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft."

In the Missouri case, the bank having discounted a draft of a lumber company for the price of certain shingles, with bill of lading attached, and assigned to the bank as security for the amount, sued one White, a lumber dealer and drawee of the draft, to whom the shingles had been consigned for sale at a certain price. White, the consignee and defendant, had taken the shingles from the carrier, paying a freight bill thereon to the amount of \$134.61, and, finding the shingles were off grade and not salable at the stipulated price, immediately notified the consignor, requesting that he take the shingles and reimburse him for the amount of his costs and charges or the shingles would be sold for that purpose. No attention being paid to this request, White sold the shingles, realizing the market value, reimbursed himself for the amount he was wrongfully out of pocket, and remitted the balance of forty dollars to the consignee and original owner. The bank sued for the entire amount of the draft, and the court of appeals, in holding that the defense was available against plaintiff's demand, said: "From that time on plaintiff occupied the same relation toward the shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolic delivery of the property covered by it. However, the rights of White, the consignee, were not impaired or disturbed by this change of ownership in the property. <sup>505</sup> He was left with the same defense as against the plaintiff bank that he would have as against the lumber company," etc.

It will be noticed here that White, the consignee, had not accepted or paid the draft drawn on him and discounted by the bank, and this distinction serves to indicate and emphasize the error in the cases we are reviewing. Until White, the drawee, had accepted the draft or acknowledged his obligation thereon by paying the same, he was only bound by the terms of the original contract, and that was the only consideration moving against him; and the discounting bank, having to assert its demand under and by virtue of the original contract of the consignor, must take his position in the transaction and be subject to the defenses available against him. But on acceptance of the draft the owner comes

under a different obligation, and the amount paid by the bank for the draft becomes a new and binding consideration, giving the bank, when a holder in due course, a position superior to the original contract between the consignor and consignee, and to any defenses existent as between them.

So far as we are now aware, the first case notably making erroneous application of these two authorities was that of *Landa v. Lattin*, decided by the Texas court of civil appeals, in June, 1898, and reported in 19 Tex. Civ. App. 246, 46 S. W. 48. That decision held, as stated, that the purchaser of goods and drawee of draft for purchase price, who pays same on presentation, may recover for breach of contract stipulations made by the vendor against one who has become the owner of the draft in due course, with bill of lading attached and assigned as security for the amount paid in obtaining the draft. A conclusion drawn from the position maintained in this and other cases holding the same view, that the holder, in taking the assignment of the bill of lading as security, becomes the owner outright of the goods and responsible for the stipulations of the bargainor given in the <sup>506</sup> original contract of sale, a position which we have endeavored to show cannot be sustained in reason or authority. The decision has since been disapproved by the supreme court of Texas, in an opinion delivered in June, 1903 (*S. Blaisdell, Jr., Co. v. National Bank*, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292, 62 L. R. A. 968), and is no longer recognized as authority in that state.

The supreme court of Mississippi has rendered a decision similar to that of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, in *Searles v. Smith Grain Co.*, reported in 80 Miss. 688, 32 South. 287. The opinion in this case, however, simply adopts the reasoning of the court in *Landa v. Lattin*, embodying the opinion in that case as its own deliverance on the subject, and in itself adds nothing to the discussion and affords the position maintained no additional weight, except that which arises from the sanction and approval of that learned and usually sane and safe court.

Another case sustaining the position announced in *Landa v. Lattin*, is that of *Haas & Co. v. Citizens' Bank*, 144 Ala. 562, 113 Am. St. Rep. 61, 39 South. 129. The decision reported also in 1 L. R. A., N. S., 242, where it is subjected to adverse comment in a note by the editor, proceeds on the theory that the holder, in taking over the draft with bill of lading attached, without proof *ultra*, thereby became the owner outright of the goods and of the contract of sale, and

by delivering the bill of lading on payment of the draft he came under all the obligations of the original parties to the contract of sale. The judge delivering the opinion states the position as follows: "And when, as here, the defendant became the owner of the debt and the goods, and assuming necessarily the responsibility and burden of delivering them to the plaintiffs, it became the seller in fact, and must bear the burden of the transaction. In short, the defendant took the contract of Klyce, the shipper, and stood in his shoes with the same rights—no greater, no less."

507 There is doubt if the court intended in strictness to apply the principle stated to a case like that presented here, for in our case it is stated expressly that the appellant took the bill of "lading as security," but on the facts suggested in the opinion we do not think the decision of Haas & Co. v. Citizens' Bank can be sustained, proceeding as it does on the assumption, without proof, that the bank on discounting the draft with bill of lading attached became the owner of the original contract of sale.

As we have held in Harper Furniture Co. v. Southern Exp. Co., 144 N. C. 639, 57 S. E. 458, "A court will take judicial notice of the general business methods of railways and other well-known and quasi public corporations when these methods are universally practiced and commonly known to exist, and to the extent that such methods are sufficiently notorious to make their assumption safe and proper." And we think it an erroneous position to hold or assume that a bank, in discounting a draft for purchase price of goods, with bill of lading attached, took over or intended to take over the original contract of sale or to come under its burdens. On the contrary, we may safely assume, when there is no proof to the contrary, that no such intent existed, and that the bank simply discounted a draft according to the ordinary methods of mercantile dealing. It held it, and had a right to hold it, by reason of the consideration moving from itself to the drawer, and when the drawee accepted or paid the draft, on presentation, he did so in recognition of the bank's position.

It is earnestly contended that the appellant in the present case comes under the obligation of the contract of sale, because the plaintiff was compelled to pay the draft before he could make examination of the cotton—that he was forced to take the cotton "unsight unseen." There is doubt if any such allegation is made against the appellant. In this connection the complaint states "that plaintiffs were unable to get said



cotton from the railroad company, when it arrived at <sup>508</sup> Charlotte, without presenting a bill of lading therefor, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain," etc.

The allegation here seems to be against the carrier, and we have held in *Sloan v. Carolina Cent. R. R. Co.*, 136 N. C. 487, 36 S. E. 21, that a common carrier, under certain circumstances, may permit a consignee to inspect goods without subjecting itself to liability; but if it be conceded that no such right existed here, and that the refusal was imputable to Trice, the appellant, he had the right to stand on the integrity of his own contract and hold the goods as owner till his draft was paid. As heretofore stated, by reason of the consideration moving from himself, as purchaser of the draft, his position was superior to that of the drawee, and he had the contract right to insist that the drawee should recognize this position before delivering to him the bill of lading.

Even on grounds of expediency, if such considerations should have place in a discussion of this character, the weight of the argument is against the plaintiff. The utmost that can be urged by plaintiff against the doctrine we apply in denial of his claim is that, by negotiation of the draft, at times colorable, he may be forced to seek redress for his wrong in a distant forum, and that his recovery may on occasions be restricted to a vendor who is insolvent. But these general laws of business, established to facilitate and promote enlightened commercial intercourse, are framed, and properly framed, on the assumption that men will act honestly, and as a rule they do. The few cases that are brought before the courts for decision are exceedingly small in proportion to the immense volume of business that is carried on and satisfactorily adjusted between the parties. And one of these rules universally recognized as well fitted for its purpose should not be interfered with nor have its usefulness seriously impaired because in rare and exceptional instances a wrong may be <sup>509</sup> possible. And it must be borne in mind that the plaintiff is left without interference to assert his demand against the original vendor, the man with whom he had elected to deal.

Speaking to this question, in the case of *Hall v. Keller*, 64 Kan. 211, 91 Am. St. Rep. 209, 67 Pac. 518, 62 L. R. A. 758, Smith, J., delivering the opinion of the court, said: "To fix a liability upon the bank or upon Keller & Dean, under the circumstances of the present case, would not only violate

well-settled rules of the law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain and other commodities by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damages on account of the defective quality of the property shipped and covered by the bill of lading, or for failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned. To hold with the plaintiff in error would, to use the language of the author of the note in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, 'undoubtedly cause a revolution in commercial circles.' "

We are not insensible to the great importance of the doctrine of *stare decisis*, a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time, so as to become accepted law, constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them require or permit that a court should adhere to a decision, found to be clearly erroneous, which affects injuriously a general business law, and under the circumstances indicated here. As it has been well said: <sup>510</sup> "Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue, if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be a grievous mistake to allow more harm than good to come from it": 26 Am. & Eng. Ency. of Law, 2d ed., p. 184. This decision, announced something like ten years ago, cited, not more than twice, as direct authority for the position it contains, and disapproved in the state where it seems to have originated, commented on adversely by the intelligent annotators and reviewers of the country, and pronounced unsound by the great weight of authority bearing on the question, cannot be considered to have ever been acquiesced in or to have

become the accepted law of the land. Nor are we inadvertent to the fact that this contract was made at a time when *Finch v. Gregg* expressed the rule which prevailed with us on the question presented, but we are of opinion that this should not be allowed to affect the result.

The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law: *Center School Township v. State*, 150 Ind. 168, 49 N. E. 961; *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 36 L. R. A. 666. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision: *Hill v. Atlantic & N. C. R. R. Co.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A., N. S., 606; *Gelpeke* <sup>511</sup> *v. City of Dubuque*, 68 U. S. 175, 17 L. ed. 520; *City of Sedalia v. Gold*, 91 Mo. App. 32. And there is high authority for the position that this is the only exception that should be allowed: *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193. And while this court, in a case of unusual hardship, has extended the principle of this exception to a criminal cause, in *State v. Bell*, 136 N. C. 674, 49 S. E. 163—a cause, it will be noted, arising on the construction of a statute—and, in another decision, to a case where a title to real estate had vested (*Hill v. Brown*, 144 N. C. 117, 56 S. E. 693), the principle should certainly not be further extended and applied to an erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods. We are of opinion, therefore, that the case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, should be overruled and the principle upon which it rests disapproved:

1. As contrary to the general current of authority on a subject where uniformity of decision is so greatly to be desired.

2. Because it puts an undesirable and injurious clog upon commercial intercourse between different sections of the country.

3. Because it may, and frequently does, work grievous wrong to parties litigant, in subjecting them to the burdens

and obligations of contracts which they never made, and holding them responsible for fraud and wrongs which they did not commit and of which they had no knowledge or notice.

And from this it follows that the judgment overruling the demurrer of the defendant Trice should be reversed, and on the facts stated in the complaint said demurrer should be sustained.

Reversed.

Chief Justice Clark, dissenting, claimed that by taking an assignment of the bill of lading, the purchaser of the draft took upon himself the title and possession of the cotton, and, by refusing to permit an examination of it, he, in effect, represented it to be as contracted for, and worth, on the basis of the contract, the amount of the draft. He relied upon the decisions dissented from by the majority opinion, to wit: *Haas & Co. v. Citizens' Bank*, 144 Ala. 562, 113 Am. St. Rep. 60, 39 South. 129, 1 L. R. A., N. S., 242; *Muller v. American Nat. Bank*, 76 Miss. 84, 23 South. 439; *Searles v. Smith Grain Co.*, 80 Miss. 688, 32 South. 287; *Columbian Nat. Bank v. White*, 65 Mo. App. 677; *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48; *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 98, 23 L. ed. 208.

The chief justice further said:

"Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of transferor to the goods described in them: *Williams v. Wilmington & W. R. R. Co.*, 93 N. C. 42, 53 Am. Rep. 450; *Haas & Co. v. Citizens' Bank*, 144 Ala. 562, 113 Am. St. Rep. 60, 39 South. 129, 1 L. R. A., N. S., 242; *Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 19 L. R. A. 701, 12 South. 568; *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 99 Ala. 416, 42 Am. St. Rep. 75, 14 South. 546; 4 Am. & Eng. Ency. of Law, 2d ed., 549.

"By the assignment of this bill of lading to Trice he became the owner of the property: *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. ed. 214; *Daniel on Negotiable Instruments*, sec. 1734a. By the indorsement of the draft to him he became the owner of the right to receive the purchase money evidenced by the draft.

"On arrival of the cotton the plaintiff had the right, if it was short either in quality or quantity, either to refuse it or, if he received it and was sued for the price, to have set up the loss by reason of such defects: *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513. In common justice, the consignee should be allowed to see the goods before paying or refusing to pay the draft. The rights of Trice, assignee of the bill of lading, are not greater than those of Nelson, assignor. If Trice had sued consignee and drawee for refusal to pay draft and accept goods, he could recover no more than their value on the con-



tract basis. He cannot put himself on a higher plane by compelling the purchaser to take them without opportunity of inspection, and thus, having collected more than their contract value, refuse to be liable in an action by the purchaser to recover back the excess sum thus extorted. *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, has been reaffirmed by *Sloan v. Carolina Cent. R. R. Co.*, 126 N. C. 487, 36 S. E. 21; *Willard Mfg. Co. v. Tierney (Connor, J.)*, 133 N. C. 630, 45 S. E. 1026, and has been cited and followed in other states, *ut supra*.

"The bill of lading is a security to the holder of the draft attached thereto that he shall receive the purchase price before he surrenders possession of the property, but it does not protect him from refunding, if by refusal of opportunity to inspect he collects the full purchase price when the goods upon delivery are found to be below the contract.

"Such cases as this could not possibly occur if the consignee was permitted to inspect the goods before paying the draft. The assignee takes the draft and bill of lading, relying on drawer and the goods. He should have no more. If there is a defect in quality or quantity, the holder of the draft and bill of lading should look to the party from whom he bought them to make good, and not, having forced payment out of the consignee and drawee by refusing sight of the goods, refuse reimbursement. This is not fair.

"A bill of lading has not the characteristics of negotiable paper, and it should not have. A bill of lading is not good against the company that issues it, even in favor of a bona fide holder for value, unless goods of the quality and quantity described therein are actually delivered to it: *Williams v. Wilmington & W. R. R. Co.*, 93 N. C. 42, 53 Am. Rep. 450. Certainly, therefore, it should not be conclusive against the consignee, unless he is afforded an opportunity to examine the shipment as to quantity and quality before accepting or paying a draft attached to the bill of lading. The rule should not be more rigid against the drawee than the holder can enforce it against the railroad or other common carrier.

"The rule in this state, allowing the drawee to inspect goods before accepting the draft, thus making the drawee liable for no more than the carrier would be if there was no delivery, i. e., only for goods of the quantity and quality actually delivered, was held the law in this state nearly ten years ago by one of the best and ablest judges on the superior court bench, and on appeal he was affirmed by a unanimous court: *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679. It has ever since been recognized as law here. Parties, including those to this action, are presumed to have dealt with each other, relying upon that ruling being the law. It has worked no hardship. Its revocation will unquestionably protect the vendor and shipper in this case in a fraud he has perpetrated, and will deprive consignees of the just protection they have had. Why, then, change it? For what purpose?

"Finch v. Gregg has not only been held law in this state for many years, and not denied till now, but our decision has been cited and followed in other states, as above quoted, as well as in our own court. Finch v. Gregg is a just decision, protecting the consignee here against fraud by vendors in distant states. It has 'made for righteousness,' and should stand. If courts in other states, where the interest of dealers in mercantile paper is the public policy, have specially favored them by assimilating bills of lading to the rights of negotiable paper, that is no reason why we should abandon our own decisions to follow theirs. We did not abandon our doctrine of mental anguish because the courts in some other states, where the claim of telegraph companies to exemption from liability was more favored, held to the contrary.

"It has been suggested that vendees of goods shipped here can, by special contract in each case, secure the right to examine the goods before accepting or paying the draft. But why change our decisions to require a special contract? Besides, such contract, if conceded by the vendor, would not be put by railroads in the bills of lading, and it could not be put into the draft without affecting its negotiability; and hence the holder, having no notice, would be exempt, and the opportunity of vendors to commit the same fraud as the vendor in this case, both in the quality and quantity of shipments, will be unrestricted.

"There are three hundred and eighty cotton mills within one hundred miles of Charlotte, North Carolina, and the number is increasing and will largely increase. The adjacent territory is growing more and more incapable of furnishing a full supply of cotton, and it must be shipped in ever-increasing quantities from distant points. Under the just and honest rule laid down in Finch v. Gregg, and followed for so many years in this and other states, above cited, the assignee of a draft looks to the drawer till acceptance, and until then the bill of lading is good against the vendee only to the extent that the quality and quantity of the goods come up to the contract, with the necessary corollary that the consignee can always examine the goods before he assumes unqualified liability by accepting the draft. It is a serious matter to affect our great and growing manufacturing interests by changing the law as we have so held it to be—a law which has protected the consignee, without any possibility of injury to any honest consignor. The holder of the draft usually receives it 'for collection'; but if he buys it he should take it on faith of vendor's credit, supplemented only by value of goods. Indeed, the holder will be benefited by a rule which forces the shipper to send goods of the quality and quantity contracted for. Failure to do so will be rare when he knows the consignee has the right to see them.

"The change will have a wider application than affecting injuriously our great cotton-milling industry. There are many dealers in North Carolina who buy meats, lard, corn, wheat and flour in the northwest in large quantities to retail to their customers. These ship-

ments are drawn for, with bills of lading to the shipper's orders attached to the draft, which is usually assigned, as in this case, 'for collection.' Under the law, as we have held it, without detriment, for the nearly ten years past, the vendee ran no risk, for he has till now had the right to examine the goods before accepting the draft. But if that is now changed, the vendee must assume the risk of such frauds as the vendor has perpetrated in this case, for not only a special contract could not be put into bill of lading or draft, but the vendors of these articles, like Armour, Swift and others, will not make such special contracts, well knowing that the dealers here must buy of them or not at all.

"Our rule has worked well. It has protected consignees here. It has not injured any honest consignor. The revocation of the rule will deliver purchasers here into the uncovenanted mercy of distant consignors who cannot be reached by the process of our courts."

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*The Rights and Liabilities of Assignees of bills of lading are discussed in the note to National Bank v. Baltimore etc. R. R., 105 Am. St. Rep. 332. The liability of an assignee of a bill of lading with a draft attached to the consignee for failure of title to or defect in goods, or for failure of consideration, is considered in the note to Hall v. Keller, 91 Am. St. Rep. 212. For subsequent decisions on this question, see Hass v. Citizens' Bank, 144 Ala. 562, 113 Am. St. Rep. 61; Leonhardt & Co. v. W. H. Small & Co., 117 Tenn. 153, 119 Am. St. Rep. 994.*

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### McKEITHEN v. BLUE.

[149 N. C. 95, 62 S. E. 769.]

**EXECUTIONS**—Issuance of Requisites.—If an execution is filled up by the clerk and a memorandum that it has issued is made on his docket, but it is not sent out of his office or issued therefrom, nor delivered to the sheriff, it does not prevent the judgment from becoming dormant. (p. 656.)

**EXECUTIONS**—Defective Issuance—Effect on Judgment.—A dormant judgment is not invalidated by an execution not issued from the clerk's office and the defendant may either by motion before the clerk or the superior court have the judgment declared dormant and the execution recalled. (p. 656.)

**EXECUTION SALES**—Irregularity—Innocent Purchasers.—Failure to give a judgment defendant notice of an execution issued under a dormant judgment is only an irregularity and does not render a deed to land sold under such execution to a purchaser without notice invalid. (p. 657.)

**EXECUTIONS**—Irregularities—Effect.—If execution is formally issued and acted upon, and only defective on account of minor irregularities not pointed out or insisted upon, it will not be recalled, nor the results under it set aside or disturbed, on a mere subsequent showing that such irregularities existed without more. (pp. 657, 658.)

**EXECUTIONS**—Irregularities—Waiver.—If a judgment defendant appears before the court in homestead appraisal proceedings

and moves to set them aside on the ground that he was not duly notified of the time and place of appraisal alone, he cannot, after a reallocation of his homestead to him and after recognizing the validity of the execution and sale under which it was made, assert that such execution was defective because issued without notice to him. (p. 658.)

U. L. Spence, W. J. Adams and T. H. Calvert, for the plaintiff.

J. McN. Johnson, J. W. Hinsdale, Jr., and H. F. Seawell, for the defendant.

<sup>96</sup> HIOKE, J. The facts relevant to this controversy seem to be that, in 1896, plaintiff obtained a judgment against defendant for the sum of six hundred and ten dollars, and some interest, and same was duly docketed in Moore county on February 27, 1896.

From the entry in the clerk's docket in said county, it appeared that executions were issued on this judgment at regular intervals, and within three years of each other, until December 30, 1905, when a final execution issued and was placed in the hands of the sheriff of said county, who proceeded to summons appraisers to lay off and allot defendant his homestead, as required by law. These appraisers allotted said homestead, finding an excess, and made return of their action pursuant to the statute. Thereupon, defendant filed exceptions to said allotment, claiming that same was made in his absence, and without any notice to him of such proceedings. The exception was, in effect, overruled by the judge on a hearing had, and defendant appealed to this court.

On such appeal it was held that substantial wrong had been done defendant in allotting his homestead without giving him proper notice and opportunity to be present, and that the same amounted to reversible error, and should be corrected: See *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285. This opinion having been properly certified down, the matter came on for hearing at May term, 1907, of the superior court, before his honor, Peebles, J., when defendant, by his attorneys, moved, in effect, that the judgment be declared dormant and all executions therein be recalled, for that no executions had in fact issued on said judgment previous to that of December 30, 1905, since the rendition of the judgment, but that same had only been filled out by the clerk and filed in his office as memorandum, made on docket, execution, etc., <sup>97</sup> from time to time, as indicated in the record, but that same had never been delivered to the sheriff, or other executive officer, nor to anyone for them.



His honor, Judge Peebles, declined to consider this motion or suggestion, holding that the same was not relevant to any proceedings before him, and entered judgment pursuant to the opinion of the supreme court, setting aside the appraisement, and appointing three commissioners to reallocate the homestead. A writ therefore issued, the homestead was reallocated, finding no excess of property subject to sale, and return made to court, and defendant filed exceptions to this reallocation, alleging various irregularities in the proceedings. In the meantime the defendant moved before the clerk to declare the judgment dormant and recall all executions issued on same, which was heard before the clerk in August, 1907, when judgment was rendered denying the motion, and defendant excepted and appealed to the judge.

The cause then came on for hearing as stated, before his honor, Jones, J., at January term of the superior court, and was heard and determined both on the exceptions entered to the reallocation of the homestead, made pursuant to Judge Peebles' order, and on the appeal from the judgment of the clerk, refusing to declare the judgment dormant, and on the hearing before his honor, he affirmed in all things the proceedings and reallocating the homestead and the judgment of the clerk, and defendant, as stated, appealed to this court.

Both the clerk and the judge find that the executions purporting to have been issued previous to that of December 30, 1905, were not sent out of the clerk's office, or issued therefrom, but were only filled up by him and memorandum of "execution" made on the docket as indicated. On this statement and finding, the authorities are to the effect that this was no sufficient or proper issuing of an execution, as contemplated and required by the statute to prevent, and the judgment was therefore dormant at the time the execution<sup>98</sup> was issued, on December 30, 1905, and being the one under which the defendant's homestead was first allotted: *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912; 8 Ency. of Pl. & Pr. 433.

In this last citation it is said: "The writ while it remains in the clerk's office is not issued, but it must be actually or constructively delivered to the sheriff before it can be properly said to have been sued out with intent to have it executed."

This being the correct position, we are inclined to the opinion that it would be open to defendant to make his motion either before the clerk, as he did, or before the superior court on the rehearing of the appraisement, as he endeavored to do; for we do not think that there is anything in the former

opinion of the court which conclusively forbids such a course. But, notwithstanding this, we are of opinion that no reversible error appears in the record to the defendant's prejudice, for the reason that there is no claim on the part of defendant nor evidence tending to show that he or anyone else has paid the judgment, or any part of it, and there is therefore no substantial merit in his application. For the judgment, though dormant, was not dead, and while the statute addressed to this question, Revisal, sections 619, 620, requires that notice be issued to defendant before leave of execution shall be allowed, when there has been no execution issued within three years next preceding the application, as a matter of fact, the clerk did issue the execution of December 30, 1905, and his having done so without notice is very generally held to have been at most an irregularity. If there had been no objection made and the officers had proceeded to sell the excess found in the first appraisalment, a stranger purchasing without notice would have acquired the title: *Lytle v. Lytle*, 94 N. C. 683.

The execution, therefore, though issued without notice, was in no sense a nullity, and defendant having appeared before the superior court in the appraisalment proceedings<sup>99</sup> and moved to set the same aside for that he was not notified of the time or place of appraisalment, and having contested the proceedings under the execution on that ground alone, making no assertion or claim that the execution was in any way defective, and the defect being, as stated, only an irregularity, we are of opinion, and so hold, that this should be considered a waiver of irregularities not specified, and the defendant should not be allowed to repudiate this waiver and avoid its effects, without any assertion or claim of payment or other substantial defense. Process formally issued and acted on, and only defective by reason of irregularities of this character, are not as a rule recalled and the results under it set aside or disturbed on showing that such irregularities existed without more. It is nearly always required that in addition there should be claim or evidence which reasonably tends to establish merit in the application: *Flowers v. King*, 145 N. C. 234, 122 Am. St. Rep. 444, 58 S. E. 1074; *LeDue v. Slocomb*, 124 N. C. 347, 32 S. E. 726. And we think this is a case which clearly calls for an application of this principle. The plaintiff having a judgment against defendant duly docketed, and with only two months of its existence remaining, and being under the impression from the entries on the clerk's docket that executions had been issued at

regular and proper intervals, caused a final execution to issue, under which defendant's homestead was allotted. On the return of the appraisers, defendant appeared, as he had a right to do, and excepted for that he had not been notified of the time or place when his homestead was allotted. He contested the allotment on this ground alone, and succeeded in having a reallocation of his homestead, all the time recognizing the validity of the execution. And we are of opinion, as stated, that in the absence of any claim of payment, or any evidence tending to establish it, and when the life of plaintiff's judgment would have otherwise expired, defendant should not be allowed to change his position and avoid the effect of his waiver.

<sup>100</sup> There is no error in the judgment of the court below that the reallocation be in all things affirmed, and be registered according to law.

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*The Issue of Execution upon a Judgment* barred by the lapse of time confers no right to sell; and the sale, if attempted, will be ineffectual to pass title: *Coward v. Chastain*, 99 N. C. 443, 6 Am. St. Rep. 533; *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588. The title of a purchaser made after the lien of the judgment has expired is the same only as if it had never been a lien, and does not divest title acquired from the judgment debtor during the life of the lien: *Harvey v. Godding*, 77 Neb. 289, 124 Am. St. Rep. 841.

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### CROMER v. SELF.

[149 N. C. 164, 62 S. E. 885.]

**EXEMPTIONS—Nonresidents.**—If the facts fully justify the conclusion that a convicted defendant has fled the state without any intention to return and serve the sentence which the law has imposed upon him, and his whereabouts are unknown, he is not a resident of the state nor entitled to the benefit of its exemption laws. (pp. 660, 661.)

Watson, Buxton & Watson, for the plaintiffs.

L. M. Swink, for the defendant.

<sup>165</sup> BROWN, J. On appeal to this court the defendant assigned error as follows:

1. That his honor erred, in that he failed to dismiss the warrant of attachment, issued in this cause, on the ground that the defendant at the time of issuing the said warrant, was not a nonresident, and that the property was not subject to attachment.

2. For that his honor erred in holding that the defendant was not entitled to his personal property exemptions of five hundred dollars out of the property attached.

It appears from the facts agreed that the defendant had been a resident of the state of North Carolina all his life up to the date of his leaving, and was a merchant in the city of Winston, North Carolina, for many years; that at July term, 1907, of the superior court of Forsyth county, he was convicted of fornication and adultery and sentenced to twelve months on the county roads, and at the same term of court an indictment was returned by the grand jury for larceny; that immediately after the term of court in which the defendant was convicted and said indictment was found, defendant offered to sell his property to Cromer Brothers Company, stating that he would have to leave the state; that immediately thereafter defendant fled the state to avoid the consequences of sentence and indictment, and was absent at the time the warrants of attachment were issued, and is now absent, and his whereabouts is unknown; that the summons in each of these actions were returned by the constable, indorsed "not to be found in Forsyth county"; that the defendant's wife and children are now living in Winston, North Carolina, and have been living in said city all the time; that prior to the sale the defendant Self, through his counsel, demanded his personal property exemptions out of the property levied on, but the constable refused to allot same, but sold all the property, contending that the defendant was not entitled to personal property exemptions, but was a nonresident of the state.

**166** The only question presented by the assignments of error relate to the status of the defendant. Upon the facts agreed, is he, within the spirit and meaning of the constitution, a resident of this state? Is he entitled to have his personal property exemption set apart in the fund from the sale of the goods?

The counsel for the defendant contends that the question presented has been heretofore decided adversely to the plaintiffs in the case of *Chitty v. Chitty*, 118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394. It is true in that case a question somewhat similar was considered by the court, but the court was divided and the views of the dissenting justice are set forth strongly and with much weight of authority. But we are not called upon to determine how much weight we will give the case as a precedent in determining this, for the facts are essentially different. In the *Chitty* case it is



found as a fact that the plaintiff, who claimed his homestead, temporarily absented himself to avoid service of a warrant "with the intention of returning as soon as the case against him should be thrown out of court"; "that the plaintiff spent his time in visiting relatives in various states intending to return," etc.

Thus we see that in the Chitty case a most important fact is found in the claimant's favor, and that is the *animus revertendi*. "A man retains his domicile if he leaves it *animo revertendi*": 4 Blackstone's Commentaries, 225; 2 Russell on Crimines, 18; *In re Miller's Estate*, 3 Rawle, 312, 24 Am. Dec. 345.

In this case there is not only no such finding, but the facts fully justify the conclusion that the defendant fled the state with no intention to return and serve the sentence which the law has imposed upon him. There is no finding that he is temporarily absent visiting relatives, but, on the contrary, it is admitted that his whereabouts is unknown.

Assuming that he may be technically a citizen of the state, he is not a resident within the meaning of article 10, section 1, of the constitution, and only a resident can claim the benefit of <sup>167</sup> our exemption laws. The defendant is not temporarily absent to avoid service of process. From the time of his escape, after sentence pronounced condemning him to an ignominious punishment, he has been a fugitive from justice, for that alone can save him from the vengeance of the law. The motive that led to his flight will induce him to continue his residence beyond the confines of the state indefinitely, for in no other way can he avoid the punishment due to his crime.

He has left the state to escape the consequences of his crime and stands in the attitude of defiance to her power. It is not for such that our benevolent exemption laws were made. The fact that his family may continue to reside within the state, and that his domicile may be technically here until he acquires another elsewhere, is not enough under the circumstances to render him a resident of this state, for a person may have his domicile in this state, and be at the same time a resident of another: *In re Thompson*, 1 Wend. (N. Y.) 43; *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423; *Haggart v. Morgan*, 1 Seld. (N. Y.) 422.

The identical question presented on this appeal was decided by the supreme court of New York in *Mayor v. Genet*, 11 Supreme Court Reports (4 Hun, 487), 3 N. Y. 646, in an opinion which fully sustains the view we take.

There are a number of authorities cited in the dissenting opinion of Clark, J., in the Chitty case (118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394) which fully accord with our judgment in this.

The judgment of the superior court is affirmed.

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*If a Citizen Ceases to be a Resident of the State* before property belonging to him becomes applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor: *Wierse v. Thomas*, 145 N. C. 261, 122 Am. St. Rep. 446; *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623. As to what constitutes a removal by a debtor from the state, see *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29; *Brown v. Beckwith*, 58 W. Va. 140, 112 Am. St. Rep. 955; *Grimestad v. Lofgren*, 105 Minn. 286, 127 Am. St. Rep. 566.

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## JONES v. W. A. SMITH & CO.

[149 N. C. 318, 62 S. E. 1092.]

**ESTATES BY ENTIRETIES—Right of Survivorship.**—If husband and wife, after marriage, acquire title to land, they take as tenants by the entirety, and neither can dispose of any part without the assent of the other, but the whole must remain to the survivor. (p. 662.)

**ESTATES BY ENTIRETIES—Partition of Timber.**—If a wife is seised of land as tenant by the entirety with her husband, she is not entitled to partition of the lumber into which timber cut therefrom by her husband without her consent has been converted. (p. 663.)

W. W. Barber, for the plaintiff.

Finley & Hendren, for the defendants.

**318 WALKER, J.** The plaintiffs are husband and wife, and were at the time of the transactions hereinafter mentioned. The plaintiff J. M. Jones, the husband, who is only a nominal party to the action, contracted to cut certain timber from a tract of land owned by him and his wife as tenants by entirety and deliver it at the defendant's mill for a price fixed in the contract. The timber was cut and delivered to defendant, and he paid for the same. It was agreed by the parties that the timber should be sold and the proceeds of sale should be held subject to the decision in this case. This action was brought by the feme plaintiff for a partition of the lumber into which the cut timber had been sawed. The allegation of the petition is that she and the defendant are tenants in common, each owning a one-half interest in the lumber. The petitioner asks for a sale of the property in order that there may be an equal division between the

parties. The court suggested that the feme plaintiff might amend and sue for her share of the money due for the timber. This she declined to do, but insisted on her right to recover according to the allegations of her petition. The court then intimated that she could <sup>319</sup> not recover, whereupon she submitted to a nonsuit and appealed.

The plaintiffs, as husband and wife, were seised of the land, including the timber, not properly as joint tenants or tenants in common, but as tenants by entirety, for, being considered as one person in law, they cannot take the estate in moieties, but both are seised of the entirety, that is, per tout, et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor: 8 Blackstone's Commentaries, 182. In 1 Washburn on Real Property, fifth edition, page 706, it is said: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they will continue to hold in common. But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seised, in the eye of the law, of moieties, but of entireties. In such cases, the survivor does not take as a new acquisition. but under the original limitation, his estate being simply freed from participation by the other; so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate": See, also, 11 Am. & Eng. Ency. of Law, 2d ed., p. 49; *West v. Aberdeen & R. F. R. R. Co.*, 140 N. C. 620, 53 S. E. 477; *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478; *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790; <sup>320</sup> 2 Kent's Commentaries. 133. The nature, incidents and properties of this estate by entirety were not changed by the provisions of the constitution relating to married women: *Long v. Barnes*, 87 N. C. 329. As the plaintiffs were thus seised of the timber, its severance from the land by cutting it did not convert the estate in the trees, when severed, or in the lumber cut from the logs, into a tenancy in common, nor is the feme plaintiff,

by reason of the severance, entitled to maintain this action for partition. If she could have enjoined the husband from cutting the timber, under the principle stated in *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478, she is certainly not entitled to have a partition of the lumber, into which the timber has been converted, no more than she would have been entitled to partition of the land or the trees standing or growing thereon. This is the only question before us, as the feme plaintiff insisted upon her legal right to partition as alleged and asserted in her petition.

The intimation of the court was correct, and therefore the nonsuit, to which the plaintiff submitted in deference thereto, must stand. It may be that the present state of the law as to married women, under the constitution and statutes and a wise public policy, calls for a change in the incidents and properties of this anomalous estate (tenancy by entirety), so that it may be turned into a tenancy in common, but this is a question which addresses itself to the legislature and not to us.

No error.

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*The General Incidents of Estates by the Entirety* are considered in *Holmes v. Kansas City*, 209 Mo. 513, 123 Am. St. Rep. 495, and cases cited in the cross-reference note thereto. It has been affirmed that a wife has no right to a share of the crops growing on land held by herself and husband as tenants by the entirety: *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306. See in this connection, *Dickey v. Converse*, 117 Mich. 449, 72 Am. St. Rep. 568; *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762. Although a husband may, by deed in which his wife does not join, convey an estate by entireties, and thus entitle the grantee to hold during the grantor's life, such deed does not give the grantee a right to cut timber on the land conveyed: *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675.

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## WHITE v. KINCAID.

[149 N. C. 415, 63 S. E. 109.]

**CORPORATIONS—Dissolution of.**—A provision in a statute that whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of the corporation that it shall be dissolved and two-thirds in interest of the stockholders consent to such dissolution, it may, in a certain manner be dissolved, enters into every charter, and every stockholder takes and holds his stock subject to this power of voluntary dissolution, and when the board of directors have determined, in their best judgment, that the corporation be dissolved and are pursuing the methods specified by the statute, it is only in rare and exceptional cases that their action will be stayed or interfered with by the courts. (p. 666.)



**CONSTITUTIONAL LAW—Damnum Absque Injuria.**—If a person, corporation, or individual is doing a lawful thing, in a lawful way, his conduct is not actionable, though it may result in damage to another. (p. 666.)

**CORPORATIONS—Dissolution—Injunction.**—When the directors of a corporation, under the power vested in them by statute, lawfully proceed to wind up its affairs, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry, nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem. (p. 667.)

**CORPORATIONS—Dissolution—Directors as Trustees.**—The directors of a corporation, in dissolving it and winding up its affairs, are to be considered and dealt with as trustees, in respect to their corporate management. (p. 667.)

**CORPORATIONS—Dissolution—Rights of Stockholders.**—If it clearly appears that the action of the board of directors in dissolving a corporation and winding up its affairs under statutory authority has been superinduced by fraud and undue influence and that its action has not been taken for the benefit of the corporation or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders or any of them and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, the court will control the action of such board of directors, but if, on the contrary, no such state of affairs appears, the court will not interfere. (pp. 667, 668.)

**CORPORATIONS—Dissolution—Dissolution of Injunction—Procedure.**—If an order dissolving a temporary restraining order issued at the request of a stockholder to prevent the directors of a corporation from proceeding under statutory authority to dissolve it is affirmed on appeal, the appellate court will not dismiss the case, but will remand it to the trial court to supervise the dissolution under statutory authority. (p. 668.)

T. C. Linn Adams and Jerome & Armfield, for the plaintiff.

L. H. Clement, H. Clement and Overman & Gregory, for the defendant.

<sup>417</sup> HOKE, J. The plaintiff, using his complaint filed in the cause as an affidavit, alleged, among other things, that he owned two thousand dollars of stock in defendant company, a corporation, having nineteen thousand dollars of paid-up stock, owning a valuable plant and owing not more than two thousand eight hundred dollars. Plaintiff also alleged certain wrongs committed in the control and management of the plant on the part of one of the defendants, J. J. Kincaid, the manager and owner of one hundred and forty shares of stock; and avers, further, that he and the individual codefendants had made a combination and entered on a scheme to dissolve the corporation for the pur-

pose of ousting plaintiff from his office as secretary and treasurer, and impairing the value of his holdings, by selling out the property at a time and in a manner that would result in a sacrifice of the same, and cause great damage to the corporation and the holders of stock therein, etc. Plaintiff alleged, further, that the corporation is solvent, and was prosperous until the last several months, when, owing to the panic, the furniture mills of the county had closed down or were working on shorter time, and this condition of affairs had made it advisable for defendant company to suspend operation temporarily, but there was every reason to believe that, with the revival of business, now probable and imminent, defendant company could resume and, under proper management, become a money-making enterprise.

The individual defendants answered and admitted that the plant was now closed down, and alleged that its indebtedness is much greater than plaintiff states, filing an itemized statement of accounts and claims against it; that, while the corporation is now solvent, there are no present means available for further operations. Defendants further admit that, under section 1195 of the Revisal, the defendants, directors, acting in their best judgment, and believing it advisable and most for the benefit of the corporation that the same be dissolved, <sup>418</sup> had passed resolutions to that effect; and, having issued proper notices for the stockholders to meet and consider and pass upon this resolution, as required by the statute, the said stockholders were proceeding to act under the notice when they were stayed by restraining process of the court issued in this cause. Defendants deny that there has been any scheme or purpose to wrong the plaintiff or deprive him of his property, or to wrong or injure the corporation, or the holders of the stock therein, either by reason of the dissolution or the disposition of the property, but aver that the property is to be sold by methods calculated to make it bring its value, and where plaintiff, and all others, shall have an opportunity to bid and buy; that defendant J. J. Kincaid is the only member of the company who has any experience in this work, and he desires to withdraw and go into the business in the eastern part of the state, and, taking all the conditions and circumstances into consideration, the directors, deeming it to the best interest of the corporation and its stockholders that it should be dissolved, have passed the resolution to that effect, as heretofore stated.

Plaintiff replied, denying the amount of the indebtedness claimed, averring mismanagement, etc., on the part of defendant J. J. Kincaid, as stated. On the hearing the preliminary restraining order was dissolved, and the plaintiff excepted and appealed.

Our statute on the subject, Revisal 1905, section 1195, provides for the voluntary dissolution of corporations, in effect, as follows: "That whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of a corporation <sup>419</sup> that it should be dissolved, they may pass a resolution to that effect by a majority of the board, proper notice being first given as required, and when this resolution has been submitted in writing to the stockholders, and, in a meeting called for the purpose, two-thirds in interest of the stockholders consent to such dissolution, and the action is filed with the secretary of state, who shall issue a certificate to that effect, and after due publication of notice in the country, and this having been made to appear to the secretary, the corporation shall be dissolved and its business affairs settled up and adjusted as required by law."

As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject: *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490. This regulation enters into every charter, subject to the provisions of the statute, and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution, by resolution of the directors concurred in by two-thirds in interest of the stockholders. This being the law governing the interest of these parties, when the board of directors of a corporation have determined, in the exercise of their best judgment, that the corporation be dissolved, and are pursuing the methods specified by the statute, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. It is a principle well established, that when a person, corporation or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may

result in damage to another; for, though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque* <sup>420</sup> *injuria*: *Dewey v. Atlantic Coast Line R. R. Co.*, 142 N. C. 392, 55 S. E. 292; *Thomason v. Seaboard Air Line R. R. Co.*, 142 N. C. 318, 55 S. E. 205; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186. In such cases the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem: *Windmuller v. Standard Distilling & D. Co.*, 114 Fed. 491.

It is true that, both before and since the enactment of this statute, there is a salutary principle very generally recognized and upheld by well-considered decisions, that the directors of these corporate bodies are to be considered and dealt with as trustees, in respect to their corporate management; and that this same principle has been applied to a majority or other controlling number of stockholders, in reference to the rights of the minority or any one of them, when they are as a body in the exercise of this control, in the management and direction of the corporate affairs: *Farmers' Loan & Trust Co. v. New York & N. R. R. Co.*, 150 N. Y. 410, 55 Am. St. Rep. 689, 44 N. E. 1043, 34 L. R. A. 76; and certainly this is true when the majority or controlling number of stockholders are exercising their authority in dictating the action of the directors, thereby "causing a breach of fiduciary duty": *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 672, 52 Atl. 842. And while these decisions have been more frequently made in reference to some assignment or disposition of the corporate property or assets, whereby the corporation is disabled from performing its work, and is necessarily retired from active business, this same principle applies, in a restricted degree, when the action complained of is a voluntary dissolution, according to the methods provided by law. In these cases also, if it clearly appears that the action of the management is in bad faith, that the resolution for dissolution, for instance, has been superinduced by fraud or undue influence, or if it could be clearly established that this resolution was not taken for the <sup>421</sup> benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders or any of them, and causing a destruction or sacrifice of their pecuniary



interests or holdings, giving clear indication of a breach of trust, such action could well become the subject of judicial scrutiny and control: *Treadwell v. Copper Co.*, 47 App. Div. 613, 62 N. Y. Supp. 708; *Elbogen v. Gerbereux-Flynn Co.*, 30 Misc. Rep. 264, 62 N. Y. Supp. 287; *In re London Mercantile & Dis. Co.*, [1865-66] L. R. 1 Eq. Cas. 276; *In re Beaujolias Mill Co.*, [1867-68] L. R. 3 Ch. App. Cas. 13.

Such cases almost invariably arise when the management of a solvent concern, going and prosperous, ceases operations and determines to dissolve and sell out, with a view of continuing the same or similar business, under different control, and when there is indication given that the sole purpose was to oppress some of the stockholders and confiscate their holdings, or when it is done in furtherance of some scheme to promote the pecuniary interest of the actors and to the detriment of the corporation, giving indication of a breach of trust on the part of the authorities in charge and control of the corporate affairs.

But no such facts are presented here. There is no testimony offered of any scheme or conspiracy on the part of defendants to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon. While the company is now solvent, it has not been running for several months, because the returns were not satisfactory, and the prospect of a change in this respect only rests in surmise. There is some dispute as to the amount of indebtedness, nor does there seem to be any capital ready and available, with which to resume operations in case such a course would be determined upon; and, from the allegations made by the parties, their attitude toward each other does not give promise of mutual co-operation or eventual success. On the evidence,<sup>422</sup> therefore, and in a case of this kind we are permitted to act on the evidence, the court is of opinion that the restraining order was properly dissolved, and that, on the facts as they now appear, the contemplated dissolution should be allowed to proceed.

While we are of opinion that the order restraining the dissolution of the defendant corporation was properly dissolved, we do not think, even if our present disposition of the question should prevail at the final hearing, that the action should be dismissed. In such case, or before that time, if the directors and stockholders see proper, or deem it prudent, to act in advance of a trial, the dissolution should proceed under the methods provided by the statute. But there are, as stated, substantial issues arising in the plead-

ings, more particularly as to the indebtedness, both between plaintiff and defendants and between the individual defendants and the corporation, which will require decision by the court. And, while by section 1201 of the statute, the directors, unless otherwise determined by order of some court having jurisdiction, are made trustees with power to settle or wind up the corporate business, under section 1203, this entire matter of winding up the business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or stockholders, or any one of them. And matter clearly arising in this action being in part incident to the proper winding up and adjustment of the corporate affairs, and necessary to be determined, there seems to be no reason why, if dissolution is to be had, the proceedings referred to and contemplated in section 1203, should not be carried on and completed in this action, and this will include such orders as to the disposition and sale of the plant as may be for the best advantage of the assets and the best interest of the parties.

There is no error, and the judgment below is affirmed.

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*A Majority of the Stockholders in a Corporation* may ordinarily wind up its affairs and dissolve it for reasons deemed by them sufficient: *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521, 61 Am. St. Rep. 57; *Bank of China etc. v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676. As to how far and under what circumstances courts will interfere to prevent such dissolution, see *Trisconi v. Winship*, 43 La. Ann. 45, 26 Am. St. Rep. 175; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

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### STATE v. HARRIS.

[149 N. C. 513, 62 S. E. 1090.]

**INCEST**—Daughter of Half Sister.—Carnal intercourse of a man with a woman who is the daughter of his half sister is incest. (p. 670.)

II. Clement, assistant attorney general, for the state.

J. A. Lockhart and McLendon & Thomas, for the defendant.

<sup>511</sup> CONNOR, J. The sole question presented by defendant's exception to the refusal of his honor to direct a verdict of not guilty is whether the daughter of defendant's half sister comes within the language of the statute. Sec-

tion 3351 defines incest to be carnal intercourse between grandparent and grandchild, parent and child, brother and sister of the half or whole blood. Section 3352 defines the crime to be such intercourse between uncle and niece, nephew and aunt. For obvious reasons, nothing is said of the half or whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in the preceding section. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that the mother of the girl is only half sister of defendant cannot affect the case. To have had such intercourse with her mother—his half sister—would have been incest. The exact question seems to have been decided in *State v. Reedy*, 44 Kan. 190, 24 Pac. 66, and *Shelby v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926, 21 S. W. 492; *State v. Wyman*, 59 Vt. 527, 59 Am. St. Rep. 753, 8 Atl. 900. We think that defendant and his niece, the daughter of the half sister, are clearly within the statute. There was no error in his honor's refusal to give the instruction asked. It must be so certified.

No error.

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*The Crime of Incest* is the subject of a note to *Tagert v. State*, 111 Am. St. Rep. 19.

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## STATE v. WHITLOCK.

[149 N. C. 542, 63 S. E. 123.]

**POLICE POWER**—Billboards.—City authorities generally have power to regulate the construction and use of billboards within its limits, and an ordinance enacted for that purpose, unless an unreasonable and unnecessary restriction of the right of the land owner to erect structures upon his land, must be sustained as a proper exercise of the police power. Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. (p. 671.)

**CONSTITUTIONAL LAW**.—States may Require Individuals to so manage and use their property that the public health and safety are best conserved. (p. 671.)

**MUNICIPAL CORPORATIONS**—Billboards—Police Power.—It is within the power of a city to prohibit the erection of insecure billboards or other structures, to require the owners to maintain them in a secure condition and to provide for their removal at the expense of such owners if they become dangerous. (p. 673.)

**MUNICIPAL CORPORATIONS**—Billboards—Police Power.—An ordinance requiring all billboards within a city to be securely kept and placed "at a distance of at least two feet more than the height of such billboard from the outer edge of the sidewalk of the street" is invalid as an unnecessary restriction of a private right. (p. 673.)

The ordinance under consideration reads as follows:

"Section 1. That all billboards now in use in the city of Asheville or which may hereafter be used in said city, shall be securely placed and kept at a distance of at least two feet more than the height of said billboard from the outer edge of the sidewalk of the street.

"Sec. 2. That any bill poster or owner of any billboard in the city of Asheville, who shall place any billboard, or allow any billboard to remain nearer the edge of the sidewalk than the distance prescribed in section 1 of this ordinance, shall be fined five dollars for each day the said billboard is allowed to remain."

H. Clement, assistant attorney general, for the state.

Craig, Martin & Winston for the defendant.

543 BROWN, J. Without going into that feature of the case, we are of opinion that the charter of the city of Asheville confers ample power upon the municipal authorities to regulate generally the construction and use of billboards within its limits. And it follows that unless the ordinance in question is an unreasonable and unnecessary restriction of the right of the land owner to erect structures upon his land, it must be sustained as a proper exercise of the police power of the state.

Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the state may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right, and make them conform to the safety and welfare of established society, that the police power of the state is invoked.

While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others: Tiedeman on Limitations, 439.

All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public, but a limitation which is unnecessary and unreasonable cannot be enforced. Al-



though the police power is a broad one, it is not without its limitations, and a secure structure upon private property, and one which is not per se an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat <sup>544</sup> and then prohibited: *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; 1 *Dillon on Municipal Corporations*, 374.

It is undoubtedly within the power of the corporate authorities of the city of Asheville to prohibit the erection of insecure billboards or other structures along the edge of the public streets, or so near as to be a menace, to require the owners to maintain all structures so located in a secure condition, and to provide for inspection and removal at the owner's expense, if condemned as dangerous. The city authorities may also adopt regulations as to the manner of construction of billboards, so as to insure safety to the passers-by, but the prohibition of structures upon the lot line, however safe they may be, is an unwarranted invasion of private right, and is so held to be by all the courts which have passed upon the precise question, as we are now advised.

In the case of *City of Passaic v. Patterson Bill Posting etc. Co.*, 75 N. J. L. 285, 62 Atl. 267, it is held that a city ordinance requiring that signs or billboards shall be constructed not less than ten feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power. In support of the decision is cited *Crawford v. Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476, 20 L. R. A. 692, and *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 108 Am. St. Rep. 496, 74 N. E. 601, 69 L. R. A. 817, cases directly in point. In that case the New Jersey court says: "The very fact that this ordinance is directed against signs and billboards only and not against fences, indicates that some consideration other than the public safety led to its passage."

The court attributes the adoption of the ordinance to aesthetic considerations, rather than to an exclusive regard for the public safety, and says: "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation": <sup>545</sup> See, also, *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460; *Bill Posting Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 342.

The ordinances considered by the Kansas, New Jersey and Massachusetts courts are, perhaps, more clearly identical to the one in question than in any other cases reported, but the same principles of law concerning the constitutionality of such ordinances are stated with force in *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1025, 70 L. R. A. 230, as well as in *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 171; *Bostick v. Sams*, 95 Md. 400, 93 Am. St. Rep. 394, 52 Atl. 665, 59 L. R. A. 282; *Bryan v. Chester*, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; *Kobleyard v. Hale*, 60 W. Va. 37, 116 Am. St. Rep. 868, 53 S. E. 793.

In *Bryan v. Chester*, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894, the supreme court of Pennsylvania says: "It is doubtless within the power of the city to prohibit the erection of insecure billboards or other structures, require the owners to maintain them in a secure condition and to provide for their removal at the expense of the owners in case they become dangerous. Perhaps regulations may be made with reference to the manner of construction so as to insure safety, but the prohibition of the erection of structures upon the lot line, however safe they might be, would be an unwarranted invasion of private right."

There is nothing in the case of *Rochester v. West*, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673, 53 L. R. A. 548, relied on by the state, which conflicts with this view, as in that case the power of the city to regulate the height of billboards was the only question considered.

This precise question has not been presented to this court before. The case differs from the cases of *Small v. Edenton*, 146 N. C. 527, 60 S. E. 413, and *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, because in both of those cases the regulation dealt with objects located on public property, awnings on sidewalks in one case, and trees growing on land dedicated to the city for a public street in the other. An application, however, of the principles recognized in those cases to the one in question, tends strongly to support the contention that the ordinance under <sup>546</sup> consideration is invalid as an unnecessary restriction of private right.

The motion to quash should have been allowed.  
Reversed.

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*A Municipal Corporation has No Right, in the exercise of its police power or otherwise, to enact an ordinance forbidding citizens within its limits from erecting secure billboards on their own property,*

merely because such boards are unsightly or may constitute a nuisance: *Bryan v. City of Chester*, 212 Pa. 259, 108 Am. St. Rep. 870, and see cases cited in the cross-reference note thereto. And a city ordinance limiting the height of signs and billboards to eight feet, and requiring them to be constructed not less than ten feet from the street line is a regulation not reasonably necessary to the public safety and not justifiable as an exercise of the police power: *City of Passaic v. Patterson etc. Co.*, 72 N. J. L. 285, 111 Am. St. Rep. 676.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OHIO.**

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**UNION SAVINGS BANK AND TRUST COMPANY v.  
WESTERN UNION TELEGRAPH COMPANY.**

[79 Ohio St. 89, 86 N. E. 478.]

**TRESPASS TO REAL ESTATE—Death of Plaintiff—Revivor of Action.**—In a suit to recover damages for injuries to real estate by a trespass, the cause of action survives the death of the plaintiff, and the action may be revived in the name of the executor or administrator of the deceased plaintiff. (p. 676.)

**PROBATE COURTS—Collateral Attack.**—An order of the probate court appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court; but if made in the exercise of proper jurisdiction over the subject matter and estate, although based upon erroneous conclusions of law or fact, it cannot be collaterally attacked. (p. 677.)

(Syllabus by the court.)

One Smith recovered judgment against the defendant in error for the sum of three thousand three hundred and fifty dollars, for damages caused by the unlawful cutting of the limbs and branches of an avenue of trees situated on the farm of the plaintiff. The judgment was affirmed by the circuit court, but reversed and remanded by the supreme court to the court of common pleas. Before a trial was had the plaintiff died and when his will was presented for probate, it was found that the Union Savings Bank and Trust Company was named therein to act as his executor, and it was appointed and qualified as such. On application the court of common pleas made a conditional order of revivor of the action in the name of such trust company as the executor of the decedent. The defendant filed an answer objecting to such revivor, claiming that such trust company was not the duly appointed and qualified executor of the last will of the decedent, and



that it had no authority to act as such; that it was not the legal representative of the decedent and could not prosecute this action in behalf of him or his estate. The court of common pleas, however, ordered that the case be revived in the name of such trust company as executor of the decedent. The circuit court reversed such order and all proceedings thereunder.

C. L. Spencer, E. S. Houck, L. Maxwell, A. Squire and D. Wulsin, for the plaintiff in error.

Martin & Martin, R. S. Alcorn and E. Barton, for the defendant in error.

<sup>98</sup> DAVIS, J. This suit is brought to recover damages for a trespass. It did not abate by the death of the plaintiff; and it was proper to revive it in the name of the decedent's personal representative: Rev. Stats. secs. 4975, 5144, 5148; *Dobbs v. Gullidge*, 4 Dev. & B. (20 N. C.) 197; *McPherson v. Seguire*, 3 Dev. (14 N. C.) 153; *City of Seymour v. Cummins*, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; *Conklin v. Keokuk*, 73 Iowa, 343, 35 N. W. 444; *Clark's Admx. v. Hannibal & St. J. Ry. Co.*, 36 Mo. 202; *Upper Appomattox Co. v. Hardings*, 11 Gratt. (Va.) 1; *Darling v. Blackstone Mfg. Co.*, 16 Gray (Mass.), 187. "It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value diminishes—survive and go to the executor or administrator as assets in his hands": 1 Cyc. 52.

It is not disputed that the plaintiff in error was appointed by, and gave bond in, the probate court as executor of the deceased plaintiff and has ever since acted as such; but it is contended here that such appointment is invalid for the reason that the plaintiff in error is legally incompetent to be an administrator or executor. This contention may be entertained here, if the order of the probate <sup>99</sup> court may be collaterally attacked in this action by showing that it was made erroneously or without jurisdiction; otherwise it cannot be considered, for it is admitted that no direct attack has been made on the order appointing the executor, in the probate court, or by appeal or error, and it stands unreversed and unmodified to this time.

The probate court is a court of record and its jurisdiction in matters testamentary and in the appointment of administrators and guardians has been broadly given by the constitution of this state, article 4, sections 7 and 8. The jurisdiction is plenary, and it may well be doubted whether the legislature,

if it chose to do so, could in any respect limit it. But for every purpose of this case, we may assume that the legislature has constitutionally limited the power of appointment to such persons as are legally competent": Rev. Stats., sec. 5995; and that the jurisdiction of the probate court is thereby restricted to the appointment of such persons only as are designated by the legislature to be "legally competent."

When the plaintiff died, being at that time a resident of Clark county, and left a will nominating the plaintiff in error to be executor of the will, and the will was offered for probate in the probate court of that county, it was within the jurisdiction of the court, and it became its duty, to appoint the person named in the will to be executor, if there were no obstacles thereto in the law as it then existed. Upon the assumption which we have made, this necessarily involved an inquiry by the court into the legal competency of the Union Savings Bank & Trust Company to be <sup>100</sup> an executor. This was eighteen months before the decision in *Schumacher v. McCallip*, 69 Ohio St. 500, 69 N. E. 986, and at a time when, as appears from the statement of facts in that case, probate courts, common pleas courts and circuit courts were entertaining a contrary view of the law. The probate court of Clark county, having jurisdiction of the subject matter and of the estate, had the right and duty to inquire into the legal competency of the trust company; the presumption is that it did so and its judgment in that regard, however erroneous it might thereafter be found to be, was not void. It was no more void than the judgments of the several courts which decided the same way in *Schumacher v. McCallip*, 69 Ohio St. 500, 69 N. E. 986. It could not, therefore, be ignored in any collateral proceeding, and could not be reviewed or set aside in any other way than in a direct proceeding for that purpose. The defendant, if it had such an interest in the estate as would give it the legal standing to do so, might have attacked the appointment in the probate court, or by appeal or error. It did not do so and cannot complain if it now finds itself bound by the presumptions which arise upon the record: *Moore v. Robison*, 6 Ohio St. 302; *Shroyer v. Richmond*, 16 Ohio St. 455; *Caujolle v. Ferrie*, 13 Wall. 465, 20 L. ed. 507.

The counsel for the defendant in error seem to have misunderstood the court in regard to its decision in *Hoffman v. Fleming*, 66 Ohio St. 143, 64 N. E. 63. The plaintiffs in error in that case insisted that it clearly appeared on the face of the record that the probate court did not have jurisdiction to make the appointment. The court went <sup>101</sup> into

the inquiry only far enough to show that this proposition was not correct. Of course, if it had affirmatively and conclusively appeared that the court had acted without jurisdiction, the order making the appointment would have been entirely void, and not merely erroneous, as it may have been in this case.

The former judgment of this court is vacated and the judgment of the circuit court is reversed and that of the court of common pleas affirmed.

Shauck, Crew, Summers and Spear, JJ., concur.

PRICE, C. J., dissenting. I think it exceedingly unfortunate that the court has not decided the main question in this case, which is, Has the trust company legal capacity to act as executor under the appointment made in the will of Adolphus H. Smith, deceased? This question was fully argued in the briefs on the first submission of the case to this court, and on the recent rehearing it was fully argued orally. Eminent counsel not of record have been heard on the subject, but the case is now disposed of—not on that question, which is of state-wide importance—but on the other point, that the judgment of the circuit court is a collateral attack upon the order made by the probate court appointing the trust company executor. The doctrine of collateral attack occupies a vast field and from its almost infinite resources enough has been gathered to wean the majority away from the <sup>102</sup> main issue, upon which it now expresses no opinion. I presume that under these circumstances it is not proper to define or express my own opinion about the capacity of the trust company to serve as executor, although that question is paramount and must soon be met in the courts.

I cannot consent that the judgment of the circuit court is a collateral attack on the order of the probate court. The testator Smith died during the pendency of this suit against the telegraph company. The proceedings to revive the action disclosed the name of the trust company as successor to Smith in the action. Who or what is this trust company that asks the place of successor? That question was no doubt answered in the court of common pleas to the effect that it is an Ohio corporation, having a certain place of residence. Its name, and thereby its character, was made known to that court. In short, the action was revived in the name of a corporation and that fact stands out on the record of that proceeding.

If the trust company was legally incompetent to take the appointment made in the will, it was likewise incompetent in

the proceedings to revive the action. If there was no legal authority to act under the appointment made in the will, there was absolutely no authority to revive the action in the name of the disqualified corporation. It being wholly a question of law and not of fact, and that question of law being apparent of record, the order of the court of common pleas could not give life and authority to the trust company. If the appointment of the corporation as executor was <sup>103</sup> illegal in the first instance, the order of revivor was illegal, and if illegal on its very face, it was void because illegal, and could be so treated in a court of review.

The state of the law is a matter always to be reckoned with.

It is not necessary to multiply words, but I believe the doctrine of collateral attack, as applied to this case, has been greatly overwrought.

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*On the Abatement and Revival of actions based upon an injury to property, see Mast v. Sapp, 140 N. C. 533, 111 Am. St. Rep. 864; Penn Mutual Life Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273; Bates v. Sylvester, 205 Mo. 493, 120 Am. St. Rep. 761; Brown v. Fletcher's Estate, 146 Mich. 401, 123 Am. St. Rep. 233.*

*Collateral Attack upon the Right of an Acting Administrator is the subject of a note to Dobler v. Strobel, 81 Am. St. Rep. 535. The action of a probate court in appointing an administrator, if jurisdiction is obtained, is not subject to collateral attack: Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299. See, also, Jordan v. Chicago etc. R. R. Co., 125 Wis. 581, 116 Am. St. Rep. 865; Dungan v. Superior Court, 149 Cal. 98, 117 Am. St. Rep. 119; Jacobs v. Bentley, 86 Ark. 186, 126 Am. St. Rep. 1086.*

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## YEAGER v. TUNING.

[79 Ohio St. 121, 86 N. E. 657.]

**EASEMENT**—Definition.—An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. (p. 680.)

(By the editor.)

**LICENSE**—Definition.—A license is a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts upon land without possessing any interest therein. (p. 680.)

(By the editor.)

**EASEMENTS, What are.**—The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former is an easement.



**EASEMENTS, How may be Created.**—An easement can be created only by deed or by prescription.

**LICENSE, Revocable, When Created.**—A parol agreement by several adjoining land owners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed.

(Syllabi 3, 4, 5, are by the court, but we find nothing corresponding to them in its opinion.)

R. M. Switzer, for the plaintiffs in error.

H. C. Johnston and E. D. Davis, for the defendants in error.

<sup>121</sup> SUMMERS, J. It is averred in the petition that the plaintiffs and the defendants mutually agreed, orally, to construct a telephone line over and across their respective lands and to their respective residences thereon to enable them to have telephonic communication with each other and with persons on other lines with which such <sup>122</sup> line might be connected; that each agreed at his own expense to erect and maintain a certain number of poles, and that the plaintiffs and defendants agreed to contribute equal money to purchase and string the wires and to contribute equally sufficient money to repair and maintain the line; that the line was constructed as agreed, that it was of a permanent nature and of the value of two hundred and fifty dollars; that each of the parties expended about fifteen dollars additional for telephone boxes and other appliances, and that the line was in use for about three years, and until shortly before the filing of the petition, when certain of the defendants cut the wires and cut down certain of the poles and rendered the line in places useless, and they pray for a mandatory order requiring the replacing of the poles and the restoring of the line, and for an injunction against the destruction or interference with the line in the future.

The case went to the circuit court on appeal where a demurrer was sustained and the petition dismissed.

<sup>124</sup> If the plaintiffs are entitled to a specific performance of the agreement, then they have an easement created by parol in the hands of the defendants.

An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. A license is a personal, revocable and nonassignable privilege,

conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein: *Greenwood Lake & P. J. R. R. Co. v. New York & G. L. R. R. Co.*, 134 N. Y. 435, 31 N. E. 874. Section 4198, Revised Statutes, provides that: "No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned, or granted, except by deed, or note in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." This statute would seem to settle the question of the right to a <sup>125</sup> decree for specific performance against the plaintiffs, but it is contended that it is the well-settled law of this state that such an agreement is a parol license and that such license when executed is irrevocable. Mr. Freeman, in a note to *Lawrence v. Springer*, 31 Am. St. Rep. 702-715, says: "At common law, a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this, although the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be <sup>126</sup> changed into an equitable right on the ground of equitable estoppel."

To the same effect is *Browne on the Statute of Frauds*, sec. 31; *Jones on Easements*, sec. 84; *Bigelow on Estoppel*, 5th ed., 666.

In *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 702, 24 Atl. 933, *Beasley, C. J.*, says: "It has not been,

and it cannot be, denied that such a grant as the one in question cannot be enforced in a court of law; such easements, being incorporeal, lie in grant, and their creation requires an instrument under seal. Nor is it questioned, nor questionable, that a parol imposition of a servitude of this kind upon land is in flat contradiction of the statute of frauds. It is true, indeed, that in one class of cases, as is well known, courts of conscience have felt dispensed from putting in force the provisions of that act. This has been the course pursued where a parol agreement for the purchase of lands, or of some interest in them, has been performed to the extent of possession having been taken in part execution of such contract. But while this is the undeniable rule in equity, it should be ever borne in mind that its introduction has been regretted by the wisest judges. 'The statute,' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been vigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements <sup>127</sup> from the necessity of the case, would have been reduced to writing. Whereas, it is manifest that the decisions on the subject have opened a new door to fraud.' And these strictures are pointed with the emphatic declaration that 'it is therefore absolutely necessary for courts of equity to make a stand, and not carry the decisions further': *Lindsay v. Lynch*, 2 Schoales & L. 4. And in the same vein, Judge Story (2 Story's Equity Jurisprudence, sec. 766) says that 'considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds further than they were compelled to do by former decisions.' To the same purpose are the criticisms of Chancellor Kent in *Phillips v. Thompson*, 1 Johns. Ch. 149, and of Chancellor Zabriskie in *Cooper v. Carlisle*, 17 N. J. Eq. 529."

Pomeroy in his work on Specific Performance of Contracts, referring to the doctrine of the irrevocability of a parol license when executed, says that it is opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states. In *Rodefer v. Pittsburg O. etc. R. R. Co.*, 72 Ohio St. 272, 74 N. E. 183,

70 L. R. A. 844, the opinion of Andrews, J., in *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824, was quoted from at length with approval, and it is unnecessary to repeat here what was said there. In that opinion he says that it is plainly the rule of the statute, as well as the rule required by public policy, that such a license, though executed, is revocable: See, also, *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38, 31 South. 947, 57 L. R. A. 720; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; <sup>128</sup> *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243.

The cases are too numerous to cite but may be readily found by reference to the reports and text-books already cited.

The early cases were grounded on some early English cases which were overruled in the leading case, *Wood v. Leadbitter*, 13 Mees. & W. 838.

The cases of *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, and *Hornback v. Cincinnati & Zanesville R. Co.*, 20 Ohio St. 81, are cited as supporting the doctrine of the irrevocability of such a license. The former seems to have been based upon precedents that were in accord with the early English decisions, which, as we have seen, have been overruled. The later case is not authority for the doctrine, but is a case of a parol agreement for the purchase of an interest in lands which has been performed to the extent of possession having been taken in part execution of the contract. The later case decided by the supreme court commission, *Wilkins v. Irvine*, 33 Ohio St. 138, is not in accord with the earlier doctrine, but is in accord with the modern doctrine and it is there held that: "A written license, without seal and unacknowledged, to enter upon and imbed water-pipes in the land of another, with privilege to enter and repair them, creates no interest in, nor encumbrance upon the land such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto." It may be added that in that case the written license had been executed, and in <sup>129</sup> the opinion it is said: "It gave the Cleveland Rolling Mill Company no dominion over the land, nor did it create, in its favor, an easement in the land. If its terms had been violated by Brooks or his grantees, the jurisdiction of a court of equity could not have been successfully invoked to enforce a spe-



cific performance. The remedy, if any it had, would have been an action for damages."

Judgment affirmed.

Price, C. J., Shauck, Crew and Spear, JJ., concur.

DAVIS, J., dissenting. The contrary rule has been a rule of property in this state for more than sixty years: *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574. It is in the strictest sense stare decisis and is no longer an open question for the courts. If there is any demand for a change of the law, the legislature alone is competent to decide whether a change so vital to property rights which have been acquired under the existing rule should be made.

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In the Subsequent Case of *Fowler v. Delaplain*, 79 Ohio St. 279, 87 N. E. 260, it was decided that if an owner of land gives permission orally to another to use and occupy a certain part thereof, but does not grant him any interest in the land, and the owner of the land on his part does not assume any obligation with regard to such occupation or use, such possession and use of the land are under a bare license, revocable at the pleasure of the licensor, although the latter has silently acquiesced in the making of improvements and the expenditure of money by the licensee on such land.

*A Parol License* to enter upon land is generally revocable at the pleasure of the licensor: *Hodson v. Kennett*, 73 N. H. 225, 111 Am. St. Rep. 607; *Miser v. O'Shea*, 37 Or. 321, 82 Am. St. Rep. 751. Whether or not this rule is applicable where the licensee has expended money or labor in the execution of the license, the authorities are conflicting: See the note to *Lawrence v. Springer*, 31 Am. St. Rep. 715-719; *Ent-whistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301; *Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255.

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## BLAKE v. HAMILTON DIME SAVINGS BANK COMPANY.

[79 Ohio St. 189, 87 N. E. 73.]

**BANKS AND BANKING—Effect of Deposit of Uncertified Check.**—The deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection, and not for payment, and if there be no funds to meet it, or if it be returned dishonored, the deposit bank may return it to the depositor and cancel the credit, and if the deposit bank receives notice of the invalidity of the check it cannot become a bona fide holder by subsequent payment. (p. 686.)

(By the editor.)

**CERTIFICATION OF CHECK—Effect.**—The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the

drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. (p. 688.)

**CERTIFIED CHECKS—Liability to Assignee.**—The transfer of a certified check is an assignment of money to meet it, and the bank making the certification is liable therefor to the holder. (p. 688.)

**CERTIFIED CHECKS—Revocation of.**—The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it, is a bona fide holder and may enforce payment of it notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor. (p. 688.)

(Syllabus by the court unless stated to be by editor.)

Burch & Johnson, for the plaintiff in error.

Pogue & Pogue and Murphy & Williams, for the defendant in error.

**193 SUMMERS, J.** The action was brought by the defendant in error, the Hamilton Dime Savings Bank Company, of Hamilton, Ohio, against the Franklin Bank, of Cincinnati, Ohio, upon a check drawn by C. C. Blake & Co. upon the Franklin Bank for two hundred and seventy-five dollars, payable to the order of C. G. Blake, and certified by the Franklin Bank to be good, and indorsed by C. G. Blake and Charles Werbel.

On Friday, October 16, 1903, Blake bought a horse from Werbel and indorsed the check to the order of Werbel and delivered it to him in payment for the horse. The indorsement of certification was as follows: "Good for \$275.00 when properly indorsed. The Franklin Bank, H. Sachteleben, Teller." Werbel indorsed the check, and **194** on the following Monday, October the 20th, deposited it to his account with the Hamilton Dime Savings Bank Company, and was given credit therefor on the books of the bank. The Hamilton Dime Savings Bank Company sent the check to the Atlas National Bank, of Cincinnati, for collection and it was protested for nonpayment for the reason "Payment stopped." Thereupon, on November 19, 1903, the defendant in error sued the Franklin Bank on the check, and the Franklin Bank, under section 5016, Revised Statutes, filed a motion for an order of interpleader, which was granted, the amount of the check with interest was paid into court and C. G. Blake was substituted as defendant.

Blake filed an answer averring that he had been induced to purchase the horse and to deliver the check in payment therefor by the false and fraudulent representations of Werbel, that Werbel is the owner of the check, that the plaintiff, the Hamilton Dime Savings Bank Company, received the check only as collecting agent for Werbel and with knowledge that Werbel had been notified that payment on the check would be stopped. A jury was waived and the court stated its findings of fact separately from its conclusions of law. Judgment was given for the bank for the amount paid into court, less costs to the date of that payment. The court found that the Hamilton Dime Savings Bank Company was the purchaser of the check for value and before notice and without knowledge of Blake's claim. On error the circuit court affirmed the judgment, not, however, on the ground that the bank was entitled to the protection afforded <sup>195</sup> to bona fide purchasers, the court stating in its opinion, as a matter of law, that the savings bank was not a purchaser for value, but that the transaction was the ordinary and usual one of a deposit by a depositor and not a purchaser of the check for value by the bank.

At the time the bank received notice of the claim of Blake it had on deposit to the credit of Werbel a sum in excess of the amount of the check.

No question is made as to the authority of the teller of the bank to bind the bank by the certification of the check.

The circuit court affirmed the judgment on the ground that "Werbel became the absolute owner of the check free from the claim of Blake to the same extent as if it had been money: 2 Daniel on Negotiable Instruments, sec. 1601; Morse on Banks and Banking, sec. 414."

The circuit court was right in its opinion that the Hamilton Bank was not a purchaser of the check.

In the absence of special agreement the deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection and not for payment, and if there be no funds to meet it or if it be returned dishonored the deposit bank may return it to the depositor and cancel the credit: Daniel on Negotiable Instruments, sec. 1623; Morse on Banks and Banking, 320, 321; National Gold Bank & Trust Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697. And in such case if the bank receives notice of the invalidity of the check <sup>196</sup> it cannot become a bona fide holder by subsequent payment. "The mere

discounting of paper and placing the amount thereof to the credit of a depositor, who already has a large balance to his credit, does not make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation between the bank and the depositor of debtor and creditor, and so long as that relation remains, and the deposit is not drawn out, the bank has simply promised to pay the depositor, has parted with no value, and is not entitled to the protection of a bona fide holder of paper": *Mann v. National Bank*, 30 Kan. 412, 1 Pac. 579. "The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank the bona fide purchaser for value. If after such credit, and before payment for value, upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment": *Daniel on Negotiable Instruments*, 5th ed., sec. 1652; *Central Nat. Bank v. Valentine*, 18 Hun, 417; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309, 37 N. W. 420.

The Hamilton Bank, therefore, upon the evidence, was not a purchaser of the check, or entitled to the protection of a bona fide holder of the paper, unless it is so entitled by reason of the fact that the check was certified.

In this state a bank check for part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of <sup>197</sup> the amount for which it is drawn (*Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94) and the holder cannot maintain an action against the bank for the amount of the check, although it has funds to the credit of the drawer sufficient to meet it: *Cincinnati H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700, 42 N. E. 700, 31 L. R. A. 653.

This is now made the law by statute. Section 3177v, Revised Statutes, provides: "A check is a bill of exchange drawn on a bank payable on demand." And section 3177z is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

But this is a certified check. Mr. Daniel says (section 1602) that the certification of checks is an expedient and outgrowth of modern commerce quite recent in its origin, but now of daily and extensive occurrence. And in *Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston*, 10 Wall.



604, 19 L. ed. 1908, decided in 1871, Mr. Justice Swayne says in the opinion that "it is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred million dollars," and that "we could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity."

And speaking of their legal effect he says:

"By the law merchant of this county, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check <sup>198</sup> is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment.

"It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

"A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'certified check account,' and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not <sup>199</sup> well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money."

Daniel on Negotiable Instruments, section 1603, says that when the check is certified the bank becomes at once the principal debtor, and that when the holder procures the bank to

certify the check "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, a certified check is a shorthand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms." Again he says: "It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it though notified by the drawer not to do so." And again he says, in section 1605, that "the check when certified circulates as the representative of so much cash in bank, payable whenever demanded, to the holder. It is then like cash, but still it is not the same as cash, for 'nullus simile est idem.'"

The drawer by delivery of a certified check, in the absence of special agreement, is not discharged from liability, the only effect of the certification being to add the credit of the bank to that of the drawer (*Daniel on Negotiable Instruments*, sec. 1626; *Cincinnati Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833), and the same is true as to a holder who procures the check to be certified before delivery. He is a new drawer and will be held liable as well <sup>200</sup> as the bank. If, after delivery, the holder procures a check to be certified, the drawers and indorsers are thereby discharged: *Daniel on Negotiable Instruments*, sec. 1601a; *Revised Statutes*, sec. 3177y. In this case the payee, Blake, procured the certification of the check after delivery to him and before delivery by him to Werbel, thereby discharging Blake & Company, the drawers, and making himself as well as the bank liable on the check. Section 3177x, *Revised Statutes*, provides that where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance, and under section 3177z, *Revised Statutes*, by necessary implication, the certification operates as an assignment of the funds to meet the check and makes the bank liable to the holder.

What then are the rights of the parties? If Blake had given Werbel money instead of the check, and Werbel had deposited the money to his credit in the Hamilton Bank, the relation of debtor and creditor between the bank and Werbel would thereby have been created. In *Cincinnati H. & D. R. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700, 42 N. E. 700, 31 L. R. A. 653, it is said

by Spear, J.: "The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and cestui que trust." And again: "The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous." The money would belong to the bank and Blake could not acquire any interest in it or impose any liability on the bank merely by notifying <sup>201</sup> it that Werbel had obtained the money from him by defrauding him in a horse trade. If, instead of money, Blake had traded a piano to Werbel for the horse, it may be that Blake could repudiate the trade on the ground of fraud and that after tender back of the horse the title to the piano would reinvest in him and that he could then recover it from anyone excepting a bona fide purchaser. But money loses its identity, and if the relation of debtor and creditor between the bank and Werbel would arise upon the deposit of the money, then the bank would necessarily be treated as a bona fide purchaser and title to the money would not be restored to Blake even by a repudiation of the trade and a tender back of the horse. Now, while it is true, as has been pointed out, that the delivery of the check was not payment for the horse and that Blake was liable on the check, still if certified checks are to circulate as money and to perform the useful purpose in trade they have heretofore, the deposit of them in bank to the credit of the holder must be, so far as the rights of the indorser are concerned, treated as a deposit of money. The transaction under consideration may serve in some slight measure to illustrate their use. Blake may have supposed that Werbel would want cash for the horse and would not accept his check, and, not wishing to carry the money from Cincinnati to Hamilton, he procured the certification of the check, and Blake accepted it as readily as he would have accepted cash. But, if he could not accept it with the same security that he could cash, then, under such circumstances, a certified check could not be used at all, or the <sup>202</sup> indorsee of such a check, if he wishes to avoid embarrassment and delays, such as have resulted in this case, must at once present the check for payment and then deposit the money instead of the check in bank. This being so, then the obligation of the Franklin Bank to pay the check was not affected by the notice to it by Blake not to pay, and the right of the Hamilton Bank to enforce payment was not affected by notice of Blake's claim.

Some question is made as to the right to an order of interpleader in such a case as this, but in view of the conclusion reached it is not necessary to consider it. And it may be added that even if the certified check were not treated as money but as property Blake had given Werbel for the horse, Blake could neither recover it nor defend against payment of it in a suit upon it, in the absence of a showing that he had repudiated the trade and had tendered the horse to Werbel, which was not done in this case, nor was Werbel made a party to the action: *Morrison v. Eaton*, Tappan, 173; *Manhattan Life Ins. Co. v. Burke*, 69 Ohio St. 294, 100 Am. St. Rep. 666, 70 N. E. 74; *Archer v. Bamford*, 3 Stark. 175; *Lewis v. Cosgrave*, 2 Taunt. 2; *Heaton v. Knowlton*, 53 Ind. 357; *Grubbs v. Barber*, 102 Ind. 131, 1 N. E. 636.

The judgment is affirmed.

Price, C. J., Shauck, Crew and Spear, JJ., concur.

#### CERTIFIED CHECKS.

- I. Meaning, Purpose and Form of Certification.**
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#### I. Meaning, Purpose and Form of Certification.

a. Purpose and Meaning of Certification.—The purpose of procuring a check to be certified is to impart strength and credit to the paper by obtaining an acknowledgment from the certifying bank that the drawer has funds therein sufficient to cover the check, and secur-



ing the engagement of the bank that the check will be paid upon presentation. And the meaning of certification is that the drawer of the check has funds in the certifying bank adequate for the payment of the check, which funds will not be withdrawn, and that the bank will honor the check when it is presented for payment. The certification, if written out, would contain a statement that the drawer has funds to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds will be retained and paid upon the check whenever it is presented: *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E. 173, 71 L. R. A. 442; *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 425; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667; *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407; *United States v. Heinze*, 161 Fed. 425.

Said Justice Brown in *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 425: "I assume that the practice of having the drawee mark and certify upon the face of the check that it is good for the sum therein expressed is of recent origin, for I find nothing said of it by the early writers, and but few reported cases where the practice is referred to. It is, however, at the present day, a prevalent custom. Checks drawn upon banks or bankers, thus marked and certified, enter largely into the commercial and financial transactions of the country; they pass from hand to hand, in the payment of debts, the purchase of property, and in the transfer of balances from one house and one bank to another. In the great commercial centers, they make up no inconsiderable portion of the circulation, and thus perform a useful, valuable, nay, an almost indispensable, office. They are enabled to perform these important functions, mainly upon the faith and credit given to the certificate of the drawee that they are good; it is this that gives them credit and currency with commercial men. The object of the drawer who obtains the certificate, and the purpose of the drawee, in giving it, is to impart strength and credit to the paper, and to assure all who accept it in the course of trade that it will be paid on presentation. The certificate is an undertaking—a contract—and in determining its legal effect we must ascertain, if we can, the intent of the parties; that is, the party who makes and the party who accepts it. The maker of the certificate puts his name to it, with a view to its circulation, and to assure those to whom the paper may be offered that it will be paid on presentation; and the party who accepts it does so upon the faith and credit of this representation and assurance. The paper upon which the certificate is impressed is negotiable by delivery, or by indorsement, and designed for circulation, and in respect to all the subsequent holders, the party making and uttering the certificate stands in the position of an acceptor, with all the responsibilities incident to that relation. The certificate means nothing less than this, but it means something more; it imports that the drawer has funds, or means convertible into funds, in the

hands of the drawee, at the time, which shall be retained and devoted to the payment of the paper, on presentation. If it does not mean this, the certificate is a sham and a snare."

And said Justice Swayne in *Merchants' Nat. Bank v. State Nat. Bank*, 70 Wall. 604, 19 L. ed. 1008: "By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'certified check account,' and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process. The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money": Approved in *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio St. 189, ante, p. 684, 87 N. E. 73.

**b. Form and Sufficiency of Certification.**—A common form of certifying a check is by stamping or writing thereon the word "certified," "good," or its equivalent, with the signature of the certifying officer: See note to *Bickford v. First Nat. Bank*, 89 Am. Dec. 444. In *Metro-politan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533, 12 L. R. A. 492, a check was certified by writing across its face as follows: "Certified, 10/1, 1888. Traders' Bank of Chicago. Charles G. Fox"; and in *Cincinnati Oyster etc. Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833, the certification was in this form: "Good for \$54.00, when properly indorsed. Fidelity National Bank, Ammi Baldwin, Cashier." The particular effect of a certification is the same whether the drawer is actually charged on the books or not: *Brown v. Leckie*, 43 Ill. 497. Perhaps a valid certification may rest in parol: *Nelson v. First Nat.*

Bank of Chicago, 48 Ill. 36, 95 Am. Dec. 510; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290; *Irving Bank v. Wetherald*, 36 N. Y. 335; but it seems clear that a mere verbal reply to an inquiry concerning a check that the check is "good" or "all right" does not amount to a certification: *Bank of Springfield v. First Nat. Bank*, 30 Mo. App. 271; *Riseley v. Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. A check with this recital, "To hold as collateral for 1000 P. T. oil, pipage paid," etc.; and having across its face the certificate of the cashier of the bank, "Good, when properly indorsed," is not drawn in the usual course of business and is not certified within the meaning of the law merchant: *Dorsey v. Abrams*, 85 Pa. 299, 27 Am. Rep. 651. A promise by a bank to pay any checks which may be drawn upon it by a specific person is a guaranty and not a certification: *Bowen v. Needles Nat. Bank*, 87 Fed. 430, affirmed in 94 Fed. 925, 36 C. C. A. 553. The fact that a check that has been indorsed "good" is not certified by the cashier at his banking house does not affect its validity: *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 19 L. ed. 1008.

## II. Authority to Certify Checks.

a. **In General.**—Any person, natural or artificial, upon whom a check is drawn may certify it. Therefore a trust company, not incorporated as a bank, has power through its authorized agent to certify checks drawn upon it: *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596. The cashier of a bank has authority by virtue of his office to bind the bank by certifying a check, and it is not uncommon for a teller to be clothed with such authority, as will presently be seen. But it is said that no officer of a banking institution has authority to certify a check until on or after the day when it is made payable: *Clarke Nat. Bank v. Albion Bank*, 52 Barb. 592; *Pope v. Bank of Albion*, 57 N. Y. 126. Nor has he authority to certify a check when the drawer has no funds on deposit: *Clarke Nat. Bank v. Albion Bank*, 52 Barb. 592; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667; and persons dealing with the bank are presumed to know this: *Clarke Nat. Bank v. Albion Bank*, 52 Barb. 592; so that the bank is liable, in such a case, only to a bona fide holder of the check: *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331. In *Pope v. Bank of Albion*, 57 N. Y. 126, it is decided that a bank is not bound, even in favor of a bona fide holder, on a certification by an assistant cashier without authority. The want of an officer's authority to certify a check may appear on the face of the paper, in which event no one can claim the protection of a bona fide holder: *Clarke Nat. Bank v. Bank of Albion* 52 Barb. 592; *Clafin v. Farmers' etc. Bank*, 25 N. Y. 293; *Dorsey v. Abrams*, 85 Pa. 299, 27 Am. Rep. 657. One in dealing with a bank is not bound by private instructions restricting the authority of a cashier or other officer ordinarily having authority to certify checks:

Farmers' etc. Bank v. Butchers' etc. Bank, 28 N. Y. 425, 26 How. Pr. 1; Clarke Nat. Bank v. Albion Bank, 52 Barb. 592.

The general authority of an officer of a bank, such as the president, to certify checks does not extend to checks drawn by himself, for no person can act as the agent of both parties to a contract, although he may have no interest on either side, nor can he act as agent in regard to a contract in which he has any interest or to which he is a party on the side opposite to his principal: *Cladlin v. Farmers' etc. Bank*, 25 N. Y. 293.

**b. Authority of Cashier.**—The cashier of a bank under his general authority and by virtue of his office has power to bind the bank by certifying checks drawn thereon: *Clarke Nat. Bank v. Albion Bank*, 52 Barb. 592; *Merchants' Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 19 L. ed. 1008. To quote from the last case: "It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit this authority as they deem proper, but this would not affect those to whom the limitation was unknown."

**c. Authority of Teller.**—The teller of a bank, it is said, has no inherent authority by virtue of his position to certify a check: *Mussey v. Eagle Bank*, 50 Mass. (9 Met.) 306. But of course it is competent for the bank to clothe him with authority, and this is not infrequently done, and the same may be inferred from previous acts and transactions. The fact that the cashier has authority to certify checks does not preclude the exercise of this function by a teller or other subordinate officer if he has been so authorized: *Meads v. Merchants' Bank*, 25 N. Y. 143, 82 Am. Dec. 331; *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 425, 26 How. Pr. 1; *Hill v. Nation Trust Co.*, 108 Pa. 1, 56 Am. Rep. 189; *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596; *Merchants' Bank v. State Bank*, 77 U. S. (10 Wall.) 604, 19 L. ed. 1008. Where a teller certifies a note or check when the bank has insufficient funds for its payment, the bank is liable only to a bona fide holder: *Meads v. Merchants' Bank*, 25 N. Y. 143, 82 Am. Dec. 331; but it is liable to such a holder if the teller is invested



with authority to certify paper: *Farmers' etc. Bank v. Butchers' etc. Bank*, 14 N. Y. 623.

### III. General Effect of Certifying Checks.

a. **As Making Bank Primarily Liable.**—By certifying a check, the bank thereby assumes a primary liability to the holder for payment. The certification is said to be equivalent to the acceptance of a bill of exchange payable on demand, and the obligation of the bank is subsequently the same as that assumed by the acceptor of such a bill. It creates an original, actionable liability against the bank, imports that the check is drawn upon sufficient funds which will be retained to pay upon a check whenever it is presented: *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436, and note; *Drovers' Nat. Bank v. Anglo-American Packing etc. Co.*, 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin (La.), 181; *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Merchants' Bank*, 25 N. Y. 143, 82 Am. Dec. 331; *Farmers' etc. Bank v. Butchers' etc. Bank*, 28 N. Y. 425, 26 How. Pr. 1; *Willets v. Phoenix Bank*, 9 N. Y. Super. Ct. (2 Duer) 121; *Blake v. Hamilton Dime Sav. Bank*, 79 Ohio St. 189, ante, p. 684, 87 N. E. 73; *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642. The amount is charged against the depositor, and passes to the credit of the check: *Poess v. Twelfth Ward Bank*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857, 14 N. Y. Ann. Cas. 439.

The certification by a bank of a note made payable thereto, where the maker keeps an account, is an absolute promise by the bank to pay the note as its own obligation rather than of another; and the bank cannot rescind its engagement because made under a misapprehension as to the sufficiency of the maker's account to meet the note: *Riverside Bank v. First Nat. Bank*, 74 Fed. 276, 20 C. C. A. 181, 38 U. S. App. 674.

b. **Effect on Drawer's Liability.**—When the drawer of a check procures its certification before delivering it to the payee, this does not discharge him. The bank, by certifying the check, becomes liable for the amount thereof, but the drawer may nevertheless be held in case the holder exercises due diligence in presenting the check to the bank for payment and giving notice of the dishonor. The only effect of a certification obtained by the drawer is to give additional currency by adding to his credit the credit of the drawee bank; the bank thereby becomes bound, but beyond that nothing is added to the legal force or effect of the instrument. But if the payee or holder of a check procures its certification from the bank, this amounts to payment as between him and the drawer, and the latter is discharged. The leading authorities in support of these principles are: *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Brown v. Leekie*, 43 Ill. 497; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533, 212 L. R. A. 492; *Wright v. MacCarty*, 92 Ill. App. 120; *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E.

173, 7 L. R. A. 442; *Anderson v. Gill*, 79 Md. 312, 47 Am. St. Rep. 402, 28 Atl. 527, 25 L. R. A. 200; *Minot v. Russ*, 156 Mass. 458, 32 Am. St. Rep. 472, 31 N. E. 489, 16 L. R. A. 510; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Meuer v. Phoenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed in 183 N. Y. 511, 76 N. E. 1100; *Dunn v. Whalen*, 105 N. Y. Supp. 588; *Cincinnati Oyster Co. v. National Lafayette Bank*, 51 Ohio, 106, 46 Am. St. Rep. 560, 36 N. E. 833; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 300; *French v. Irwin*, 4 Baxt. 401, 27 Am. Rep. 769. This distinction appears not to be recognized by all of the courts. According to *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229: "Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee."

The reason for the rule that the drawer of a check is discharged where the payee or holder procures its certification is, "that the moment the check is certified the funds cease to be under the control of the original depositor and pass under the control of the person who procures the certification": *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E. 173, 7 L. R. A. 442. "A check being payable immediately on demand, the holder has no right to demand from the bank anything but payment of the check; and the bank has no right, as against the drawer, to do anything else but pay it. Where, therefore, the holder, instead of demanding and receiving the money, has the check certified, and leaves the money in the bank subject to future draft, he enters into independent contractual relation with the bank not contemplated by the drawer and to which the drawer is not a party. Instead of receiving payment as he might and should have done, he chooses to accept in place of payment an express executory agreement by the bank to pay the check to the holder when presented at any time thereafter. In contemplation and by operation of law the holder is in the position of having actually drawn out the funds from the bank and redeposited them to his own credit and caused a certificate of deposit to be issued to him therefor. It is evident that the drawer is thereby made to stand in a different relation to the payee and holder from what he would were the check certified by his own procurement prior to its delivery to the payee": *Cincinnati Oyster etc. Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833.

The New York court of appeals, in holding that where a holder of a check presents it and has it certified instead of being paid, the cer-

tification is a payment as between the holder and drawer and discharges the latter from liability, said: "When the drawee accepts, it is an appropriation of the funds pro tanto to the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer and becomes that of payee or other holder in the hands of the acceptor. It is entirely clear that the acceptance of a time draft before due does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft. But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that the check is good; we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says no, I will not take the money; you may certify the check and retain the money for me until the check is presented. The law will not permit a check when due to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer. The money being due and the check presented, it is his own fault if the holder declines to receive the pay and for his own convenience has the money appropriated to that check subject to its future presentment at any time within the statute of limitations": *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708, approved in *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533, 12 L. R. A. 492; *Strauss v. American Ex. Nat. Bank*, 72 Ill. App. 314.

**c. Effect on Indorser's Liability.**—When the holder or indorser of a check procures it to be certified, the drawer and indorsers are thereby discharged, notwithstanding the absence of funds: *First Nat. Bank v. Currie*, 147 Mich. 72, 118 Am. St. Rep. 537, 110 N. W. 499; *Meuer v. Phoenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed in 183 N. Y. 511, 76 N. E. 1100. "The certification constitutes a new and distinct contract between the holder and certifying bank, which becomes the debtor of and only liable to the holder. The funds of the drawer have in legal contemplation been withdrawn from his credit and appropriated to the payment of the check. He and the indorser, if any, are released from all further liability; as to them the check is paid": *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 52. According to *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933, 26 Am. Rep. 126, certification of a check by the drawee, at the request of the indorser, before delivery to the holder, does not release the indorser.

**d. Effect on Drawer's Control Over Funds.**—When a check is certified, it should immediately be charged as paid to the account of the drawer, and the sum thus charged remains as a deposit to the credit of the check, and is withdrawn from the control of the drawer except as a holder of the check. Thereafter he cannot check against or draw out the funds in the bank necessary to meet the check; these funds are no longer his. Neither can he, save as holder of the check,

countermand its payment. After delivery and certification the check and the fund passes forever beyond his control: *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Wright v. MacCarty*, 92 Ill. App. 120; *Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608; *Friend v. Importers' etc. Nat. Bank*, 12 Hun, 537, affirmed in 76 N. Y. 352; *Central Guarantee Trust etc. Co. v. White*, 206 Pa. 611, 56 Atl. 76. In *Schlesinger v. Kurzrok*, 47 Misc. Rep. 634, 94 N. Y. Supp. 442, it is held that when the drawer of a check has it certified before delivering it to the payees, and the bank fails before presentation, the drawer on thereafter receiving the check from the payees is not entitled to set off the amount thereof against an indebtedness to the bank.

The rule that the possession of a check by the drawer raises a presumption that delivery has not been made to the payee, and that unless notice of a different state of facts is brought to the attention of the drawee bank, the bank has a right to act upon that presumption and cancel the check upon the drawer's application, applies to a certified check: *Buehler v. Galt*, 35 Ill. App. 225.

**e. Effect on Bank's Right to Withhold Payment.**—The certification of a check imports that the check is drawn upon sufficient funds and that they will be retained by the bank and paid upon the check whenever it is presented for payment. The certification binds the bank to have and hold sufficient funds to pay the check to one lawfully demanding payment, and thereafter the bank cannot, as between itself and a bona fide holder of the check, dispute that the drawer had funds on deposit when the check was certified; by the certification the bank loses power to withhold payment, except perhaps to one who is not a bona fide holder: *Note to Bickford v. First Nat. Bank*, 89 Am. Dec. 442; *Smith v. Branch Bank at Mobile*, 7 Ala. 880; *Irving Bank v. Wetherald*, 36 N. Y. 335; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Goshen Nat. Bank v. Bingham*, 7 N. Y. St. Rep. 493; *National Park Bank v. Steele etc. Mfg. Co.*, 58 Hun, 81, 11 N. Y. Supp. 538; *Cabinet Works v. German Exch. Bank*, 87 N. Y. Supp. 462; *Bowen v. Needles Nat. Bank*, 87 Fed. 430, affirmed in 94 Fed. 925, 36 C. C. A. 553; or to one who has consented to a withdrawal of the fund upon receiving the benefit of the amount of the check: *Stevens v. Corn Ex. Bank*, 3 Hun, 147, 5 Thomp. & C. 283.

A certified check is valid in the hands of a bona fide holder, although the drawer has no funds in the bank, and the certification of a check is prohibited and made a crime by statute, "unless the amount thereof actually stands to the credit of the drawer upon the books of the bank": *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399.

The transfer of the check carries with it, as against the bank, title to the amount named in the check. The transfer is an assignment of money to meet the check, and the bank making the cer-



tification is liable therefor to the holder: *American Trust etc. Bank v. Crowe*, 82 Ill. App. 537; *Blake v. Hamilton Dime Sav. Bank Co.*, 70 Ohio St. 189, ante, p. 684, 86 N. E. 989. But it is said that the certification creates no trust relationship between the bank and the holder of the check, nor does it bind the bank to set apart from its other funds a particular sum for its payment. To quote from *People v. St. Nicholas Bank*, 77 Hun 159, 28 N. Y. Supp. 407: "The contract that a bank makes when it certifies a check is in effect an acceptance. There is no trust relationship between such bank and the holder of the check, nor is the bank bound to set apart from its other funds a particular sum for its payment: *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Lynch v. First Nat. Bank*, 107 N. Y. 179, 1 Am. St. Rep. 803, 13 N. E. 775; *Bingham v. Goshen Nat. Bank*, 118 N. Y. 349, 16 Am. St. Rep. 765, 23 N. E. 180, 7 L. R. A. 595. These cases are authority for the proposition that by the certification of a check, or the issuance of a certificate of deposit, a bank becomes debtor to the holder of such check, and is not obliged to set apart any portion of its assets as a particular fund to pay such check."

A bank upon which a certified check has been drawn cannot, when the check is presented, set off an indebtedness of the holder against the check: *Brown v. Leckie*, 43 Ill. 497.

#### IV. Presentation, Demand and Payment.

**a. Check as Payment.**—Where the payee or holder of a check procures its certification by the drawee bank, this, as has already been seen, discharges the drawer and operates as payment between the drawer and the holder. Aside from this, however, a certified check given in the ordinary course of business and unattended by special circumstances is not presumed to be received as payment. In this respect certified checks differ little, if any, from ordinary checks: *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Born v. First Nat. Bank of Indianapolis*, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E. 173, 7 L. R. A. 442; *Cincinnati Oyster etc. Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833. When no objection is made to the tender of a certified check in payment of a debt, the tender may be regarded as sufficient: *Germania Life Ins. Co. v. Potter*, 109 N. Y. Supp. 435, reversing 107 N. Y. Supp. 912.

**b. Presentation, Demand, Laches and Limitations.**—When the drawer of a check delivers it already certified, the relations, duties and obligations between him and the payee holder are essentially the same as if the check were not certified. The certification in such case, therefore, does not relieve the holder from the necessity of making due presentation and giving notice of dishonor if he wishes to hold on to the liability of the drawer: *Cincinnati etc. Co. v. National Lafayette Bank*, 51 Ohio St. 106, 46 Am. St. Rep. 560, 36 N. E. 833. But when the payee or holder of a check procures its certification, the law of demand and notice has no application, and the bank becomes so far the primary debtor that delay in presenta-

tion does not affect its obligation. Demand for payment within a reasonable time is not necessary to render the bank liable to the holder; laches will not be imputed to the holder by reason of delay: *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596; *Farmers' & Mechanics' Bank v. Butchers' etc. Bank*, 11 N. Y. Sup. Ct. (4 Duer) 219, affirmed in 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Merchants etc. Bank*, 25 N. Y. 143, 82 Am. Dec. 331; *Nolan v. Bank of New York Nat. Banking Assn.*, 67 Barb. 24; *Girard Bank v. Bank of Penn Township*, 39 Pa. 92, 80 Am. Dec. 507; *Andrews v. German Nat. Bank*, 56 Tenn. (9 Heisk.) 211, 24 Am. Rep. 300; *French v. Irwin*, 63 Tenn. (4 Baxt.) 401, 27 Am. Rep. 769. When the bank certifies the check it enters into an absolute undertaking to pay it when presented at any time within the period fixed by the statute of limitations: *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113, 65 N. E. 136, 59 L. R. A. 657; *Riverside Bank v. First Nat. Bank*, 74 Fed. 276, 20 C. C. A. 181. But it has been said that the certification of a check does not permit an action to be brought upon it without demand: *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106.

#### V. Attachment or Garnishment of Funds.

A bank receiving from a customer a check on another bank indorsed "for deposit," and procuring it to be certified by the drawee, becomes at once liable to the depositor, as for money had and received, and that liability may be reached by garnishment: *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50. The obligation to pay a certified check to one who presents it, after the funds of the maker in the bank have been attached, depends upon the good faith of the holder. If the bank, having notice that good faith is wanting, pays the check, it does so at its peril: *Gibson v. National Park Bank*, 49 N. Y. Sup. Ct. (17 Jones & S.) 429, affirmed in 98 N. W. 87.

#### VI. Validity of Certification—Fraud, Forgery and Alterations.

a. *Checks Payable to One Under Fictitious Name.*—It is well understood that a contract entered into by a person under an assumed or fictitious name is valid. The law looks to the identity of the individual, and when this is established the act is binding upon him and others irrespective of the name he has assumed: *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Hartman v. Thompson*, 104 Md. 389, 118 Am. St. Rep. 422, 65 Atl. 117; *Scanlan v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351, 15 S. W. 417, 12 L. R. A. 714; *Alexander v. Graves*, 25 Neb. 453, 13 Am. St. Rep. 501, 41 N. W. 290. Accordingly, where a check is drawn, payable to a person under a fictitious name, it can nevertheless be enforced against a certifying bank: *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 32 N. E. 247, 34 N. E. 608; *Merchants' Loan etc. Co. v. Metropolis Bank*, 7 Daly, 137.

**b. Checks Certified by Mistake.**—Where a bank, through mistake, certifies a check when the drawer's funds are insufficient to meet it, the bank may, on discovering the error, revoke or cancel the engagement into which it has entered, provided no rights have intervened. The certification is irrevocable only where rights or liabilities have been incurred or losses sustained in consequence of it. The general rule is that only bona fide holders can resist the cancellation of a certification made under the mistaken supposition that the drawer had sufficient funds on deposit: *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71; *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128, 34 Am. Rep. 300; *Irving Bank v. Wetherald*, 36 N. Y. 335, affirming 34 Barb. 323; *Rankin v. Colonial Bank*, 31 Misc. Rep. 227, 64 N. Y. Supp. 32; *National Park Bank v. Steele & Johnson Mfg. Co.*, 58 Hun, 81, 11 N. Y. Supp. 538; *Brooklyn Trust Co. v. Toler*, 65 Hun, 187, 19 N. Y. Supp. 975, judgment affirmed 138 N. Y. 675, 34 N. E. 515.

**c. Certification Induced by Fraud.**—Where a bank is induced by fraud to certify the check of a depositor for an amount in excess of his deposit, it may countermand payment unless the rights of other parties have intervened: *Bank of the Republic v. Baxter*, 31 Vt. 101. But if the check has reached the hands of a bona fide purchaser, it would seem that the fraud cannot be urged as a defense against him: *Detroit Nat. Bank v. Union Trust Co.*, 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092. However, when the certification of a check is obtained by fraud, and is transferred without indorsement, the transferee takes it subject to all equities and defenses existing between the original parties: *Bingham v. Goshen Nat. Bank*, 118 N. Y. 349, 16 Am. St. Rep. 765, 23 N. E. 180, 7 L. R. A. 595, distinguishing *Lynch v. First Nat. Bank*, 107 N. Y. 179, 1 Am. St. Rep. 803, 13 N. E. 775. This is in accordance with the general rule that the transfer of a negotiable instrument without indorsement does not cut off the equities of antecedent parties: *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; *Sackett v. Montgomery*, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083; *First Nat. Bank v. McCullough*, 50 Or. 508, 126 Am. St. Rep. 758, 93 Pac. 366, 17 L. R. A., N. S., 1105.

**d. Forged Certification.**—Where a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as if it was genuine: *Continental Bank v. Commonwealth Bank*, 50 N. Y. 575.

**e. Forged or Altered Checks.**—When a bank certifies a check drawn upon it, it warrants that the signature of the drawer is genuine, and is bound accordingly though the signature proves to be a forgery: *Hagen v. Bowery Nat. Bank*, 64 Barb. 197, 6 Lans. 490; *Adam v. Manufacturers' etc. Bank*, 116 N. Y. Supp. 595. It seems, also, that the bank engages that the payee exists and has authority

to indorse: *Adam v. Manufacturers' etc. Nat. Bank*, 116 N. Y. Supp. 595. Moreover the bank, as has already been seen, engages that it has funds of the drawer on deposit sufficient to cover the check, and that they will not be withdrawn. But this is the extent of the bank's engagement. That is, the certification of a check by the bank on which it is drawn is, in general, an acknowledgment of the genuineness of the signature of the drawer, that he has sufficient funds to his credit to meet the check, which funds will not be withdrawn; but the certification is not a warranty of the genuineness of the signatures of the indorsers nor of the correctness of the amount of the check. If the check, prior to certification, has been raised or indorsed by forgery or unauthorized alteration the certification does not cover this defect: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247, 38 N. E. 739, 26 L. R. A. 289; *First Nat. Bank v. Northwestern Nat. Bank*, 40 Ill. App. 640, affirmed on another point, 29 N. E. 884; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *Marine Nat. Bank v. National City Bank*, 36 N. Y. Super. Ct. (4 Jones & S.) 470, affirmed in 59 N. Y. 67, 17 Am. Rep. 305; *Security Bank of New York v. National Bank of the Republic*, 67 N. Y. 458, 23 Am. Rep. 129; *Clews v. New York Nat. Banking Assn.*, 114 N. Y. 70, 20 N. E. 852. Compare, however, *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189, 26 Am. Rep. 92. When a bank has certified a raised check by mistake and subsequently pays the money thereon, without any culpable negligence, it can recover the amount thus paid as money paid by mistake: *Clews v. Bank of New York*, 89 N. Y. 418, 42 Am. Rep. 303; and in an action therefor, extrinsic evidence is not admissible to prove the understanding of merchants and bankers that the effect of a certification is other than that pronounced by the law: *Security Bank v. National Bank*, 67 N. Y. 458, 23 Am. Rep. 129.

"By the certification," to quote from *Clews v. Bank of New York*, 89 N. Y. 418, 42 Am. Rep. 303, the bank "guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer to the prejudice of any bona fide holder of the check; and the certification did not impose upon the defendant any further or greater responsibility. It did not import that the body of the check was genuine or that the funds on deposit with it were absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank cannot be called upon in consequence of its certification to pay the amount of the raised check. And when a bank has thus certified a raised check by mistake, and subsequently pays the money thereon without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake."



In another case the New York court of appeals uses this language: "When a check is presented for certification to a bank on which it is drawn, the purpose is to ascertain, with certainty, what the bank alone can know, and that is, whether the drawers of the checks have funds sufficient to meet it; and, further, to obtain the engagement of the bank that those funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank must, of necessity, enable it safely to go in the way of assertion; and its own power over its own funds will suffice to protect it as to its obligation. But if the doctrine contended for in opposition to this view is correct, and the certifying bank is bound to warrant not only the genuineness of the drawers' signature and the sufficiency of their credit, but also the genuineness of the check in all its parts, including the specification of the amount to be paid and the names and identity of the payees, then obviously there must occur an immediate and complete change in the modes of doing business, which would defeat and practically put an end to the use of certified checks. For no bank, under such a rule, could safely certify a check without, in the first instance, investigating its origin and history by inquiry of its makers and payees": *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305.

**f. Check Altered After Certification.**—If a check is raised before certification, the bank, upon the discovery of the alteration, is not, as has been seen in the preceding paragraphs, bound to pay the same, and if by mistake it has paid the check, it can recover the money back. The rule is not different where the check is raised after its certification. In such case the drawee bank is not responsible for the larger amount inserted, and in the event of paying the check before the alteration is discovered the bank may recover the excess if the holder has suffered no loss by reason of the mistake: *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520; *National Bank of Commerce in New York v. National Mechanics' Banking Assn.*, 55 N. Y. 211, 14 Am. Rep. 232; *Clews v. Bank of New York Nat. Banking Assn.*, 114 N. Y. 70, 20 N. E. 852, affirming 105 N. Y. 398, 11 N. E. 814. In the above *Clews* case a check, certified by the defendant bank, was stolen from the holder. The thief presented it in payment for property to the plaintiff, who, before taking it, inquired of the paying teller if the certification was good, and was given an affirmative answer. The thief had altered the amount and the payee's name, making the check payable to the plaintiff. It was decided that, in the absence of evidence that the defendant acted in bad faith, it was not answerable. In the above *National Bank* case, in 55 N. Y. 211, 14 Am. Rep. 232, it is decided that when a bank has by mistake paid to a bona fide holder a certified check, which had, after certification, been fraudulently altered by raising the amount, it can recover back the sum paid, unless the holder has suffered loss in consequence of the mistake.

**g. Lost or Stolen Checks.**—The rights of bona fide holders of lost or stolen negotiable instruments are considered in the recent note to *Ehrlich v. Jennings*, 125 Am. St. Rep. 802. A bona fide indorsee of a certified check has been held entitled to payment, notwithstanding the paper was stolen and never had a valid delivery: *Poess v. Twelfth Ward Bank*, 43 Misc. Rep. 45, 86 N. Y. Supp. 857. In this case it is further affirmed that notice to a bank that the certified check has been lost and direction by the maker not to pay it cannot prejudice a bona fide holder.

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## McGILL v. CLEVELAND AND SOUTHWESTERN TRACTION COMPANY.

[79 Ohio St. 203, 86 N. E. 989.]

**MASTER AND SERVANT—Promise to Repair Instrument or Tool.**—The rule that a direction by the master to continue the use of a defective instrument or tool, coupled with a promise to replace it with one not defective, relieves the servant from the doctrine of assumed risk if injured during such continued use and because of the defect, does not apply to cases of ordinary labor with a tool of simple construction with which the servant is entirely familiar, and which he understands and comprehends as fully as the master. (pp. 708, 709.)

**MASTER AND SERVANT—Promise to Repair Instrument or Tool—Liability.**—Where an employé, whose duties require him to use an ordinary step-ladder, discovers and appreciates that the step-ladder has become and is defective, dangerous and "unfit for him to use in connection with his said work," and he notifies the master, who promises to furnish another, but before doing so the employé in using such defective step-ladder is injured, the master, under such circumstances, is not liable. (p. 712.)

(Syllabus by the court.)

Skiles, Green & Skiles and Stroup & Fauver, for the plaintiff in error.

E. G. H. C. and T. C. Johnson, for the defendant in error.

**203 CREW, J.** On January 31, 1907, the plaintiff in error, David B. McGill, commenced an action in the court of common pleas of Lorain county, Ohio, against the defendant in error, the Cleveland and Southwestern Traction Company, to recover damages for personal injuries received by him on October 23, 1906, while in the employ of said defendant company. The petition filed by him, omitting caption and verification, was in the words and figures following:

"Now comes the plaintiff, David B. McGill, and <sup>204</sup> says that the defendant, the Cleveland and Southwestern Traction Company, is now and was on the twenty-third day of October, 1906, a corporation duly organized under the laws of the state of Ohio, and as such corporation owned, operated and controlled a line of electric railway extending from the city of Cleveland, in the county of Cuyahoga, to the village of Wellington, county of Lorain, and elsewhere.

"That in said village of Wellington at said time, near the public square, defendant maintained a certain sidetrack and other equipment used by the defendant in the operation and maintenance of its said line of railway.

"Avers that on and prior to the twenty-third day of October, 1906, plaintiff was in the employ of the defendant company in the capacity of helper to one Mike Gibbons, who was then in the employ of the defendant company in Wellington, Ohio, as car inspector.

"Plaintiff avers that he controlled no person and was subject to the orders, direction and control of his said foreman or boss, Mike Gibbons.

"Avers that at said time, defendant maintained as aforesaid a certain sidetrack along the main street in said village of Wellington, where the defendant placed certain of its cars from time to time to be inspected, repaired and cleaned. Avers that it was plaintiff's duty, among other things, at said time, to assist, under the direction of said boss or foreman, in cleaning, washing and repairing the cars of defendant company. That it became and was necessary in cleaning and washing said cars of defendant company, and particularly <sup>205</sup> the windows and window-frames on the outside of said cars, for this plaintiff to use a certain step-ladder about seven feet high, said ladder being furnished by defendant company for that purpose in the performance of his work.

"Avers that some days prior to the twenty-third day of October, 1906, plaintiff discovered that said ladder which defendant had furnished him to be used while performing his duties, as aforesaid, had become old, worn and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in that the steps of said ladder were loose and worn and the iron braces holding said steps to the side pieces of said ladder were loose, broken and defective.

"Avers that a few days prior to the twenty-third day of October, 1906, this plaintiff complained to his said foreman,

Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant, through its foreman, assured and promised plaintiff that he would have said ladder repaired with a new, proper and sufficient one, so that plaintiff could safely perform his work.

“Plaintiff avers that about a week or ten days prior to the twenty-third day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strail, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new, sufficient and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished. That plaintiff relied upon defendant’s <sup>206</sup> fulfilling its said promises and assurance, and he continued to perform his labor as directed by said foreman, Mike Gibbons, until the twenty-third day of October, 1906, when plaintiff was injured in the direct line of his duty and without fault or negligence upon his part, as hereinafter set forth.

“Plaintiff avers that on said twenty-third day of October, 1906, he was ordered by defendant’s foreman, Mike Gibbons, to clean the windows on the outside of the vestibule on the west end of one of defendant’s cars placed on said sidetrack in said village, and in order to properly perform his work it became and was necessary for plaintiff to use said ladder furnished by the defendant company, and that while attempting so to do, the steps of said ladder and braces thereof gave way, by reason of its old, defective and dangerous condition, and plaintiff was thrown upon and across the bumper on the west end of said car, and was precipitated to the fender of said car, bruising plaintiff and inflicting serious and permanent injuries as hereinafter set forth.

“Plaintiff avers that the defendant was guilty of negligence and carelessness in permitting and allowing said ladder to be and remain in said defective, worn out and dangerous condition, and in ordering said plaintiff to work with the same at said time. That the defendant was guilty of carelessness and negligence in not furnishing plaintiff with a new, proper and sufficient ladder, in accordance with the promises and assurance of defendant.

“Plaintiff avers that his injuries were caused solely by reason of the fault and negligence of the defendant, as aforesaid, and without any fault <sup>207</sup> or negligence upon his part.



That by reason of the negligence of the defendant aforesaid, plaintiff was thrown upon the iron bumper of said car, thereby suffering a fracture of two ribs on his right side; that his right arm and shoulder were severely sprained and bruised; that he is unable to use said right arm and shoulder as he formerly did, and he believes he never will have the proper use of said arm and shoulder. Avers that the same gives him constant pain; that he sustained a severe injury to his head and neck; that his head causes him constant pain and that he suffers from dizziness; that he received a severe bruise to his right hip; that he further received a severe injury and shock to his entire nervous system; that he suffers from sleeplessness as a result of the injury to his head. Avers that by reason of the fracture of the ribs on his right side his right lung has become affected, the exact nature and extent of which plaintiff is unable at this time to determine. That he was confined to his bed for a period of about two weeks; that prior to said injury he was able to perform and did perform manual labor; that since said injury, he has not been able to perform any manual labor and believes he will be incapacitated from performing the same as he formerly did. Avers that his injuries are permanent, all of his damage in the sum of ten thousand dollars.

"Wherefore plaintiff prays judgment against said defendant for his damages so sustained, as aforesaid, in the sum of ten thousand dollars."

A general demurrer to this petition was sustained by the court of common pleas, and the <sup>208</sup> plaintiff not desiring to amend or to further plead, his petition was dismissed and judgment rendered against him for costs. On error this judgment was affirmed by the circuit court. A reversal of both of said judgments is here asked by the plaintiff in error.

<sup>214</sup> In support of the claim that the averments of the petition in this case sufficiently allege and show a liability on the part of the traction company to plaintiff for the injuries alleged to have been sustained by him through the negligence of said traction company, reliance is had upon the general rule that where the servant notifies the master of a defect in machinery or in his place of work, and the master promises to repair the same or to obviate and remove the danger, and the servant reasonably relying upon such promise remains in the service, that the master thereby assumes the risk of injury to the servant,

and is liable to him in damages for an injury resulting to him from such defect pending the making of the repair promised. While such doubtless is the general rule applied in cases where the servant is engaged in working with machinery or appliances of which he has but a limited and imperfect knowledge, and in cases where some measure of skill and experience is necessary to enable the servant to know and appreciate the particular defect and the danger incident thereto, yet, that this rule was never designed or intended to apply to cases of common and ordinary labor, such as requires in its <sup>215</sup> performance the use only of some simple implement, instrumentality or tool with which the employé is himself entirely familiar, is, we think, clearly and abundantly established by the overwhelming weight of authorities.

Judge Bailey in his work on Personal Injuries, volume 2 at section 3103, in speaking of this rule and its limitations, says: "A master is not liable to a servant of mature years and ordinary mental capacity who is injured in his employ by reason of a defect in a ladder of which he was aware, though the servant had notified the master of such defect, and was told to use the ladder until another was furnished. The rule exempting an employé from an assumption of the risk in case of a promise to remedy the defect is designed for the benefit of employés engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar." In the case of *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721, which was an action to recover for a personal injury occasioned by a defective ladder used by a watchman in lighting and extinguishing lamps at street crossings, the court, in discussing this rule, said: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished, the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and <sup>216</sup> comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to

which he is accustomed, and in regard to which he has complete knowledge, cannot be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. . . . The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case, does not render the master responsible if an accident occurs. A rule imposing a liability under such circumstances would be far-reaching in its consequences, and would extend the rule of respondeat superior to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff, in the case at bar, was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery." In *March v. Chickering*, 101 N. Y. 396, 5 N. E. 56, in the opinion of the court by Miller, J., it is said: "As a general rule, it is to <sup>217</sup> be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employe who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him.

"The rule stated, however, is not applicable in all cases, and where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

"In considering the application of the rule just stated due regard must be had to the limited knowledge of the employe as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise: *Powers v. New York etc. R. R. Co.*, 98 N. Y. 274.

"In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. . . . It does not rest with the servant to say that the <sup>218</sup> master has superior knowledge and has thereby imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and if he is thereby injured it is by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs." In *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393, a comparatively recent case, it is said: "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended and the servant exempted from its application under a promise from the master to repair or cure the defect complained of are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master." In *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, decided by the supreme court of Nebraska, May 24, 1907, and reported in 13 L. R. A., N. S., 668, the first two paragraphs of the syllabus are as follows: "(1) The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. (2) But the <sup>219</sup> foregoing rule has no application where the servant possesses ordinary intelligence and knowledge, and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant." The rule as announced by the foregoing authorities has found recognition, and has been declared, in many other cases, among which are *Bowen v. Chicago etc. R. R. Co.*, 117 Ill. App. 9; *Corcoran v. Mil-*



waukeee Gas Light Co., 81 Wis. 191, 51 N. W. 328; Jenney Electric Light etc. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; Conley v. American Exp. Co., 87 Me. 352, 32 Atl. 965; St. Louis etc. Ry. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; International Packing Co. v. Kretowicz, 119 Ill. App. 488; Erdman v. Illinois Steel Co., 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; Gulf etc. Ry. Co. v. Brentford, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561.

Tested then by this apparently now well-settled rule, we are of opinion that the allegations of plaintiff's petition in the present case do not state a cause of action. In his petition plaintiff avers, "that some days prior to the twenty-third day of October, 1906, plaintiff discovered that said ladder which defendant had furnished him to be used while performing his duties, as aforesaid, had become old, worn and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work, in that the steps of said ladder were loose and worn and the iron braces holding said steps to the side pieces of said ladder were loose, broken and defective.

"Avers that a few days prior to the twenty-third day of October, 1906, this plaintiff complained to his said <sup>220</sup> foreman, Mike Gibbons, of the defective and dangerous condition of said ladder, and plaintiff avers that said defendant through its foreman assured and promised plaintiff that he would have said ladder repaired with a new, proper and sufficient one, so that plaintiff could safely perform his work.

"Plaintiff avers that about a week or ten days prior to the twenty-third day of October, 1906, he further complained to the master mechanic of defendant company, Fred Strail, of the defective and dangerous condition of said ladder, and that said master mechanic then and there promised and assured plaintiff that he would be furnished with a new, sufficient and proper ladder with which to perform his work as soon as the same could be made, and that he should use said ladder until a new ladder was furnished." It sufficiently and affirmatively appears from the foregoing allegations that the unfit and unsafe condition of this step-ladder, on and prior to October 23, 1906, was fully known to and understood by the plaintiff. He knew as he alleges, "that the same was unfit for plaintiff to use in connection with his said work." He was familiar with and appreciated its

condition and defects, all of which were alike open to his observation and within his comprehension, and it would seem from the averments of his petition that he was so impressed by this defective and unsafe condition that he not only complained of the same to his foreman but to the master mechanic as well. Plaintiff knew as well as the foreman, master mechanic or master, that said step-ladder in its then condition could not be used with any assurance of safety, and having such knowledge <sup>221</sup> he must be held to have assumed the risk of its use. To hold the master liable to an employé, under such circumstances, for injuries resulting to the latter from the use of so simple an implement or tool as an ordinary step-ladder, would be to extend the rule of *respondeat superior* beyond its reasonable limit and to apply it as never intended. The case of *Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669, cited by counsel for plaintiff in error as supporting their contention in the present case is not in point, that being a case where the injury to the employé was caused by a complicated machine, and not by a simple instrumentality or appliance such as the step-ladder in the case at bar.

Judgment affirmed.

Price, C. J., Shauck, Summers, Spear and Davis, JJ., concur.

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*By the Promise of the Master to Repair a Defect* of which the servant has complained, a new relation is created, by which the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following the promise: *Morden Frog and Crossing Works v. Fries*, 228 Ill. 246, 119 Am. St. Rep. 428, and extended note thereto.

*The Liability of an Employer for Defective Appliances* which result in injury to an employé is considered in the notes to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289; *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884.

## LINGLER v. WESCO.

[79 Ohio St. 225, 86 N. E. 1004.]

**CHATTEL MORTGAGES—Death of Mortgagor—Right of Mortgagee to Maintain Replevin.**—Where the mortgagor dies in possession of the goods and chattels covered by the mortgage, even after condition broken, and his administrator has taken possession of said goods and chattels in his trust capacity, the mortgagee cannot maintain replevin against such administrator for their possession. In such case, if the mortgage is valid, the interest of the mortgagee in the property under mortgage is transferred to the fund arising from the sale by the administrator. (p. 719.)

(Syllabus by the court.)

Andrews, Harlan & Andrews, for the plaintiff in error.

A. Wesco, A. F. Hume and E. A. Belden, for the defendant in error.

**226** PRICE, J. On the fifteenth day of April, 1904, the plaintiff in error filed a petition in the court of common pleas of Butler county against Florentine Kraft, as administratrix of the estate of Franz Kraft, deceased, to obtain possession of certain personal property then in the possession of defendant. The petition contains two causes of action. In the first it is alleged that on the fourth day of May, 1903, Franz Kraft, now deceased, executed and delivered to the plaintiff, Lingler, his twelve promissory notes, each for the sum of \$100 and payable in six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen months after the date thereof, each to bear six per cent interest from date, interest to be paid annually and each note payable at the Second National Bank, of Hamilton, Ohio. No part of said notes has been paid, and when the petition was filed, the notes due in six, seven, eight, nine, ten and eleven months from date were then due, and the other notes were not then due.

It is further alleged that on the 4th of May, 1903, in order to secure the payment of said notes, the said Franz Kraft executed and delivered to Lingler a chattel mortgage on "all bar fixtures, wines, liquors, cigars, chairs, tables, furniture, ice box, two billiard tables, and all property now in the building known as the Bank Saloon, No. 227 High Street . . . of the city of Hamilton and used by said mortgagor in the conduct of said saloon."

The mortgage contained the condition that if said Kraft should pay, or cause to be paid when due, his twelve promissory notes of said date **227** for the sum of \$100 each, with

interest thereon, then the mortgage to be void, otherwise to be and remain in full force.

The plaintiff alleges that no part of said notes or mortgage has been paid, and that the mortgage has become absolute, and that the plaintiff has acquired special ownership or interest in and is entitled to the immediate possession of said goods and chattels, and that Florentine Kraft, administratrix of Franz Kraft, deceased, wrongfully detains in her possession said goods and chattels, and has so detained them from plaintiff for more than thirty days to his damage in the sum of \$400.

For a second cause of action plaintiff alleges, that on the seventh day of May, 1903, said Franz Kraft executed and delivered to him his certain promissory note for the sum of \$2,500, payable one year after date with six per cent interest from date, the interest payable annually. No part of said note has been paid. To secure the payment of this note Kraft executed and delivered to Lingler a chattel mortgage on the same property covered by the first mortgage and already described. The latter mortgage contained the condition that if the note was paid when due, the mortgage should be void, otherwise to remain in full force. This mortgage, as was true of the first, was duly sworn to as required by law, and filed with the recorder of Butler county, and that each of said mortgages is a valid lien upon said property.

The plaintiff alleges that said Kraft died in Butler county, Ohio, intestate, on the seventh day of <sup>228</sup> March, 1904, and that plaintiff has acquired special ownership in and is entitled to immediate possession of said goods and chattels, and that said Florentine Kraft, administratrix of the estate of Franz Kraft, deceased, wrongfully detains said goods from the plaintiff, and has so detained them for thirty days, to damage of plaintiff in the sum of \$400.

The prayer is for a recovery of possession of the property and for damages in the sum of \$800.

An affidavit in replevin was filed with the petition, and the property mortgaged was taken on a writ of replevin and delivered to the plaintiff on his giving a proper bond. The property replevined was appraised at \$2,565.65. An answer to the petition and the reply thereto were withdrawn with consent of the court, and the defendant filed a general demurrer to the petition. The court sustained the demurrer, and on motion of the defendant, proceeded to assess damages, and found as follows, "the court finding that



said defendant, as administrator of Franz Kraft at the time the property described in plaintiff's petition and replevined from her by said plaintiff, had the right of possession thereof for the purpose of administering the same according to law as administrator of said estate, and the court, being fully advised, does find that the value of the property described in the petition at the time it was replevined, was \$2,565.65, and does assess the damages caused to the defendant by said plaintiff replevining said property from her, at \$153.83." Judgment was rendered for the sum of \$2,719.48, <sup>229</sup> and costs of the action. This judgment was affirmed by the circuit court.

The case is here on error.

<sup>233</sup> There is nothing in the petition which was held bad on demurrer to indicate that the chattel mortgage confers any special powers, such as power to sell or make other disposition of the mortgage property. As our statement of the case shows, the petition describes certain notes executed and delivered by Franz Kraft to the plaintiff Lingler, and that to secure their payment as <sup>234</sup> each should become due, the mortgage was executed and delivered to the payee of the notes. It was properly verified and filed in order to perfect the intended lien on the personal property described therein. In addition to the facts alleged as to creation of the lien by virtue of this mortgage, it is averred "and that thereby the said property was conveyed to this plaintiff by said Franz Kraft."

The other material provision of the mortgage is the written condition that if said Kraft should pay or cause to be paid when due each of the several notes described in the mortgage, then it was to be void; otherwise to remain in full force.

The second mortgage referred to in the petition, given at a later date to secure the payment of a note for \$2,500, covers the same property and contains similar conditions. It may be inferred from the language of the petition that Kraft paid some of the notes, but he died on the seventh day of March, 1904—less than a year from the date of the notes and mortgage, at which time notes due in six, seven, eight, nine, ten and eleven months respectively, had matured. His wife, Florentine Kraft, became administratrix of his estate, and on April 15, 1904, Lingler brought suit in replevin against the administratrix to recover possession of the mortgaged property, and in pursuance of the provi-

sions of the statute of which he availed himself, he obtained possession.

As before stated, the petition discloses no condition upon which the mortgagee might take possession, save the averment that by the execution <sup>235</sup> of the mortgage Kraft thereby conveyed the mortgaged property to Lingler who thus acquired a special ownership therein. Evidently this personal property remained in the possession of the mortgagor and was in his possession at the time of his death. What change, if any, in the relation of the mortgagee to this property was wrought by the death of the mortgagor?

It is not claimed that death discharged or in any degree weakened the lien of Lingler, but he was not satisfied with holding his lien and permitting the administratrix to sell and administer upon the proceeds, and therefore asserted title under his mortgage and charged that the administratrix wrongfully and illegally detained the property from him. The lower court decided that he could not maintain replevin against the administratrix and assessed damages against him for the value of the goods replevied.

Death soon or later is the certain fate of all men, and when a party accepts a mortgage upon chattels securing the payment of a series of notes, some of which will not mature for many months, as was the case here, such party must be held to take such security in contemplation of what the law may require if death prevents the mortgagor from complying with the terms of his contract. The value of mortgaged property might be far in excess of the debt, and the estate of the deceased mortgagor would in such case be largely interested in the proper and advantageous disposition of the same, and it would seem unfair to the estate that a mortgagee should be permitted to arbitrarily take possession and keep or dispose <sup>236</sup> of the property as he please. The petition discloses no duty on the part of the mortgagee in respect to such property. It does not appear that he was authorized by the mortgage to sell at either public or private sale, nor does it appear what shall be done with the proceeds in case a sale should be made.

But aside from the lack of averment of what powers were conferred by the mortgage in question, we still have the question, What change occurs in the rights of a mortgagee on the death of the mortgagor?—not change in his contract lien, but change in the remedy to enforce it. Indeed, on the facts alleged in the petition in the present case, it cannot be fairly urged that the decision of the lower

court tended to impair any of the contract rights of the mortgagee. He contracted for a lien to secure his notes. Death did not remove or impair the lien, but we think it did so change the relation of the parties that the remedy by replevin, which might have been enforced in the lifetime of the mortgagor, is not available when the mortgaged property passes into the custody of the administratrix. The new situation does not dissolve the contract relation or impair the contract, but cuts off one of the remedies that could have been pursued against the mortgagor. Hence, it is not correct to say, that unless the mortgagee may take the property from the personal representative of the mortgagor, he does not enjoy the full measure of his contract rights. His rights as to the debt and its security may be one thing, and the remedy to enforce them may be another. The former may not be changed <sup>237</sup> by the death of a party, while the other may necessarily be affected.

While the statute provides the method of obtaining a valid lien on personal property by mortgage, and one which was adopted by Lingler in this case, other provisions provide for the sale and distribution of personal property after the death of the owner. Section 4163 of the Revised Statutes provides that: "When a person dies intestate and leaves any personal property, such personal property shall be distributed in the manner prescribed in section 4159," etc. This section points out the course of descent and distribution. But there are still other provisions to be observed after death of the owner of personal property. It is the subject of administration, and section 6006 of the Revised Statutes requires a bond of the administrator, one of the conditions of which is to make and return into court on oath within three months, a true inventory of all moneys, goods, chattels, rights and credits of the deceased which have or shall come to his possession or knowledge. The statute requires the administrator to administer according to law all the moneys, goods and chattels, etc. These are some of the duties of an administrator as to personal property of the deceased which comes into his possession or of which he has knowledge, and these duties are primary, or first duties in discharge of the trust. Later it is the duty and power to sell the personal estate and make due return of the same. In this case, some interest in the mortgaged property vested in the administrator, the extent of which depends upon <sup>238</sup> its value as compared with the amount of valid liens, and the contract called the chattel mortgage

"must be expounded according to the laws in force at the time they are made, and the parties are as much bound by a provision contained in the law, as if that provision had been inserted in, and formed part of, the contract": Lindemann *v.* Ingham, 36 Ohio St. 1.

Applying this rule to the case at bar, we think the chattel mortgage and Lingler's rights under it must be expounded and determined with a proper recognition of the statutes regulating the settlement of estates of deceased persons, and that the mortgagee should not be allowed to supplant administration under the law, and take upon himself the administration on part of the estate. These provisions by statute for the administration of estates must be regarded as in contemplation of the parties who enter into such contracts, and they must be interpreted and enforced accordingly. And the mortgagee is not made to suffer by this method of procedure, for under sections 6090 and 6091 of the Revised Statutes, which prescribe the order in which the administrator shall pay debts, his lien is preserved and recognized, and as said in section 6091: "Nothing in the preceding section shall affect or impair any lien, legal or equitable, which any creditor or other person shall have upon the personal estate of the deceased during his lifetime." Hence, to this extent at least, the administrator is a trustee for the benefit of the mortgagee as well as other creditors of the deceased.

In *Kilbourne v. Fay*, 29 Ohio <sup>239</sup> St. 264, 23 Am. Rep. 741, the relation which the administrator sustained to creditors was under consideration, although it was not the paramount question in the case. The syllabus indicates the nature of the controversy: "Where a chattel mortgage is declared void by the statute 'as against the creditors of the mortgagor,' and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor, whose duty, as well as right, it is to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor."

It is not claimed that the mortgage in the present case is void as to creditors, or as to the mortgagor, but the pertinent principle found in that case is, that the administrator is a trustee for the benefit of the creditors of the estate. In the course of the opinion, on page 279, McIlvaine, J., says: "I shall not stop to cite cases wherein the executor or ad-



ministrator has been held to be a trustee for the benefit of the creditors of the estate. The provisions of the eighty-third section of the administration act above quoted clearly establish such relation. (Said section 83 is now 6091, Revised Statutes.) The ordinary course of administration is the means and process provided by law whereby creditors of a deceased debtor receive payment. It is true that in the case of a solvent estate the heir has also a beneficiary interest in the trust as a distributee, but where the estate is insolvent, the interest of the heir is merely technical, as all the assets in such <sup>240</sup> case are administered for the exclusive benefit of creditors. The analogy between the duties of the office of an administrator of an insolvent estate and those of an assignee of an insolvent debtor are so perfect that we might at once affirm that the doctrine of *Hanes v. Tiffany* must control the decision of the present case."

The perfect analogy mentioned is reinforced when we consider the duties of an assignee of an insolvent debtor defined by section 6351, Revised Statutes: "The probate court shall order the payment of all encumbrances and liens upon any of the property sold, or rights and credits collected, out of the proceeds thereof, according to priority."

This being the relation which an administrator sustains to the creditors of the estate of a deceased person, the case of *Lindemann v. Ingham*, 36 Ohio St. 1, becomes direct authority. It is not necessary to here restate the facts of that case. It was an action against Lindemann for conversion of goods and chattels covered by a chattel mortgage, which goods the assignee sold with full knowledge of the mortgage, which instrument was the title of the mortgagee. This court held that, "where a mortgagor in possession of goods mortgaged makes an assignment thereof for the benefit of his creditors, and the assignee proceeds in the probate court to administer the trust in accordance with the statutes regulating such assignments, the mortgagee cannot maintain an action against the assignee for converting the property to his own use. In such case, his interest in the property under the mortgage, <sup>241</sup> where the assignee is clothed with authority to sell the goods, is transferred to the fund arising from the sale by the assignee. And it will make no difference that the condition in the mortgage was broken at the time of the assignment." In the case at bar the mortgagee sued in replevin after condition broken, and thus gained possession of the property.

This court had occasion to again consider the question decided in *Lindemann v. Ingham*, 36 Ohio St. 1, in *Ingham v. Lindemann*, 37 Ohio St. 218. The doctrine of the first case was adhered to, and it has been quoted with approval by this court in several subsequent cases, and we think it has become the settled law of this state.

The plaintiff in error complains of the judgment assessing the damages. The judgment entry shows the following: "And thereupon this cause came on to be heard on said demurrer to said petition, and the court having heard the argument of counsel and being fully advised in the premises, does find that said demurrer is well taken and does sustain the same at the costs of the plaintiff and does render judgment on said demurrer against the plaintiff and in favor of defendant; and on application of the defendant herein filed the court proceeded to assess proper damages to the defendant, the court finding that said defendant, as administrator of Franz Kraft, at the time the property described in plaintiff's petition and replevined from her by said plaintiff, had the right of possession thereof for the purpose of administering the same according to law as administrator of said estate, and the court being fully advised <sup>242</sup> does find that the value of the property described in the petition at the time it was replevined, was \$2,565.65 and does assess the damages caused to the defendant by said plaintiff replevining said property from her, at \$153.83." The court then rendered judgment for the aggregate of the two amounts and costs of the action.

Before the demurrer was filed it seems that some issue had been made up by answer and reply, for the record shows that the defendant had leave to withdraw the answer and the plaintiff to withdraw the reply. Thus the deck was cleared for a demurrer to the petition, which was filed, and the right of plaintiff to maintain replevin against the administrator was thereby challenged. The question was decided on the demurrer against the right of replevin. The plaintiff did not ask permission to amend his pleading and he was in possession of the property replevined. It does not appear that either party demanded a jury to assess the damages, and for what we know, they may have waived a jury, for the record is silent on the subject. The entry shows that the court made a finding in favor of the defendant and against the plaintiff on the demurrer, and that defendant was entitled to possession of the property when suit was brought, and then the court proceeded to

find the value of the property at the time of replevin, and assessed its value as the measure of damages. Such a finding presupposes the introduction of evidence, and where the record is silent, a reviewing court will presume that the court below, being one of general jurisdiction, <sup>243</sup> acted upon evidence to support the finding of value and amount of damages.

Therefore it appears that no one objected to the court hearing the evidence and passing upon it. No one asked for a jury, but the parties proceeded with a submission of the case. The condition of the record here warrants the use of the rule established in *Bonewitz v. Bonewitz*, 50 Ohio St. 373, 40 Am. St. Rep. 671, 34 N. E. 332: "A party may waive his right to a jury trial by acts, as well as by words."

We find no error, and the judgment is affirmed.

Judgment affirmed.

Shauck, Crew, Summers, Spear and Davis, JJ., concur.

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*The Rights of a Mortgagee of Personal Property* after condition broken and upon the death of the mortgagor is considered in the note to *St. Marys etc. Co. v. National etc. Co.*, 96 Am. St. Rep. 688.

**CASES**  
IN THE  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**LILLIBRIDGE'S ESTATE.**

[221 Pa. 5, 69 Atl. 1121.]

**WILLS—Presumption as to Testamentary Intent.**—If an instrument speaks for itself and is by its terms a testamentary disposition of property, the law will presume that the maker signed it understandingly and intended it as his will, if legal proof is furnished of its execution. (p. 724.)

**WILLS—Subscribing Witnesses, Want of Knowledge on Their Part.**—Where an instrument is in terms a will, it is not necessary that the subscribing witness knew of its character or of its having been read to the testator. (p. 724.)

**WILLS—Subscribing Witness, No Request to Necessary.**—It is not necessary that a subscribing witness to a will be specifically requested by the testator to sign as such witness. If the attestation was in his presence, it will be presumed to have been with his knowledge and approval. (p. 724.)

William A. Wilcox and A. A. Vosburg, for the appellant.

S. B. Price, Joseph O'Brien, Willard, Warren & Knapp, and Thomas F. Wells, for the appellee.

<sup>6</sup> STEWART, J. The paper propounded as the last will of George Jerome Lillibridge is upon its face a last will and testament. It so purports and is susceptible of no other meaning. The execution of the instrument by George Jerome Lillibridge is attested by two subscribing witnesses, both of whom testified before the register that they saw the testator sign his name to the instrument. The register on this state of facts very properly admitted the will to probate. On appeal from his decree, the learned judge of the orphans' court set aside the probate, on the ground, that upon the hearing on the appeal it was made to appear that neither attesting witnesses knew, at the time they attested the execution, that the instrument was a will; that the paper was not read to the testator in their presence,



and that the testator himself had not in terms requested them to sign as witnesses. Neither of these things was essential to the proof of execution. Where an instrument speaks for itself, and by its terms is a testamentary disposition of property, if legal proofs be furnished of its execution, the law will presume that the maker signed it understandingly, and that he intended it to be his will. We so held in *Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886, distinguishing between the cases where the instrument was of doubtful purport and those where it was clearly and manifestly of testamentary character. The ruling there was in exact accord with all our cases. We have uniformly held that the necessity for two subscribing witnesses relates only to the formal execution of the paper; and we have just as uniformly held that where the instrument is in terms a will, it is wholly immaterial that the witnesses did not know that the paper was a will, or were without knowledge that it had ever been read to the testator. It is quite as immaterial here that they signed as witnesses without having been specifically requested to do so by the testator. Many a will has been executed with formal attestation when the testator was so enfeebled that it was beyond his power to express any such request; but never has one been refused probate <sup>7</sup> for any such reason. Both these witnesses say that their attestation was in the presence of the testator. The law will presume that it was with his knowledge and approval. It was error to set aside the probate in this case. On the appeal from the probate there was a request for an issue *devisavit vel non* to determine questions of testamentary capacity and undue influence. The court having set aside the probate, this matter was not considered. In reversing the decree, we do so without prejudice to the right of the appellants from the decree of probate to renew their application for an issue.

Decree reversed at the costs of the appellants.

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*The Questions Involved in the Principal Case* will be found discussed in the note to *Lane v. Lane*, 114 Am. St. Rep. 209. As to the evidence of subscribing witnesses in support or opposition of the will, see the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

STEVENSON v. UNITED STATES EXPRESS COMPANY.

[221 Pa. 59, 70 Atl. 275.]

**NEGLIGENCE.—One Who Leaves a Horse Unhitched and Unattended on a City Street** takes the risk of what the horse may do and is presumed to have been guilty of negligence. The strength of the presumption varies with the circumstances, being strong when the animal is young, nervous or unused to the sights and sounds of such city, and slight when he is old, staid and accustomed to city life. (p. 725.)

**NEGLIGENCE, Temporary Question of, When for the Jury.—**If an invalid left unattended in a rolling-chair in a city street some twenty feet behind an unhitched and unattended horse and wagon is injured by the backing of such horse and the consequent overturning of the chair, the question of contributory negligence is for the jury. (pp. 725, 726.)

Action by the plaintiff to recover for injury received by him while in a city street in an invalid rolling-chair. He had been left unattended about twenty feet behind an unhitched and unattended horse and wagon, whereupon the horse suddenly backed up and overturned the chair, thereby seriously injuring the plaintiff. There was testimony tending to show that the horse's action was caused by an attack of colic. The question of the defendant's negligence and of the plaintiff's contributory negligence were submitted to the jury, which returned a verdict in favor of the plaintiff for six thousand dollars, and the defendant appealed.

James F. Campbell, for the appellant.

A. S. Ashbridge, Jr., for the appellee.

<sup>61</sup> Per CURIAM. One who leaves a horse unhitched and unattended on a city street takes the risk of what the horse may do. It was held in *Henry v. Klopfer*, 147 Pa. 178, 23 Atl. 337, 338, that such an act raises a presumption of negligence and puts on the party doing it the burden of showing circumstances which justified or excused it. How strong the presumption will be must depend largely on the circumstances. If the horse is young, skittish, nervous or unused to the sights and sounds of a city street, the presumption would be strong, while if he is old, staid and accustomed to city life, it might be very slight. But even a staid and veteran horse may be liable to sudden fright, or as in this case to sudden pain which may induce dangerous behavior. It is, therefore, a matter for the jury.

So, on the other hand, was the question of contributory negligence of the plaintiff. The ordinance of February 2, 1897 (Brown's Digest, p. 1348), regulating travel on the public highways of Philadelphia, classes together all persons riding or driving, "whether on horseback, in carriages, wagons or other vehicles, or upon bicycles, triecycles, or other mechanical contrivances," as occupants of the cart-way, and the next section subjects all persons using "barrows or hand-carts" to the regulations prescribed for carriages, wagons and other vehicles. Wheeled or rolling chairs are not specifically named, but they are clearly within the description of vehicles, and "other mechanical contrivances." Whether in view of their almost exclusive use for small children and invalids they might not reasonably be entitled to take the foot pavement, they certainly are not obliged to do so. It would be a question for the <sup>62</sup> jury on which the customs of the people would be weighty evidence.

Prima facie, therefore, the plaintiff was within her legal rights, if not her legal obligations, in using the street. Whether or not she was negligent in stopping and being left unattended in her condition of impaired capacity for movement, behind an unhitched horse, was clearly a matter for the jury.

Judgment affirmed.

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*A Person has No Right to Leave His Horse* in a public street, unless it is securely fastened or in charge of some one competent to take care of it, and he is bound to take care that the horse does no injury in consequence of being frightened by anything that may occur: *Denver v. Utzler*, 38 Colo. 300, 120 Am. St. Rep. 108; *Damonte v. Patton*, 118 La. 530, 118 Am. St. Rep. 384, and cases cited in the cross-reference note thereto, but leaving a very gentle team upon the public street restrained by a fifty-six pound weight connected by straps to the bridle-bits is not negligence per se, for which the owner of the team is liable for mischief done by the team in running away. The question whether such act is due care or negligence is for the jury to determine from all the facts and circumstances surrounding the transaction: *Caughlin v. Campbell-Sell Baking Co.*, 39 Colo. 148, 121 Am. St. Rep. 158.

## ADAMS' ESTATE.

[221 Pa. 77, 70 Atl. 436.]

**TRUSTEE AND COTRUSTEE, Duties and Liabilities of.**—A trustee is not an insurer of trust funds against the possibility of loss, nor a surety for his cotrustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements are met, he is not liable for losses due to the bad faith or embezzlement of his cotrustee. (p. 728.)

**TRUSTEES, What Required of.**—The law requires of a trustee fidelity to the trust and the exercise of the same degree of diligence that a man of ordinary prudence may be expected to exercise in the care of his property under the same circumstances. (p. 728.)

**COTRUSTEES, Liability of for One Another.**—Though, as a general rule, a trustee is not liable for trust funds received by his cotrustee, yet he is required to exercise general superintendence and care over the trust. If he hears of any fact tending to call attention to the mismanagement or misapplication of trust funds by a cotrustee, it is his duty to intervene and prevent a devastavit. His failure to do so is a breach of his trust, imposing liability upon him for the loss. (p. 728.)

**COTRUSTEES.—The Joint Receipt by Cotrustees** of trust funds imposes a joint liability. The obligation rests upon each to exercise good faith and use reasonable diligence in executing the trust. If, through the negligence or default of either trustee, the other is permitted to dissipate the funds or convert them to his own use, he is responsible for the loss. (p. 729.)

**COTRUSTEES, Duty of One to Take Action Against the Other.** If two trustees have and are entitled to the possession of negotiable trust funds or securities, each must exercise a general superintendence over them and observe reasonable and proper precautions in protecting them against loss from embezzlement by the other. Neither can shut his eyes and fold his hands and permit his cotrustee to use the funds at his own pleasure and for his own purposes, and if either has any reason to believe that the other is not acting in good faith or will convert the trust funds to his own use, he must take all necessary steps to prevent such misapplication of the funds. (p. 731.)

**COTRUSTEE, Facts Showing His Liability for an Embezzlement by the Other Trustee.**—If a trustee discovers that all the trust securities have been removed, without the consent or knowledge of the innocent trustee, by his cotrustee from a box in a bank in which they had been kept, and after an agreement that the box should not be opened except in the presence of both trustees, and the guilty trustee, on the demand of the other, returns the securities to the box, these circumstances are sufficient to excite grave suspicion, especially when the financial circumstances of the removing trustee are known to be bad, and if the funds are left in the same box where the other trustee has an opportunity to, and in fact does, remove and dispose of them, embezzling the proceeds, his cotrustee is answerable for the loss, because it was possible for him to have had the funds placed where they could not have been removed or disposed of without his knowledge. (pp. 734, 736.)

**A TRUSTEE is not Exonerated from Liability for the Embezzlement of His Cotrustee** because he was a helpless invalid long before the embezzlement occurred, if, before becoming such invalid, he knew of an act on the part of the other trustee indicating a pur-



pose to commit a breach of the trust, and took no measures to guard against the embezzlement which the previous conduct and the financial condition of such trustee rendered probable. (p. 735.)

A TRUSTEE is not Relieved from Liability because he bestows the same degree of care on the trust estate as on his own property of like character, nor because the cotrustee, who is guilty of embezzlement, is a brother. The standard of care required is to be gauged by the conduct of a reasonably prudent man in the management of his property. (p. 735.)

A TRUSTEE, by Informing the Cestuis Que Trustent of the misconduct of the cotrustee in removing securities from the place of their deposit, does not relieve himself from liability for the future misconduct of such cotrustees, where he does not exercise reasonable diligence to prevent such misconduct. (p. 736.)

Joseph De F. Junkin, Charles Sinnickson and Frederick C. Newbourg, Jr., for the appellants.

Thomas Leaming, for the appellee.

<sup>81</sup> MESTREZAT, J. The duties and liabilities of cotrustees in Pennsylvania are well settled. A trustee is not an insurer of trust funds against the possibility of loss nor a surety for his cotrustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements be met, he is not liable for losses occasioned by the bad faith or embezzlement of his cotrustee: *Fesmire's Estate*, 134 Pa. 67, 19 Am. St. Rep. 676, 19 Atl. 502. The law requires of the trustee fidelity to the trust, and the exercise of the same measure of diligence that a man of ordinary presence may be expected to exercise in the care of his own property under the same circumstances: *Jones' Appeal*, 8 Watts & S. 143, 42 Am. Dec. 282. While as a general rule a trustee is not liable for trust funds received by his cotrustee, yet he is required to exercise a general superintendence and care over the trust. If he hear of any fact tending to call his attention to the mismanagement or misapplication of the trust funds by his cotrustee, it is his duty to intervene and prevent a devastavit. His failure to do so would be a breach of trust imposing liability upon him for the loss. Mr. Perry, in his work on Trusts, section 419, says: "In all cases, if a trustee becomes aware of any fact tending to show that his cotrustee is committing a breach of trust, or if he learns any fact endangering the trust funds, he must communicate it to his cotrustees or make application <sup>82</sup> to the court, and take active measures to protect the fund, or he will be personally liable for its loss." In effect the same doctrine is announced in *Pim v. Downing*, 11 Serg. & R. 66, where

Tilghman, C. J., said (p. 71): "It is clear enough, that where one who does not receive the money consents that the other should misapply it, particularly where he has it in his power to secure it, he is responsible."

The joint receipt by cotrustees of trust funds imposes a joint liability. The obligation rests upon each trustee to exercise good faith and use reasonable diligence in executing the trust. If, through the negligence or default of either trustee, the other trustee is permitted to dissipate the funds or convert them to his own use, he is responsible for the loss. The possession of the trust funds is joint, and it is the duty of each trustee to exercise good faith and reasonable care to protect the trust funds against his cotrustee as well as against others.

The trust funds in the Adams estate were awarded to the three trustees, sons of the testator, on June 4, 1895. They accepted the funds jointly and proceeded to administer them jointly. Within a year one of the three trustees was discharged. The other two trustees retained joint possession of the funds and distributed the income as required by the trust. The securities in which the trust funds were invested were kept in a box in the Western National Bank of Philadelphia to which each of the trustees had access. On July 8, 1896, H. Carlton Adams, the surviving and accounting trustee, knowing that his cotrustee's financial condition was bad, visited the box alone and discovered that all of the securities had been removed. This greatly troubled him and naturally aroused his suspicions. He called upon his brother, Robert Adams, Jr., the other trustee, who admitted that he had taken the securities from the box and requested Robert to return them by the following day, which he did. The trust funds in the box consisted of unregistered securities, coupon bonds, etc., which could be negotiated by either of the trustees. At the time the accounting trustee discovered the removal of the securities from the box and requested his brother to return them, it does not appear what, if anything, was said why they were removed without the knowledge of the cotrustee, or what purpose Robert had in removing them. In a subsequent <sup>83</sup> conversation between the accounting trustee and Mrs. Moran, one of the cestuis que trustent, in 1897 or 1898, he told the latter, as she testifies, that the securities had been taken by his brother and put up as collateral; that he had compelled him to return the securities and that she need have no further anxiety about it; that he had arranged at

the bank that both executors must be present when the box was opened. The testimony of the appellee's wife tended to show that the accounting trustee told Mrs. Moran that the securities had simply been placed in another box. The trustees agreed that each should have access to the box containing the securities of the estate and visit the box together, but, as the auditing judge found, there was no evidence showing the bank to have been a party to the agreement or that any notice had been served upon the bank that the trustees had made any such agreement between themselves.

In 1904 H. Carlton Adams, the accounting trustee, became an invalid and has continued such to this time. The auditor found that he was "a helpless invalid, a physical wreck, unable to lift his arm. . . . His mental faculties are weakened and his memory poor. He is unable to carry on a coherent conversation and in talking rarely takes the initiative." He also found "that, as a rule, his answers were more or less exact when, under agreement of counsel, his depositions were taken at his present place of abode."

The last joint visit of the two trustees to the box containing the securities was on February 8, 1904, and the securities were then intact. Robert Adams, Jr., one of the trustees, died suddenly on June 1, 1906, and an examination of the box on June 4, 1906, showed that it was empty and that all the securities were gone. The surviving trustee has refused to account for the securities, alleging that his brother and cotrustee, Robert Adams, Jr., removed them from the box and converted them to his own use. The accountant claims that the securities were not lost by reason of his failure to perform any duty imposed upon him as trustee, nor by any negligence or default on his part. If his position be correct, the loss of the securities does not rest upon him, and he is not under any obligation to account for them to the *cestuis que trustent*.

The court below refused to surcharge the accountant for <sup>84</sup> the devastavit created by the loss of the securities awarded to the trustees by the orphans' court. It was held that the conduct of the accountant did not disclose any negligence or default on his part in the management of the trust or in protecting the trust funds. The court held that the accountant's conduct in the management of the trust funds was that of a reasonably prudent man and did not show any lack of good faith or reasonable diligence in the execution of the trust.

We cannot agree with the conclusion reached by the learned court below. We think that the facts disclosed by the evidence before the auditing judge, and not controverted by the accountant himself, clearly show negligence and a lack of reasonable diligence on his part with regard to the securities of the trust estate which were converted to the use of the cotrustee. The simple question presented for solution, and the answer to which will determine the liability of the accountant, is whether the securities held by the trustees jointly were lost to the estate by reason of the failure of the accountant to exercise reasonable care to protect them. What were the duties of the accountant under the circumstances? The trust funds were awarded to and accepted by the three trustees jointly. After the discharge of one of the trustees, the first funds were in the possession of the two remaining trustees to be jointly administered by them. The duty resting upon each trustee was that of good faith and the exercise of such care as a reasonably prudent man might be expected to exercise in the protection and management of his own property. There was a duty resting on each trustee to exercise prudence and care to insure the safety of the trust funds. In the absence of inculpatory circumstances, he was not required to regard his colleague other than honest, nor to believe that he would not honestly and properly administer the trust. At the same time, the funds being in the joint possession of the two trustees, the law required each to exercise general superintendence over them and to observe reasonable and proper precaution in protecting them against loss or embezzlement by the other trustee. Neither trustee could shut his eyes and fold his arms and permit his cotrustee to use the funds at his own pleasure and for his own purpose. If either trustee had any reason to believe that his cotrustee was not acting in good faith or might convert <sup>85</sup> the trust funds to his own use, it was incumbent upon him to take the necessary steps to prevent such misapplication of the funds. This was unquestionably his duty, and the failure to observe it will impose liability for any loss caused thereby.

On July 8, 1896, the accountant discovered that all of the trust securities in the box in the Western National Bank to which he and his cotrustee had access had been removed. This was done without his knowledge or consent, and, of course, without his authority. The two brothers, the trustees, had agreed that the box should only be opened in the presence of both. This was a proper precaution on the part



of each of the trustees, and, of course, the agreement should have been observed. The securities, representing the whole trust estate, were in that box. Their removal, without his knowledge or consent, very naturally aroused the suspicions of the accountant. As his cotrustee was the only other person who had access to the box, the accountant knew that he had withdrawn the securities from the box. He demanded of his brother their immediate return to the box, and the demand was complied with on the following day. No explanation why they were withdrawn was demanded or given. Concede, as contended by the appellee, that they were simply taken from the box of the trust estate by the defaulting trustee and placed in the latter's own box in the Philadelphia Trust Company, yet that was an improper act on the part of the defaulting trustee, and sufficient to require the accountant to take the necessary precautions to prevent a repetition of the act and a misapplication of the trust funds by his brother. The agreement between the trustees required the box to be opened only in the presence of both. This agreement had been violated by Robert, and he had taken the trust funds and placed them in his own box in another institution to which alone he had access. There is no evidence in explanation of this conduct. When the accountant demanded the return of the securities Robert offered no explanation, and the accountant demanded none, why they were removed from the joint possession of the trustees to the possession of the one who had abstracted them. This is a singular and suggestive incident. They could not have been removed for the purposes of the trust, as its administration devolved upon both trustees. It was not made to <sup>86</sup> appear before the auditing judge that there was any necessity for the removal of the funds in the administration of the trust. The securities were just as safe in the box in the Western National Bank as they were in the box in the Philadelphia Trust Company to which they were removed, and to which alone Robert had access. If it was necessary to sell or dispose of them, the duty rested upon both of the trustees to act in the matter, and, therefore, they should have remained in the common box. The securities were removed without the knowledge of the accountant, and if the purpose of Robert in removing them was a proper one, and in the interest of the trust estate, he should, and naturally would, have stated the purpose to the accountant when their return was demanded. This was not done, and we can only surmise Robert's purpose in thus violating his agreement and abstracting the securities

from the common box and placing them in a trust company beyond the reach of his cotrustee. That it was for an improper purpose, and sufficient to excite the grave suspicions of his cotrustee, we have no doubt, in view of the admitted fact that the accountant knew at that time that Robert's financial condition was bad. No man of ordinary prudence or business sagacity would, under such circumstances, have permitted his own funds to have remained, as it were, at the mercy of another whose conduct, unexplained, showed an intention, as well as an attempt, to appropriate the funds to his own use.

We are not favorably impressed with the argument of the learned counsel for the appellee in which he attempts to minimize Robert's conduct in abstracting the securities from the common box of the trustees. It was an act that would naturally suggest to a cotrustee or a co-owner an intention on the part of Robert to deal with the funds as his own, and to apply them to his own purposes. It was enough to require the accountant to take the necessary steps to deprive Robert of an opportunity of misapplying the trust funds, and there has been no reasonable excuse for the accountant not taking such precautions. It would indeed be a very dangerous precedent to hold, as suggested in argument, that the accountant was justified in not taking steps to prevent the defaulting trustee from converting the funds to his own use by the fact that Robert <sup>87</sup> was "prominent in society and in politics." There would indeed be little protection to trust funds throughout this country if such an excuse could avail to protect a trustee from the defaults or crimes of his colleague. Common knowledge derived from every-day experience tells us that such reason is frequently assigned as the cause for the default of personal representatives and trustees. At all events, it is no sufficient excuse, or one which will relieve a trustee when he has knowledge that the defaulting trustee is in financial straits, and has been guilty of an act which discloses an intention to convert the trust funds to his own use. Such act is an admonition which a cotrustee cannot ignore, and which, if he does disregard, subjects him to liability for the loss that follows. If Carlton Adams had not discovered in July, 1896, the removal of the securities from the common box and demanded their return, there might have followed shortly thereafter a devastavit of the estate. Robert's conduct on that occasion was, in the light of the circumstances, highly censurable, and could not have been in the line of his duty as a trustee. It is the first step a trustee would take if he

intended to defraud the trust estate and apply the funds to his own use. After Robert had removed the securities to his own private box in the Philadelphia Trust Company he had absolute and sole control over them, and could have disposed of them and placed the proceeds in his pocket. This condition of affairs, in view of Robert's financial condition known to the accountant, was sufficient to require the latter to put the trust funds where Robert could not again abstract them and divert them from the purposes of the trust. This could readily have been done by an arrangement with the bank that both executors should be present when the box was opened. Such an agreement, as we have seen, was made between the trustees when they received the trust funds, but the bank was not a party to it, and had no right to enforce it. This simple and obvious precaution should have been taken by the accountant after he was warned of the danger of a misapplication of the funds by Robert's conduct in July, 1896. If this had been done, it is manifest that Robert could not have converted the securities to his own use without the knowledge of the accountant. It was the failure of the accountant to exercise this reasonable <sup>ss</sup> precaution and thus protect the funds that gave Robert the opportunity to commit the devastavit and to deprive the cestuis que trustent of their property.

It is contended, however, that the accountant should not be surcharged with the default because he was a helpless invalid for more than two years before it occurred, and while he was unable to protect himself or the trust estate. This position is untenable and cannot be sustained. The dereliction of duty on the part of the accountant did not arise and was not confined to the time during which he was an invalid. He committed a breach of duty, imposed upon him by the acceptance of the trust, immediately after he discovered the conduct of Robert in July, 1896, by not then taking the necessary steps to prevent a recurrence of Robert's misconduct and to protect the trust funds. This breach of duty was a continuing one and began in July, 1896. The accountant, although warned not only of a possibility, but of a probability, that Robert might misapply the trust funds, took no effective measures whatever to prevent such conduct. The door was left wide ajar, and at any time within the ten years Robert could have entered and despoiled the trust estate. That he did not do so earlier may be attributed to the fact that his necessities did not require it. It was not because the accountant had taken any steps to prevent it. If, after the discovery of Robert's misconduct in 1896, the accountant had notified the bank to

require the presence of both trustees when the box was opened, there could not have been, as has been suggested, a conversion of the securities by Robert without the accountant's consent. This would have been equally true during the accountant's illness. The latter could, in case of his inability to be present, have acted by an agent; or he could have resigned, and thereby cast upon the cestuis que trustent the responsibility of protecting themselves. There is no reason given, nor, so far as the record discloses, can any reason be given, why the accountant did not appoint an agent to act in the matter when his enfeebled condition prevented his presence when the box was opened. Instead of taking this precaution to protect the trust estate, or resigning and thus admonishing the cestuis que trustent that they must protect their own interests, he continued to invite the confidence of the beneficiaries of the trust by remaining a <sup>so</sup> trustee, thereby affording Robert a still greater opportunity to plunder the estate.

It is contended that the accountant bestowed the same degree of care upon his own interest in the trust estate and upon his own private securities as he did upon the interest of the other cestuis que trustent. But that is no excuse for his dereliction of duty. It is not the standard of care required of a trustee. His conduct is gauged by that of a reasonably prudent man in the management of his own property. That Carlton Adams saw proper to rely upon the honesty of his brother in the management of the trust estate, beyond what a prudent and careful man would have done, cannot relieve him from the devastavit committed by the one who abused his imprudently bestowed confidence. It may well be that the kindness to, and confidence in, a brother account for the loss which gives rise to this litigation, but it cannot be held to be either an equitable or legal reason why a cotrustee should not account for funds misappropriated by reason of that kindness and confidence. Carlton Adams had a right to trust his brother to any extent with his own estate, but that rule does not prevail as to funds held by Carlton Adams as a trustee. The overconfidence naturally reposed in a brother is not a sufficient justification for failure to perform a duty in the administration of a trust estate.

It is suggested that the accountant is relieved from surcharge by reason of the fact that he communicated to the cestuis que trustent the conduct of Robert in removing the securities from the common box of the estate. This fact, however, did not relieve the accountant from performing the duties imposed upon him by law as a trustee. He occupied



a position of confidence, and a trust was reposed in him that he would protect the estate or exercise reasonable diligence and good faith in securing the trust estate to those entitled to it. The cestuis que trustent had a right to rely upon the performance of this duty, and when they were informed of Robert's misconduct in abstracting the securities from the common box, they were justified in believing that the accountant would prevent a repetition of such conduct, and take the necessary steps to guard the estate from any further attempt to despoil it. In fact, they not only had the right to assume that the accountant would take such <sup>90</sup> action to protect the estate, but he gave them the assurance, if the only testimony on the question is believed, that they "need have no further anxiety about it, that he had arranged at the bank that both executors must be present when the box was opened." It was not incumbent upon the cestuis que trustent under these circumstances to employ counsel to compel the accountant to perform a duty which he himself recognized as a duty. As the testimony shows, the accountant knew that he could effectively protect the trust funds from misapplication by Robert by an arrangement with the bank, and the cestuis que trustent had a right to rely upon his doing so.

We are unanimously of the opinion that the loss to the trust estate sustained by the devastavit of Robert Adams, Jr., trustee, was attributable to the negligence of the accountant, his cotrustee, and that, therefore, the latter should be surcharged with the amount of the devastavit.

The decree of the court below is reversed, and the record is remitted with directions to restate the account in accordance with this opinion.

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*The Liability of a Trustee for the acts of his cotrustee is discussed in Bruen v. Gillet, 115 N. Y. 10, 12 Am. St. Rep. 764; Estate of Fesmire, 134 Pa. 67, 19 Am. St. Rep. 676; Municipal Court v. Whaley, 25 R. I. 289, 105 Am. St. Rep. 890. Some authorities hold that where a trustee receives any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his cotrustee for investment or distribution; and if he does, he will be personally responsible for the acts and defaults of such trustee: Fox v. Tay, 89 Cal. 339, 23 Am. St. Rep. 474.*

## SHOENBERGER'S ESTATE.

[221 Pa. 112, 70 Atl. 579.]

**COLLATERAL INHERITANCE TAXES—Situs.**—The liability of the property of a decedent to collateral inheritance taxes is to be determined by its situs at the time of his death. (p. 739.)

**COLLATERAL INHERITANCE TAXES—Real Estate, When Becomes Converted into Personalty.**—At the instant of a testator's death, his real estate, which he has directed to be converted into money, becomes, by operation of law, so converted, and may, therefore, for the purpose of the collateral inheritance taxes, be treated as if situated in the state of his domicile. Therefore, if a testator, dying and domiciled in New York, directs the conversion into money of his real estate in Pennsylvania, the proceeds of such conversion are not subject to the collateral inheritance taxes of the latter state. (p. 740.)

**COLLATERAL INHERITANCE TAXES, What State may Impose.**—A state can tax only what is within it at the time of the death of the owner of it. (p. 740.)

**LEGACY, Moneys Improperly Paid as Collateral Inheritance Taxes, Deduction of from.**—Where, during the progress of the administration of the estate of a decedent, collateral inheritance taxes are paid upon property not as a matter of law subject thereto, no deduction can be made because of such payment from a legacy remaining unpaid, if the legatee had not appeared at earlier stages of the administration and presented the question of the necessity of paying such tax, and no adjudication had therefore been made against him on that question. (pp. 740, 741.)

William R. Blair and George C. Burgwin, for the appellant.

James J. Johnson, James E. Hood and William Early Rhein, for the appellees.

**116 BROWN, J.** John H. Shoenberger, a resident of the city of New York, died there in November, 1889, possessed of a large estate. He was childless, but left a widow, to whom, by his will, executed March 10, 1887, he devised certain real estate and gave all of his personal property in his residence and stable. In addition, he gave her certain securities, of the value of several hundred thousand dollars, and any balance that might remain of a deposit to his credit in a New York bank, after the payment of his funeral expenses, just debts and the costs of the administration of that portion of his estate given to his wife. After making this provision for her, he made the following appointment of executors by the the third clause of his will: "I hereby nominate and appoint my beloved wife, Alice, executrix, and my nephew, Alexander T. Mason, executor, of this my will, in relation to the portion of my estate mentioned in the second clause of this my will; and of whatever portion of my estate may be

situate at the time of my decease in the State of New York, and I direct that neither of them shall be required to give security for the performance of their duties. And I hereby order, authorize and direct my executor, above named, to pay and hand over any portion of my estate, whether moneys in bank, bonds, mortgages, certificates of stock, notes or other securities which may be in the City of New York at the time of my decease, and which are not hereinbefore specifically bequeathed, to the trustee and executors hereinafter appointed for the states of Pennsylvania, Ohio, Kentucky and Illinois, the said portion so paid over to form part of my general estate to be administered by them." The trustee and executors referred to in the foregoing <sup>117</sup> clause were appointed by the following: "I do hereby constitute and appoint 'the Pennsylvania Company for the Insurance on Lives and the Granting Annuities of the City of Philadelphia, Pennsylvania, my Trustee and Executors, and my friends, Andrew Long, Esq., now cashier of the Exchange National Bank of Pittsburg, Pennsylvania, J. M. Brownson, Esq., now in the employment of Messrs. Shoenberger, Speir and Co., of Pittsburg, Pennsylvania, and Anthony J. Antello, Esq., of Philadelphia, Pennsylvania, as co-executors of this my last Will and Testament, for all that portion of my estate, real and personal, and effects and interests in the States of Pennsylvania, Ohio, Kentucky and Illinois, and of any property that may be transferred to them upon the close of the administration of my estate in the State of New York by my Executors hereinbefore appointed by me for that State."

The entire personal estate of the decedent remaining after the provision for his wife, together with the proceeds of his real estate, which he directed his Pennsylvania executors to convert into money, passed into their hands. They filed nine accounts in the court below, the last involving nothing but the residuary estate. All of the pecuniary legacies, except those given in the residuary clause, were paid on the adjudications of the prior accounts, the eighth having been adjudicated on December 10, 1897. At that time there was a balance of \$81,332.39, and it was directed to be held for a further account. It is included in the last account, showing a fund in the hands of the accountants of \$272,276.63, out of which they are directed to pay to the appellant a bequest of \$250,000.

Though the bulk of the personal estate of the testator, including the proceeds of the sale of the real estate, passed into the hands of the Pennsylvania executors, the commonwealth made no claim for collateral inheritance tax on the legacies

heretofore paid by them, amounting to \$1,326,000. In October, 1891, a collateral inheritance tax of \$25,750 was paid "as per compromise" on \$515,000, the appraised value of testator's real estate, situated in this state, and, on the final distribution of the residuary estate, the court below deducted \$12,500, or five per cent, from the bequest to the appellant, holding that though the commonwealth had not been entitled to the tax of \$25,750 paid on the real estate, the appellant's legacy of \$250,000 <sup>118</sup> was liable to tax under Lewis' Estate, 203 Pa. 211, 52 Atl. 205, and deducted the same from it, to the relief of the final distributees of the residuary estate. The single question before us is the correctness of this ruling. From all that appears the collateral inheritance tax of \$25,750 may have been paid upon the real estate of the testator, which he specifically devised; but, assuming it to have been upon that sold by the executors, the learned judge of the orphans' court correctly held that the commonwealth was not entitled to collateral inheritance tax upon it: Coleman's Estate, 159 Pa. 231, 28 Atl. 137; and, this being so, Lewis' Estate, 203 Pa. 211, 52 Atl. 205, is not authority for relieving the final distributees at the expense of the appellant.

The final distributees of the residuary estate having permitted the tax of \$25,750 to be paid to the commonwealth, they cannot now ask that \$12,500 be deducted from appellant's legacy, to their relief. They ought to have protected themselves at the proper time. Even if the tax had been properly paid, there is no reason why appellant's legacy should bear the burden of nearly half of it, instead of its just proportion, as one of many legacies amounting in the aggregate to more than \$1,500,000.

The liability of the property of a decedent to collateral inheritance tax is to be determined by its situs at the time of his death. The words of our collateral inheritance tax act of May 6, 1887 (Pub. Laws, 79), are: "All estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, and all such estates situated in another state, territory, or country, when the person, or persons, dying seised thereof, shall have their domicile within this commonwealth, passing from any person, who may die seised or possessed of such estates, either by will, or under the intestate laws of this state, or any part of such estate, or estates, or interest therein, transferred by deed, grant, bargain or sale, made or intended to take effect, in possession or enjoyment after the death of the grantor or bargainor, to any



person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife, or widow of the son of the person dying seised or possessed <sup>119</sup> thereof, shall be and they are hereby made subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates." The situs of the personal property of this testator at the time of his death was in New York, for it was all actually "situated" there, except the proceeds of the real estate which he directed to be converted into money, and this must be regarded as part of his personal estate situated in his domicile, for the status of property at the instant of death must govern the question of tax: *Handley's Estate*, 181 Pa. 339, 37 Atl. 587. At the instant of the testator's death his real estate, which he had directed to be converted into money, became, by operation of law, so converted, and all of the personal estate belonging to him was, therefore, either actually or by legal fiction, within the state of New York. None of it having been "situated" here at the time of his death, the commonwealth had no claim upon it for collateral inheritance tax. The domicile of the testator, at the time of his death, was the situs of his personal estate, and that situs, and not what he directed to be done with his estate, is the sole test of the right of this sovereignty to tax it. The state taxes, and can tax, only what is within it at the time of the death of the owner of it.

*Lewis' Estate*, 203 Pa. 211, 52 Atl. 205—not a convincing authority—was decided upon its own peculiar facts, and is not to be stretched, as it manifestly was by the court below, in extending it to the present case. The actual situs of the property of *Harriet E. Lewis*, which she directed to be distributed among collateral legatees, was, at the time of her death, and had been for many years prior thereto, within this state, in the custody and control of her agents here, empowered to invest and reinvest it, and the executor, legatees and foreign creditors requested that there should be in Luzerne county, through its orphans' court, "a complete administration and distribution of the whole estate comprehended in the account." No such situation is presented here, and there is not even the analogy which the learned judge below seemed to think existed of "the legatee now coming, by counsel, before the court and asking for payment in full." The appellant did not even appear before the adjudicating judge to claim the legacy, according to the appearances noted by him.

Its first appearance by counsel, so far as can be <sup>120</sup> gathered from the record, was before the court in bank on exceptions to the adjudication, to resist the attempt of the appellees to have \$12,500 deducted from its legacy.

The decree of the court below is reversed, the exceptions to the adjudication are overruled and the same is confirmed, the costs on this appeal to be paid by the appellees.

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*The Principal Case* will be found cited in the recent note to English v. Crenshaw, 127 Am. St. Rep. 1035, on inheritance taxation.

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## KESSLER'S ESTATE.

[221 Pa. 314, 70 Atl. 770.]

**WILLS—Subscribing Witnesses—Hearing Will Read or Knowing Its Contents.**—It is not necessary that a subscribing witness to a will should hear it read or know its contents. (p. 742.)

**WILLS.—A Subscribing Witness Need not See the Testator Sign His Will.** He may, after the will has been prepared, affix his name and subsequently acknowledge his signature in the presence of a subscribing witness. (pp. 742, 743.)

**WILLS—Executor as Subscribing Witness.**—The nomination by the testator of a person to act as executor does not in itself constitute such an interest as to disqualify him from acting as a subscribing witness. (p. 744.)

**WILLS—Subscribing Witness, Interest Which will Disqualify.** The interest which will, as such, disqualify a subscribing witness must be present, certain and vested, not uncertain, remote or contingent. It must be substantially a legal interest. (p. 744.)

**WILLS—Subscribing Witnesses, Necessity of Their being Disinterested.**—The purpose of requiring an attesting witness to a will was to place the testator at the time of its execution in the presence of two disinterested witnesses, so that he would be entirely free from importunity and solicitation of interested persons. (p. 745.)

**WILLS—Subscribing Witnesses, When not Disinterested.**—If an attesting witness is interested as a devisee or legatee under the will or is to derive a pecuniary benefit or advantage from any part of it, or if he is interested at the time of attesting in a religious or charitable institution to be benefited thereby, he is not disinterested within the meaning of the statute. (p. 746.)

**WILLS—Subscribing Witness, When has a Disqualifying Interest.**—Where one who is made executor in a will was an officer and trustee of a church which is to be benefited, had an option to purchase certain shares which were part of the trust for religious or charitable uses at a price to be agreed upon by disinterested persons, was one of two trustees to whom certain stock was given to vote at corporate elections, and whose duties required that dividends received be paid by them to the trustees named, had certain benefits accruing as stockholder in a corporation by reason of the power to vote stock held in trust by him, and was entitled to commissions as

trustee as well as executor, is so interested under the will that he is disqualified to be a subscribing witness thereto. (pp. 745, 746.)

James Gay Gordon, Charles H. Hassert and Sandberg & Heymann, for the appellants.

John G. Johnson, W. H. G. Gould, William R. Murphy and Samuel H. Kirkpatrick, for the appellees.

**319** **ELKIN, J.** The question to be determined on this appeal is whether certain bequests to charitable and religious uses contained in the last will and testament of the decedent are valid under section 11 of the act of April 26, 1855 (Pub. Laws, 328). The will was prepared and executed more than one calendar month before the decease of the testator, and the only point pressed in the court below and raised here is that it was not attested by two credible, and at the time disinterested, witnesses as required by the act. There are two subscribing witnesses to the will, and if they are disinterested, the bequest to charitable and religious uses must stand; if not, they must fall. The whole case turns on the point what constitutes such an interest as will disqualify an attesting witness. It was held in a recent case that the attesting witnesses required by the act of 1855 must be subscribing witnesses: Paxson's Estate, 221 Pa. 98, 70 Atl. 280. It was decided in Morgan's Estate, 219 Pa. 355, 68 Atl. 953, that where a subscribing witness knows that he is signing a testamentary paper, sees the testator sign it, and is asked by the testator or by the other witness in testator's presence to sign as a witness, it is not necessary that he should hear it read or knows its contents. Under the rule of Paxson's Estate, 221 Pa. 98, 70 Atl. 280, the only witnesses to be considered in the present case are Wilmerton and Fuigle, who attested the will by subscribing their names as witnesses to its execution. As to the subscribing **320** witness Fuigle, the contention that he is not an attesting witness within the meaning of the act because he did not see the testator sign his name to the will and was not made familiar with its contents cannot prevail under the authority of Morgan's Estate, 219 Pa. 355, 68 Atl. 953. To the same effect is Combs' Appeal, 105 Pa. 155, wherein Mr. Justice Trunkey, who delivered the opinion of the court, said: "Hence if witnesses were present at that time of the execution and saw the testator sign the will, and they subscribed it in his presence, it is unnecessary that they should have known the contents or that the testator should have declared to them that it was his will." It is not indispensable that the witness should see the testator sign the

will. The testator may, after the will has been prepared, affix his name thereto and subsequently acknowledge his signature in the presence of a subscribing witness: Irvine's Estate, 206 Pa. 1, 55 Atl. 795. This is what was done with the witness Fuigle, who went into the office where the testator was seated at a desk, with the will already signed by him in his hand, the name of the testator being in the plain view of the witness who was requested to sign his name below that of the other subscribing witness, which he did, after having been told by the other witness out in the shop that the testator desired him to be a witness to his will. It was not necessary that he should have affirmative knowledge of the contents of the will, or of the devises, or bequests, or of the testamentary disposition made of the property by the testator in order to qualify him to act as a witness to its execution. We, therefore, hold that Fuigle was a credible and at the time of the execution of the will, a disinterested witness.

The act of 1855 is a remedial statute, and should be construed so as to give effect to the purpose for which it was enacted. While charities may be said to be favorites of the law, and when in times like the present vast wealth is accumulated in the hands of individuals, it is not only desirable, but highly commendable, for persons possessed of large estates to set apart portions thereof for religious and charitable uses, yet the law discourages such gifts at or near the time of impending death, when the mental faculties are impaired, the will power broken and the vital forces weakened, <sup>321</sup> because, under such circumstances, the importunities of designing persons or the terrors of final dissolution, may induce dispositions of property contrary to natural justice, and without regard to the ties of kinship, which, under normal conditions, would be operative on the mind of the testator. A man may do what he will with his own. He may give all he has to his relatives and friends, or he may give it to religious and charitable uses if he so desires, but when he leaves the channels through which natural benefactions flow to extend aid to those objects or institutions intended to improve the morals and better the conditions of the general public, the law says to him such intention must be manifested by a deed or will, executed at such a time and in such a manner as to make it reasonably certain that the thing done was the free will act of the donor, and was not the result of undue solicitation on the part of interested persons. Hence the requirement that the deed or will be attested by two credible, and at the time disinterested, witnesses. With the policy of the



law involved in this legislation we have nothing to do, but as to the act itself, clearly within the power of the legislature to pass, it is the duty of the court to enforce its requirements so as to effectuate the purpose for which it was enacted. It must, therefore, be determined whether Wilmerton, who attested the will as a subscribing witness, had such an interest as to disqualify him within the meaning of the act. He was one of the executors of the will; he was a trustee and officer in a church to which part of the income and ultimately a portion of the corpus of the trust estate was directed to go; he had an option to purchase certain shares of stock which were a part of the trust for religious and charitable uses, at a price to be agreed upon by three disinterested persons, to be selected in a particular manner; he was one of two trustees to whom the stock of the Kessler Wagon Works Company was given in trust to vote at corporate elections, and whose duties required that dividends received be paid by them to the charities named and in the proportions fixed in the will; he was also a stockholder and director in the wagon company, as well as an officer and employé, and had whatever benefit accrued to him as a stockholder and officer in that company by reason of having the power to vote the stock so held in trust by him; he was also entitled to his commissions, not only as <sup>322</sup> executor but as trustee. Did these things create such an interest as to disqualify him as a witness to the will? It must be conceded that there is some confusion growing out of our own cases on the subject, and it must be accepted as finally settled that the nomination by a testator of a person to act as an executor does not in itself constitute such an interest as to disqualify the person so nominated to act as a witness. This is the doctrine of *Snyder v. Bull*, 17 Pa. 54, *Combs' Appeal*, 105 Pa. 155, and *Jordan's Estate*, 161 Pa. 393, 29 Atl. 3. We recognize these cases as authority for the exact question decided therein, that is to say, an executor may be an attesting witness to a will making bequests to religious and charitable uses. *Snyder v. Bull*, 17 Pa. 54, decided in 1851, had no reference to the act of 1855. The matter for consideration in that case was the proper proof of a will under the act of 1833, and all that was said by Mr. Justice Gibson had reference to the law as it then stood. The test applied was the qualification of witnesses generally in legal proceedings, but this test can scarcely be held to apply to the act of 1855, which had not been passed at that time, and which was intended to accomplish a very different purpose. It is true that in *Combs' Appeal* and in *Jordan's Es-*

tate the line of reasoning suggested in *Snyder v. Bull* was followed by the learned justices who wrote the opinions in the later cases. The rule of these cases is predicated on the theory that an interest such as would disqualify must be present, certain and vested, and not uncertain, remote or contingent. In other words, it must be what has been called a substantial or legal interest. With such a definition of interest it naturally followed that an executor, though nominated in the will, did not have a present or vested interest because he might die before the testator, or his nomination as executor, or the will itself, might be revoked. While we consider the rule of these cases to have overlooked the spirit and purpose of the act of 1855, it is authority for what was therein decided, and will be so regarded, but the doctrine will not be further extended. We agree with the suggestion of the learned judge of the court below, who delivered the opinion on the exceptions to the adjudication in the present case, in reference to the logical result of the application of this doctrine, wherein it is said: "Carried to its <sup>323</sup> logical extreme such interpretation practically nullifies the purpose of the act, at least so far as a will is concerned, for as the testator may at any time revoke a will, and as, therefore, none of its provisions may ever become effective, every witness can necessarily have no interest pecuniary or otherwise at the time of signing; and as a deed is witnessed before delivery and becomes effective only on delivery, by a parity of reasoning all witnesses to deeds are at the time disinterested." We think the test of qualification for witnesses in judicial proceedings generally, as given by Greenleaf and other text-writers, and followed by some decisions of our courts, does not, and should not, control in arriving at a proper interpretation of the act of 1855. The words, "disinterested witnesses," used in this act, must be read and understood in connection with the subject matter of the statute, the evils to be avoided, the requirements intended to safeguard the rights and property of persons approaching death, and the remedy to be provided in such cases. When so read and understood, the interest which disqualifies a witness under the act is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself or by reason of the attesting witness being then interested in the religious or charitable institutions for which provision is made by the testator, or both, or either, as the case may be. Again, from what has been hereinbefore stated and by reason of the specific requirements of the act, it seems clear that an interest in any part of the will

is such as will disqualify a witness for the purpose of attestation. The act requires the execution of the deed or will to be attested by two disinterested witnesses. It will be observed that the attestation of the execution of the whole instrument is what is required by the statute. The purpose of the act was to place the settler, or the testator, at the time of the execution of the instrument, in the presence of two disinterested witnesses, so that he would be entirely free from the importunities and solicitations of interested persons. If the attesting witness be interested as legatee or devisee under the will, or is to derive a pecuniary benefit or advantage from any part of it, or if he is interested at the time of attestation in a religious or charitable institution to be benefited thereby, he is not disinterested within the meaning of the statute. Under <sup>324</sup> this view of the law, Wilmerton was disqualified to act as an attesting witness and the bequests to religious and charitable uses must be held invalid.

Decree reversed and record remitted to the court below, in order that distribution may be made in accordance with this opinion.

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*The Competency of Subscribing Witnesses to a Will* is the subject of a note to *Stevens v. Leonard*, 77 Am. St. Rep. 459. An executor may, in Louisiana, be a witness to the will naming him as such executor: *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575.

*The Attestation and Witnessing of Wills* is the subject of a note to *Lane v. Lane*, 114 Am. St. Rep. 219.

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## YEVSACK v. LACKAWANNA & WYOMING VALLEY RAILROAD COMPANY.

[221 Pa. 493, 70 Atl. 837.]

**NEGLIGENCE, Presumption of from Standing in Front of a Car.**—A person who walks in front of a moving car which he saw, or could have seen, by the exercise of the reasonable care which the law requires, will be conclusively presumed to have been negligent. (p. 748.)

**NEGLIGENCE—Standing in Front of a Moving Car, Where There is a Passageway.**—Though there are platforms along the track of an electric railway and a passageway extending from one platform to another, a person alighting from a moving car must, before going along such passageway from one platform to another, use the great care required of a person at a crossing over which he knows trains constantly pass. (p. 748.)

John P. Lenahan and Richard B. Sheridan, for the appellant.

John McGahren and John A. Mangan, for the appellee.

**494** FELL, J. The defendant operates a double-track electric railroad eighteen miles in length between Wilkes-Barre and Scranton. Midvale, where the accident happened, is on the line of this road but it is not a regular stopping place. Cars stop there only on signal to take on or let off passengers. There is a platform on either side of the tracks, raised three or four inches above them. A plank walk twelve feet wide and twenty-three feet long, level with the tracks, extends from one platform to the other. Between the tracks there is a fence about four feet high which extends one hundred and thirty feet in either **495** direction from the walk. The town of Midvale is west of the tracks, and persons going from it to the east platform or to it from this platform are required to use the plank walk.

The plaintiff lived in Midvale, rode on the cars frequently, and was familiar with the situation. On a September evening, when it was dusk, he got off a north bound car onto the east platform, and, as the car moved from the station, he crossed the track behind it on the plank walk and was struck by a south-bound car when stepping from the west track to the west platform. He testified that he looked north when on the east platform, again when on the east track, and again when between the rails of the west track; that the last time he looked, he saw the car from which he had alighted two hundred feet away, but saw no car approaching on the west track, although he could see up that track two hundred and fifty feet. One of his witnesses, who was standing on the west platform waiting for a car, a place less favorable for observation because of a curve in the road, testified that he could see up the track three hundred feet and that he saw the car when it was that distance from the crossing, and another testified that the car that struck the plaintiff was fifty feet from the station when the car from which he had alighted had gone thirty feet from it.

It was the plaintiff's duty to look, after he had crossed the east track and passed the fence, before attempting to cross the west track. At this point he was within seven feet of the west platform and could see up the track two hundred and fifty or three hundred feet. The car was lighted and there was nothing to prevent his seeing it as his witness saw it. It could not first have come into view after he had looked. The



testimony of the plaintiff's witnesses in relation to speed was that the car was running "pretty fast," "very fast," "as quick as she always goes into the station." These witnesses all agreed that the car was stopped within one hundred and fifty feet of the crossing. In considering the plaintiff's testimony in the light most favorable to him, the conclusion is irresistible that he did not look or that he saw the car and took the chance of crossing in front of it. The case is within the rule that a person who walks in front of a moving car, which he saw or could have seen by the exercise of the reasonable care which the law requires, will be conclusively presumed to have been negligent.

<sup>406</sup> That the passageway over the tracks was provided by the defendant company for the use of persons going to or from the east platform was a fact to be considered in determining the plaintiff's negligence, but it did not relieve him from the exercise of reasonable care. It was not a place where passengers alighted, nor a way leading from the place where they alighted to the station to which they were going, which they might assume would be kept clear of trains and be safe at the time. It led from the platform on the east to the street and, while its use was a convenience and it may be a necessity, it was not a place where passengers stood in getting on or off cars. The care required in its use was not the ordinary care required of a passenger who must cross a track between his train and the station, but the greater care of a person at a crossing over which he knows trains constantly pass.

The judgment is reversed, and judgment is now entered for the defendant.

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*One Who Leaves a Street-car* and steps in front of another car going in an opposite direction without looking or giving attention to warnings cannot be regarded as having exercised due care: *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456; *Buzby v. Philadelphia Traction Co.*, 126 Pa. 559, 12 Am. St. Rep. 919. As to the general duty of a person to stop, look and listen before crossing a street railway track, see *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161; *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 118 Am. St. Rep. 844; *Hornstein v. United Ry. Co.*, 195 Mo. 440, 113 Am. St. Rep. 693; *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476. In *Shuler v. North Jersey St. Ry. Co.*, 75 N. J. L. 824, 127 Am. St. Rep. 834, where a passenger alighted from a street-car, passed around the rear platform, and was struck by the corner of the feeder of a car approaching at excessive speed on the other track, it was held that he was guilty of contributory negligence in failing to wait for the car from which he alighted to move on so as to enable him to look with effect along the other track, and that the fact that the approaching car was running at an excessive speed did not relieve him of the charge of negligence.

AMERICAN CAR AND FOUNDRY COMPANY v. ALEXANDRIA WATER COMPANY.

[221 Pa. 529, 70 Atl. 867.]

**SUBPOENA DUCES TECUM, Certainty in.**—The same reasonable certainty in describing what is required should be observed in a subpoena duces tecum as is held necessary in the case of applications for orders to produce books and papers. (pp. 751, 752.)

**SUBPOENA DUCES TECUM—Fishing Expeditions.**—Anything in the nature of a fishing expedition is not to be encouraged. Where the plaintiff swears that some specific book contains material evidence, and sufficiently identifies and describes what he wants, it is proper that he should have it produced, but this does not entitle him to have brought in a mass of books and papers, in order that he may search them through to gather evidence. (p. 752.)

**A PECULIARITY of the Subpoena Duces Tecum** is that, from the nature of things, it must specify with as much precision as is fair and feasible the particular documents desired, because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand. (p. 752.)

**SUBPOENA DUCES TECUM, When not Sufficiently Specific.**—An order or subpoena to produce papers concerning matter in dispute is not sufficiently specific. (p. 753.)

**SUBPOENA DUCES TECUM.—A Subpoena Commanding a Witness to Produce a List of All the Persons and Firms with whom contracts had been made during a year** is too indefinite to be sustained, and the court will excuse the witness from answering or producing such list, in the absence of all particularity in specifying what is wanted or of any showing of materiality. (p. 753.)

**PRINCIPAL AND AGENT—Burden of Proving Authority of Agent.**—A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of proof lies on him to establish the agency and the extent of it. (p. 753.)

**WITNESS, Cross-examination of Should Extend to His Authority.**—Where the defendant puts an alleged agent of the plaintiff on the stand for the purpose of proving the scope of his authority, this opens the door to plaintiff on cross-examination, to show precisely the limits of that authority. (p. 754.)

**MECHANICS' LIENS—Effect of Taking Notes.**—As a general principle, the taking of the notes of the contractors for the amount due for material does not of itself effect a relinquishment of the right to file a lien. Nothing less than an agreement of the parties that it shall do so has the effect of waiving the right to file the lien. (p. 754.)

**JUDGMENT NON OBSTANTE VEREDICTO.**—Under the act of April 22, 1905, of the legislature of Pennsylvania, if a point requesting binding instructions for the plaintiff is refused, and a verdict is rendered for the defendant, the court may subsequently enter judgment for the plaintiff non obstante veredicto if a binding instruction in his favor would have been proper at the close of the trial. (p. 755.)

Thomas F. Bailey and Samuel I. Spyker, for the appellant.

II. H. Waite, W. H. & J. S. Woods and C. C. Brewster, for the appellee.

**532** PORTER, J. This was a scire facias upon a mechanic's lien filed by the American Car & Foundry Company, as subcontractors, against the reservoir and waterworks and system of the Alexandria Water Company. The right to maintain the lien was sustained by this court, in 215 Pa. 520, 64 Atl. 683. A trial was then had under the scire facias which resulted in a verdict for the defendant. Judgment on this verdict was reversed, because of error of the trial judge in permitting certain cross-examination of plaintiff's witness and in rejecting evidence offered by plaintiff, and a venire facias de novo was awarded: American Car & Foundry Co. v. Alexandria Water Co., 218 Pa. 542, 67 Atl. 861. The case was tried **533** again and the verdict was again for the defendant, subject to points of law reserved. A motion for judgment non obstante veredicto was filed by the plaintiff and granted by the court below and judgment was entered for plaintiff for the full amount of the claim with interest. Defendant has appealed.

There was no dispute as to the contracts, the performance of the work, and furnishing materials, nor as to the amount due the claimant. The defendant denied liability, for the alleged reason that the claimants had accepted notes of the contractors in payment of the balance due upon the account, and had, therefore, lost the right to file a mechanic's lien.

It appears from the evidence that the Alexandria Water Company contracted with William M. Powell & Company to construct a gravity water system at Alexandria, Huntingdon county, Pennsylvania, for \$18,000. Powell & Company in turn contracted with the American Car & Foundry Company for the cast iron pipe and specials necessary for the construction of the water plant, for \$12,221.20. The water-pipe, etc., were furnished according to the contract, and the contractors paid on account of the contract price, \$3,649.98, leaving a balance due of \$8,571.22, for which the mechanic's lien was filed.

William P. Lowery was district manager for the American Car & Foundry Company, having an office at Berwick, Pennsylvania, and the contract with Powell & Company was made by him for his company. The payments on account made by Powell & Company were sent by them directly to the home office of the American Car & Foundry Company at St. Louis, Missouri. William M. Powell testified that they remitted to

the home office at St. Louis because they were directed on the invoices to do so. Lowery, who was called by defendant as witness, testified that he had power to make contracts within certain lines for his company, but that he had no authority to make collections or to receive notes, checks or money in payment for the sales made by him; that all collections were made from the treasurer's office at St. Louis, and that all invoices were dated as from the home office where payments were to be made. There was no evidence that Lowery had any authority to receive payments either in cash or note for the company, or that he at any time received any payments on its behalf.

<sup>534</sup> It appears from the testimony that in December, 1903, Mr. Mandeville, a member of the firm of Powell & Company, accompanied by a lawyer, Mr. Abner Smith, visited Lowery at his office in Berwick with a view to making settlement of the claim. Mr. Smith testified that Mr. Lowery agreed to accept certain notes, but he refused to say that he agreed to accept them in satisfaction of the claim. His memory was indistinct as to that. Mr. Lowery testified that his understanding was, that the notes were to be tendered for the decision of the company, and that a few days afterward the notes were given to him, and he sent them to St. Louis for the consideration of the company at the home office. The notes were rejected by the company and returned to Lowery, who turned them over to the attorney of the company, with instructions to proceed to collect the claim. He obtained a judgment as collateral for two of them, and also gave notice and filed the lien upon which this *scire facias* was issued.

The entire defense rests upon Smith's testimony that the notes were accepted, and the inference which it was strongly urged should be drawn from that fact, that such acceptance was in satisfaction and payment of the indebtedness.

Prior to the trial the defendant served upon Lowery a subpoena duces tecum, commanding him to produce at the trial certain books and papers. It was not specific, but was couched in the most indefinite terms. Thereupon Lowery petitioned the court, setting forth that it would put the plaintiff to a tremendous amount of trouble and expense to produce all the books and papers required by the subpoena; that it would require a number of very large boxes to transport them and that they would then be exposed to destruction, and that he was advised that the greater part of the books and papers were not and could not become material in any way to the issue to be tried, and praying that he might be



relieved from the compliance with the subpoena. The court granted the prayer of the petition, and confined the production of books and papers to such only as might be shown to be material in the case. This action of the court is made the subject of the first assignment of error.

The learned judge was entirely right in his conclusion. The same reasonable certainty in describing what is required, should <sup>535</sup> be observed in a subpoena duces tecum as is held necessary in the case of applications for orders to produce books and papers. In *Cowles v. Cowles*, 2 Penr. & W. 139, it was held that, where an order for the production of books and papers under the act of February 27, 1798, is asked for, the papers must be described with reasonable certainty. In *Wills v. Kane*, 2 Grant Cas. 47, Justice Woodward said (p. 54): "The affidavit of notice must describe the books and papers with reasonable certainty—must allege that they are, or at least that the affiant verily believes them to be, in the possession or power of the party—and that they contain evidence pertinent to the issue."

Anything in the nature of a mere fishing expedition is not to be encouraged. Where the plaintiff will swear that some specific book contains material or important evidence, and sufficiently describes and identifies what he wants, it is proper that he should have it produced. But this does not entitle him to have brought in a mass of books and papers in order that he may search them through to gather evidence. In 23 *American and English Encyclopedia of Law*, second edition, 179, it is said: "The courts uniformly decline to grant an application for production and inspection where it is merely for the purpose of a fishing examination, as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant, or for the purpose of determining whether he has a cause of action, or a defense, or in anticipation of a defense, or to gratify curiosity."

And the fair and proper rule upon the subject is also set forth in 3 *Wigmore on Evidence* (1904), section 2200, where it is said: "A peculiarity of the subpoena duces tecum is that in the nature of things it must specify with as much precision as is fair and feasible the particular documents desired, because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand." And in a note to above the following cases are cited: *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746 (demand for all books and papers for a business during

three months held insufficient); *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426 (there must be a "reasonably accurate description of the papers wanted," and a showing that it is material in a pending cause; here, a call for all telegrams between half a dozen <sup>536</sup> persons within fifteen months past was held too broad); *United States v. Babcock*, 3 Dill. 566, Fed. Cas. 14,484 ("the papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relative evidence").

An order to produce all papers concerning the matter in dispute is not sufficiently specific. The papers and documents to be produced should be described with reasonable precision. An inspection of the subpoena in this case shows that the court below was fully justified in refusing to compel obedience to what was asked for. The first assignment of error is, therefore, dismissed. For the same reason the second assignment of error is overruled. It was unreasonable to ask for a blanket list of persons and firms with whom contracts had been made during the year. In the absence of all particularity in specifying what was wanted, and without any showing of materiality, the court was right in sustaining the objection to the demand for a general list of contracts with other persons.

With regard to the authority of the agent, Mr. Lowery, to accept the notes in full payment of the claim, this court said, when this case was here before, 218 Pa. 542, 67 Atl. 861, that the evidence offered upon the former trial was too meager to enable us in reviewing the case to determine what the general powers of the agent were, and the case was sent back to enable defendant, if possible, to produce more satisfactory evidence in that respect. But the correctness of the judgment which has now been entered in the court below must, of course, be tested by the evidence offered upon the last trial. The trial judge held it was insufficient to establish authority in the district manager to accept the notes of the contractors in full settlement of the account, and our review of the testimony leads us to the same conclusion. The burden of proof was upon the defendant; "a party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted.

The burden of proof lies on him to establish the agency and the extent of it": *Hays v. Lynn*, <sup>537</sup> 7 Watts, 524; *Moore's Exrs. v. Patterson*, 28 Pa. 505; *American Underwriters' Assn. v. George*, 97 Pa. 238; *Baltimore & Ohio Relief Assn. v. Post*, 122 Pa. 579, 9 Am. St. Rep. 147, 15 Atl. 885, 2 L. R. A. 44; *Smith v. Crum Lynne Iron & Steel Co.*, 208 Pa. 462, 57 Atl. 953.

In the present case the district agent, Mr. Lowery, who was called by the defendant to establish his authority to receive the notes in payment, not only denied positively that he had taken them in payment, but denied that he had authority to so receive the notes, and denied further that he had any authority to receive payments even in cash. There was no other evidence of his authority, and it appeared from the evidence that the contractors, Powell & Company, had notice, from the invoices of the material sent to them, that payments must be made to the treasurer of the plaintiff company at St. Louis. And in pursuance of such notice they did forward the cash payments made by them on account directly to St. Louis, and they paid no money to Mr. Lowery. At the trial the defendant put Mr. Lowery on the stand for the purpose of proving the scope of his authority, and this opened the door to the plaintiff on cross-examination to show precisely the limits of that authority. We see no merit in the third assignment of error.

As a general principle, the taking of the notes of the contractors for the amount due to the materialmen would not of itself effect a relinquishment of the right to file a lien. This was decided in *Kinsley v. Buchanan*, 5 Watts, 118, where it was said (p. 119): "Additional securities are in their nature cumulative; nor where the parties have not expressly or impliedly so stipulated, is there any reason why the one should be a relinquishment of the other. Accordingly, it has been determined in one of the cases cited that acceptance of a bond is not an abandonment of a mechanic's lien. The case is in point and rules the present." To the same effect are *Jones v. Shawhan*, 4 Watts & S. 257; *Odd Fellows' Hall v. Masser*, 24 Pa. 502, 64 Am. Dec. 675; *Shaw v. First Reformed etc. Church*, 39 Pa. 226; *Noar v. Gill*, 111 Pa. 488, 4 Atl. 552.

Nothing less than the agreement of the parties that it shall do so will have the effect of waiving the right to file a lien. "If the note is taken as a payment of the debt, the lien is waived. It is not, however, to be presumed that a note taken <sup>538</sup> by a person entitled to a lien was taken as payment, but it must be shown that such was the case": 27 Cyc. L. & Pr.

272. In the present case, if there had been evidence of authority on the part of Lowery to receive payment of the account in the shape of notes, then the testimony of the witness Smith would have been sufficient to take the case to the jury on the question of fact as to whether or not the notes were so accepted in payment, and with the intention of releasing the right to lien. But in the absence of any evidence of such authority on the part of Lowery, there is nothing in the record to show that the defendant company ever parted with the right to enforce its lien.

The fact that one of the points reserved was a request by the plaintiff for binding instructions brings the case directly within the terms of the act of April 22, 1905 (Pub. Laws, 286), which applies expressly where such a point requesting binding instructions has been reserved or declined. Under all the evidence, as we have seen, a binding direction in favor of the plaintiff would have been proper at the close of the trial. The court below, therefore, very properly entered judgment non obstante veredicto for the plaintiff.

The assignments of error are all overruled, and the judgment is affirmed.

### SUBPOENA DUCES TECUM.

- I. Scope of Note, 755.
- II. Introductory, 756.
- III. Subpoena Duces Tecum.
  - a. Authority to Issue, 756.
  - b. Application and Issuance, 759.
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#### I. Scope.

The discussion in this note is directed exclusively to the rules governing the subpoena duces tecum, and does not enter into the consideration of any of the other methods employed in actions at law to compel the production of documentary evidence. Neither do we consider the equitable remedy of a bill of discovery, which is in some respects analogous to the subpoena duces tecum.



## II. Introductory.

Although our present inquiry is confined to the subpoena duces tecum, it may be well, by way of introduction, to note that the English courts of common law early exercised the power to make an order for the inspection of writings which were in the possession of one of the parties to a suit, in order to assist the other party in preparing his pleadings.

It also recognized the right of one of the parties to a suit to require the other party to produce at the trial writings in his possession which were deemed material to the issues, by serving upon such party a notice to produce, and upon such party failing to comply with the notice, to permit secondary evidence of the contents of such writings. But there is no record to be found in the books of the use of the subpoena duces tecum prior to the reign of Charles II. Some similar writ, however, must have been employed by the courts of common law at an earlier period, for not only the rights of property, but of liberty and even of life itself, may depend upon written evidence which is the exclusive property of a stranger to the case, and it is not conceivable that the justice for which the common law has been immemorially famed could have been administered without some better means of obtaining written evidence than by an order for inspection or a notice to produce, both of which related only to papers or documents in possession of the adverse party.

In many cases the only method of securing documentary evidence is by a subpoena duces tecum. "If a party wishes to introduce a written instrument in evidence which is in the hands of a third person, he must take out a subpoena duces tecum": *Carlton v. Litton*, 4 Blackf. (Ind.) 1. The court will not, on motion, compel a stranger to the suit to produce a deed of his own for the inspection of a party, but plaintiff must compel its production by a subpoena duces tecum: *Davenport v. McKinnie*, 5 Cow. (N. Y.) 27.

"Where a deed or instrument which a party wishes to prove as an exhibit is in the hands of a third person, who is unwilling to produce the same, the proper course is to compel him to produce it, under a subpoena duces tecum": *Aiken v. Martin*, 11 Paige (N. Y.), 499.

Certainly, at the present time, as was said by the court in *Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 421, "A subpoena duces tecum is the usual method of compelling the production of papers to be used in the trial of a cause." The importance, therefore, of the topic to be herein considered can hardly be overestimated, but it has not heretofore received from law-writers the attention its importance would seem to merit.

## III. Subpoena Duces Tecum.

a. **Authority to Issue.**—The power of courts of common law to compel by subpoena duces tecum the production of written papers to be used as evidence in a trial is now fully established both in this country and in England. It was said in *Re Hirsch*, 74 Fed. 928: "Upon the subject of power generally in courts of common law to compel by

subpoena duces tecum the production of written papers to be used as evidence, the question with respect to both private and public or official documents was carefully considered, and was settled by the judges of the court of king's bench in 1808, who decided that such power existed, that a subpoena was the proper method, and who, speaking by Lord Ellenborough, said that, "The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them: *Amey v. Long*, 9 East, 472." This decision of the court of king's bench has been referred to by practically all the American courts as settling the question that courts of common law have authority to issue a subpoena duces tecum, for the reason, as was said by Chief Justice Shaw in *Bull v. Loveland*, 27 Mass. (10 Pick.) 9, "There seems to be no difference in principle between compelling a witness to produce a document in his possession, under a subpoena duces tecum, in a case where the party calling a witness has a right to the use of such document, and compelling him to give testimony, when the facts lie in his own knowledge"; and again, in *Hall v. Young*, 37 N. H. 134, the court said: "There is no distinction in principle in compelling a witness to produce a document in his possession under a subpoena duces tecum, and compelling him to testify to facts within his knowledge." Likewise, the power of the federal courts to issue this writ was decided twenty-five years ago by Judge Choate in *United States v. Tilden*, Fed. Cas. No. 16,522 (10 Ben. 566), and has been recognized by these courts ever since: *In re Shephard*, 18 Blatchf. 225, 3 Fed. 12; *In re Hirsch*, 74 Fed. 928; *Davis v. Davis*, 90 Fed. 791; and in the late case of *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, the supreme court of the United States said that it would be "utterly impossible to carry on the administration of justice without this writ." And the power to issue this writ extends to suits in equity as well as suits at law: *Wertheim v. Continental Ry. & Trust Co.*, 21 Blatchf. 246, 15 Fed. 716; *Russell v. McLellan*, Fed. Cas. No. 12,158 (3 Woodb. & M. 157); *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 195; *United States v. Terminal R. Assn. of St. Louis*, 148 Fed. 486; and as parties to suits in equity as well as in suits at law are now competent witnesses, and may be examined at the instance of their adversary, it is held by some of the courts that a party to a suit in equity may be compelled by a subpoena duces tecum to produce books, documents and papers the same as any other witness: *Murray v. Elston*, 23 N. J. Eq. 212; *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226; *In re Mitchell*, 12 Abb. Pr. (N. Y.) 249; *People v. Dyckman*, 24 How. Pr. (N. Y.) 222; *Bischoffsheim v. Brown*, 29 Fed. 341; *Edison Electric Lighting Co. v. United States Electric Lighting Co.*, 44 Fed. 294, 45 Fed. 55; *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 195; *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 733.

The New York cases just cited are opposed to *Trotter v. Latson*, 7 How. Pr. 261, where it was held that a party to an action could not be compelled by the adverse party to produce his books and papers under a subpoena duces tecum. But the ruling in the *Latson* case has been so often repudiated by the courts of New York, that in *People v. Dyckman*, 24 How. Pr. 222, the court said: "I think it may not be considered an open question that a party examined as a witness either at or before the trial may be required, upon a subpoena duces tecum, to produce his books relating to or containing evidence pertinent to the issue in the action. That question has been put at rest by the decisions of nearly or quite all the courts."

But the power to compel one of the parties to a suit in equity to produce documents under a subpoena duces tecum was strongly denied in *Campbell v. Johnston*, 3 Del. Ch. 94, the chancellor saying: "It is not to be supposed that a statute which merely authorizes the examination of a party as a witness was meant to subvert the long-settled course of chancery practice as to cross-bills and substitute for it the summary process of a subpoena duces tecum." And in *Beebe v. Equitable Mut. L. & E. Assn.*, 76 Iowa, 129, 40 N. W. 122, it was held that section 3672, Code of 1873, providing that a witness may be required by subpoena to produce books or writings in his possession, and section 3675, making disobedience of the subpoena a contempt of court, apply to witnesses only, and not to parties.

The function, too, of a subpoena duces tecum is confined to securing the production of documentary evidence—i. e., of books, papers, accounts and the like; therefore a court has no authority to compel the production by such subpoena of a "pattern" for a stove: *Wertheim v. Continental Ry. & Trust Co.*, 21 Blatchf. 246, 15 Fed. 716; nor of a piece of metal in the nature or form of a model: *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 191; nor of a watch: *Hunter v. Allen*, 35 Barb. (N. Y.) 42. The authority, also, of a court to issue a subpoena duces tecum is confined to those documents that are prima facie competent and material evidence in the case, although the court will not finally determine their materiality until the documents have been produced: *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753.

The authority to issue this writ is statutory, and Revised Statutes, section 4906, which provides that on the application of any party to a contested case in the patent office the clerk of any federal court shall issue a subpoena for any witness commanding him to "appear and testify," does not include an authority to issue a subpoena duces tecum: *In re Moses*, 53 Fed. 346.

Likewise in *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753, it was held that Revised Statutes, section 863, providing that "any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court," did not give a notary public, before whom depositions were to be taken, authority to compel a witness by subpoena duces tecum to produce documents.

But in *Re Miller*, 65 Ohio St. 128, 61 N. E. 701, it was held that, under sections 5269-5271 of the Revised Statutes of Ohio, a notary public can issue a subpoena for a witness to attend and testify in a deposition before him, which may contain a clause directing the witness to bring with him any book, writing or other thing under his control which he may be compelled to produce as evidence.

And in *Re Strauss*, 52 N. Y. Supp. 392, 30 App. Div. 610, it was held that where a commission was issued by a court of another state to take testimony in New York for use in a court of record in such other state, a justice of the supreme court of New York has no authority to issue a subpoena duces tecum, as Code of Civil Procedure, section 915, applies only to a subpoena ad testificandum. And the same doctrine was announced with reference to a subpoena duces tecum issued by a justice of the supreme court of New Jersey, requiring a witness to produce documents before a commissioner appointed by the supreme court of New York to take testimony in New Jersey: *In re Edison*, 68 N. J. L. 494, 53 Atl. 696.

b. *Application and Issuance.*—Where the statutes do not require it, generally it is not necessary to obtain leave of court to issue a subpoena duces tecum: *In re Lester*, 77 Ga. 140.

In many jurisdictions, however, and in the federal courts, a subpoena duces tecum is not a matter of right, and may not be issued as such by the clerk, but only upon an order of the court: *Bentley v. People*, 104 Ill. App. 353, 107 Ill. App. 245; *Duke v. Brown*, 18 Ind. 111; *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753.

It has been held, however, in the federal courts that when, under the sixty-seventh rule in equity, a court has appointed a special examiner to take testimony in another district, a subpoena duces tecum may issue from the clerk's office of the latter district in the usual way, without a direct order of court. Revised Statutes, section 869, requiring an order of court for the issuance of such a subpoena, does not apply, as it is restricted to the taking of depositions *de bene esse*, or in *perpetuam rei memoriam* and under a *dedimus potestatem*, according to the provisions of sections 863 and 866: *Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.)*, 48 Fed. 191.

But whenever it is necessary to obtain an order of court for the issuance of a subpoena duces tecum, such order will not be granted unless it is made to appear that the documents called for contain matter material to the issues in the cause in which they are intended to be used: *Bentley v. People*, 104 Ill. App. 353, 107 Ill. App. 245; *Dancel v. Goodyear Shoe Machinery Co.*, 28 Fed. 753. This rule is also recognized in the principal case (*American Car & Foundry Co. v. Alexander Water Co.*, 221 Pa. 529, ante, p. 749, 70 Atl. 867), and, as we shall presently see, when we come to discuss the necessity and grounds for the writ, is found running through all the cases.

"A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case.



Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal constitution": *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753.

And a motion for a subpoena duces tecum is addressed to the discretion of the court. There is no conflict among the authorities on this proposition. "As a matter of course, a court will exercise its sound discretion with reference to the necessities of the case, and will not ordinarily compel the detention of books which are in daily use, or compel public officers to bring public documents into court when the production of copies will equally answer the purpose": *In re Hirsch*, 74 Fed. 928. It is true that an application for a subpoena duces tecum is addressed to the discretion of the court. "But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles": *United States v. Burr*, Fed. Cas. No. 14,692d. "Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, before compelling its production by a subpoena duces tecum, it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will refuse to issue the writ": *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753.

But where it appears that the nature of the matters concerning which a party is to be examined before trial, and his general attitude toward the examination is such that it is reasonably certain that he will not or cannot answer the questions to be propounded to him without reference to his books, a subpoena duces tecum may issue before the examination is begun: *Crompton v. Dobbs*, 119 App. Div. 331, 104 N. Y. Supp. 698.

And in a suit by a municipality, a subpoena duces tecum may be awarded for the production of a document in defendant's possession, on the affidavit of a committee from members of the city council, having peculiar knowledge of the importance of such document as evidence for the municipality: *City of Wheeling v. Black*, 25 W. Va. 266.

But when the district attorney, either upon his own motion or at the instance of the grand jury, applies for a subpoena duces tecum, he should state that there is a question either pending before, or which is intended to be brought before, the grand jury or the court, in which certain telegrams, sent from or received at the telegraph office in charge of the witness named, are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, they were sent or received, which should be a reasonable time; or if the names of the parties should not be known, then the time and the subject matter which the dispatches contain or to which they relate should be stated: *United States v. Hunter*, 15 Fed. 712.

In a suit for infringing a patent on steel rails, where the defense is want of invention, in view of the prior state of the art, and that rails of the kind patented were in public use more than two years before the application, and it appears that rails of that general character were manufactured by a certain company for several years prior thereto, it is *prima facie* material to inquire into the exact shape of such rails, and therefore a subpoena duces tecum will issue to compel the production of drawings descriptive thereof: *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 191.

Like all other discretionary powers of the judiciary, the only danger in the exercise of the discretion in issuing or refusing to issue a subpoena duces tecum lies in an abuse of the power by a loose and unrestricted exercise of it; and the difficulty generally to be met in determining the rules which should govern the subpoena duces tecum is, when, in any given case, the necessity and grounds for its issuance really exist, and if so, whether the documents sought have any special immunity peculiar to themselves, as, for example, that they are privileged communications, or documents whose contents would incriminate the party required to produce them, or the production of which would work great inconvenience to the witness, or that they are documents of a public or official character, or perhaps for other reasons that may appear later on. But, "in all cases it is a question for the consideration of the judge at the trial, whether upon the principles of reason and equity production should be required under a subpoena": *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790. We will now see how these "principles of reason and equity" have been applied in particular cases.

**c. Necessity and Grounds for Issuance.**—As a general rule, a subpoena duces tecum will not issue when it is not made to appear that the documents required contain anything pertinent or material to the matter under investigation: *Tharp v. Page*, 66 Ark. 229, 50 S. W. 454; *Bentley v. People*, 104 Ill. App. 353, 107 Ill. App. 245; *Dancell v. Goodyear Shoe Machinery Co.*, 128 Fed. 753. Thus in *Tharp v. Page*, 66 Ark. 229, 50 S. W. 454, the sheriff had levied certain executions in favor of the judgment creditors of a partnership upon a stock of goods as the property of the firm. The wife of one of the partners claimed to be the owner of the goods levied on. The creditors gave an indemnity bond to the sheriff on the seizure under the executions, and the sheriff sold the goods. This action was brought by the claimant to recover on the bond. Before the trial, defendants asked the court for a subpoena duces tecum requiring plaintiff's husband to produce at the trial all the books of the partnership to be used as evidence, and the court denied it. It appeared at the trial that plaintiff claimed to have purchased the goods with money paid to her by the firm for services as their bookkeeper. It was held that there was no error in denying the motion for the subpoena duces tecum, as it did not appear in what way the defendants wished to use the books. Said Judge Battle: "It was not the duty of the court to

grant the request of the defendants merely because they made it. Had they asked for the subpoena for the purpose of showing that the books were not in the handwriting of Mrs Page (the plaintiff) but in that of other persons, and in that way that she was at no time the bookkeeper of W. L. Page & Co., the subpoena duces tecum should have been granted." This case seems to carry the rule requiring the court to be satisfied that the documents required will be relevant and material evidence a little far, for though it is undoubtedly the duty of a court to be satisfied that proper grounds exist for the issuance of a subpoena duces tecum before granting a motion therefor, it was distinctly held in *United States v. Terminal Ry. Assn. of St. Louis*, 148 Fed. 486, that, to entitle a party to a subpoena duces tecum to produce books and papers, it is not necessary that the court should be satisfied beyond a reasonable doubt of their relevancy and materiality as evidence, but all that is required is that there should be shown to be a reasonable ground to believe that they may be relevant and material—not palpably foreign to the subject of inquiry.

In *Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162, it was held that, in an action for refusal to receive goods sold, the buyer's request for a subpoena duces tecum to produce correspondence had by the seller with third persons in reference to the goods after their rejection is properly refused.

And where documents are in court, their production for admission in evidence may be required without the issuance of a subpoena duces tecum: *Kincaide v. Cavanagh*, 198 Mass. 34, 84 N. E. 307; *Hunton v. Hertz & Hosbach Co.*, 118 Mich. 475, 76 N. W. 1041.

Where, in ejectment against a grantee, his grantor, though not nominally a party, employed counsel to defend the case, and placed in his hands a deed to be used in the litigation, the paper is legally in the custody of the warrantor, and must be produced under a subpoena duces tecum: *Steed v. Cruise*, 70 Ga. 168.

In *Re Lester*, 77 Ga. 143, the mayor of the city of Savannah, who is ex-officio judge of the police court, a court of record, was adjudged guilty of contempt for failing to obey a subpoena duces tecum, directing him to produce before the grand jury the "information docket" of his court, but it was held on appeal that the mayor, as judge of a court of record, was not subject to the subpoena duces tecum, and, moreover, that an entire record cannot be removed from one court to another by a subpoena duces tecum directed to the officers thereof. Said the court: "While a portion of the information docket of the mayor's court might possibly throw light upon a particular case undergoing investigation before a grand jury, yet the necessity for having the entire docket for that purpose is not clearly perceived." After then remarking that it was the duty of the grand jury to make diligent inquiry and to present all infractions of the criminal law that should come to their knowledge, and that their powers were to a certain extent inquisitorial, the court were further of the opinion that

they had no authority "to make every man a spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer."

So, too, in *State v. Smithers*, 14 Kan. 629, a criminal action had been removed from one county by change of venue to another county some fifty miles away. A subpoena duces tecum was then served on the treasurer and county clerk of the first county requiring them to produce at the trial the books and records of their offices for a certain period. It was held that the district court had no power to issue the subpoena, as copies of the records could be used as evidence. And to same effect is *Delaney v. Regulators of City of Philadelphia*, 1 Yeates (Pa.), 403.

Likewise a subpoena duces tecum will not be ordered to the clerk of a court in Virginia to bring into a court of the District of Columbia original papers filed in his court: *Craig v. Richards*, Fed. Cas. No. 3337, 1 Cranch C. C. 84.

But in *Randall v. Hodges*, 3 Bland (Md.), 477, it was held that documents and vouchers upon which an account has been passed in the orphan's court, lodged with the register of wills, may be produced by a subpoena duces tecum. This decision, however, is based distinctly on the ground that such documents and vouchers were not a part of the records of that court, for it was said in the opinion that if they were to be so considered, "then it is clear that the register or keeper of them cannot be called upon to bring them before this or any other court, because, as constituting a part of the judicial records of the state, they cannot be removed from the place where they are by law directed to be kept; since copies of all such records are made legal evidence for every purpose, and those copies may be obtained by anyone paying the legal fees."

In *Re Waterman*, 110 App. Div. 115, 97 N. Y. Supp. 169, a subpoena was issued by the supreme court on petition under section 915, Code of Civil Procedure, to H. to appear and give testimony in an action pending in Connecticut against a national bank and its receiver to recover the value of bonds deposited with the bank which the cashier of the bank had abstracted and converted to his own use, they being afterward sold by the one to whom the cashier pledged them for his debt, plaintiff's claim being that the bank and the receiver were liable because of the negligence and lack of ordinary care of the bank and its directors in failing to remove the cashier. The witness to whom the subpoena was directed was a member of a New York firm of brokers through whom the cashier was engaged in speculating, and his evidence was sought to prove the transactions of the cashier through his firm and the knowledge of the bank officers of such speculation. It was held that while a motion to vacate the subpoena was properly denied, the subpoena should be modified so as not to require H. to produce the books of account of letters of the cashier showing his transactions subsequent to the time he converted the bonds, and



also so as not to require him to deposit copies of extracts from the books of his firm; a witness not being required to have such copies made, but it being for the party having him subpoenaed, if desiring copies of the books, to have them read into the minutes before the officer taking the deposition.

A witness or party in proceedings supplementary to execution may be required to produce books, papers, etc., by a subpoena duces tecum: *Pruden v. Tallman*, 6 Civ. Proc. Rep. (N. Y.) 360. But a subpoena duces tecum will not lie to compel the printer of a newspaper containing the advertisements of the notices of the sale of unsold lands for taxes to produce such paper. "If the party wants the benefit of them, it behooves him to purchase them or get them in the best way he can": *Shipper's Lessees v. Wells*, 2 Yeates (Pa.), 260.

In *National Exchange Bank v. Lubrano* (R. I.), 68 Atl. 944, a partner was sued upon his individual indorsement of a firm note to the plaintiff bank. The bank was requested, through its attorneys, to produce at the trial its books showing its accounts with the firm and the individual members thereof, but it failed to do so. When plaintiff closed its case defendant moved that a subpoena duces tecum issue commanding the bank's cashier to bring such books into court, but the motion was denied. It did not appear that the accounts asked for, if produced, would have furnished any evidence material to the controversy. Furthermore, the president of the bank was in court, and the attention of defendant's counsel was called to him with the statement that his evidence was available if the defendant desired; but defendant did not call him. It was held that the trial court exercised a proper discretion in denying the motion for a subpoena duces tecum, the court saying: "Such books of account of a bank doing its regular daily business manifestly could not be produced in court without great inconvenience to the plaintiff; and the statute (Constitution and Practice Act 1905, section 402) points out a very simple method whereby, by order of court, before trial, the defendant could have procured the information, if desired, so as to be able to inform the court what the books would show if produced, and so as to have procured copies of the entries, if any, relating to the note in suit."

And on application for a subpoena duces tecum directed to a consul, it must appear that the document is not an official paper protected by law from examination and seizure: *In re Dillon*, Fed. Cas. No. 3914, 7 Saw. 561.

So, also, when the major general commanding the department of the east was served with a subpoena duces tecum, requiring him to produce in court official papers on file in the office of the headquarters of the department, it was held that the subpoena should be set aside on its appearing that the copies of such papers could be read in evidence: *Corbett v. Gibson*, Fed. Cas. No. 3221, 16 Blatchf. 334.

But in the celebrated case of *United States v. Burr*, Fed. Cas. No. 14,692d, where it was held that a subpoena duces tecum may issue to the President of the United States, directing him to bring any paper

of which the party praying for it has a right to avail himself as testimony, it was further held that, where it does not affirmatively appear that letters and executive orders in the hands of the President of the United States which may be material to the defense of an accused contain any matter which it might be imprudent to disclose, a subpoena duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear in the return.

In *Edison Electric Light Co. v. United States Electric Lighting Co.* (C. C.), 45 Fed. 55, the action was for infringement of a patent. Defendant claimed that complainant, in a divisional application upon which letters patent were never issued, made admissions which greatly restrict the claim of the patent in suit, and, having laid a foundation for secondary evidence, sought to compel complainant to bring into court a copy of the divisional application. It was held that a subpoena duces tecum was the proper method when the paper was identified by a specific description.

Likewise in *Johnson Steel Street Rail Co. v. North Branch Steel Co.* (C. C.), 48 Fed. 191, which was a suit for infringing a patent on steel rails, the defense was want of invention in view of the prior state of the art, and that rails of the kind patented were in public use more than two years before the application. It appeared that rails of that general character had been manufactured by a certain company for several years prior to complainant's application. It was held that it was *prima facie* material to inquire into the exact shape of such rails, and therefore a subpoena duces tecum will issue to compel the production of drawings descriptive thereof.

There has always been strenuous opposition on the part of corporations to the production of their papers and records under subpoena duces tecum, both in suits to which they were parties as well as to those in which they were not, but with the exception of some of the earlier New York cases these bodies politic do not seem to have been accorded any greater immunity in this respect than natural persons. The early courts of New York took the position that when a corporation is a party to a suit it cannot be compelled to produce its books under a subpoena duces tecum, but that they could be reached only by a notice to produce or by a bill of discovery. Thus in *Bank of Utica v. Hilliard*, 5 Cow. (N. Y.) 419, the court refused to compel the cashier of a bank to produce its books and papers, though admittedly in his possession. The court said: "The course for proving the books or papers of a bank, where it is the adverse party, is to give notice to produce them; and on its noncompliance, to show the contents by inferior evidence as in other cases. The effect of this motion would be to compel a party to give evidence against himself. . . . The cases in which the production of papers may be coerced by subpoena are where they are the property of a competent witness; or, at least, where they do not belong exclusively to the adverse party. When he can say, 'These are my papers,' we will not compel

one who happens to have the temporary possession of them in the right of the party to produce them on subpoena." And to same effect are the later cases of *La Farge v. La Farge Fire Ins. Co.*, 14 How. Pr. (N. Y.) 26; *Central Nat. Bank v. White*, 37 N. Y. Super. Ct. (5 Jones & S.) 297; *Morgan v. Morgan*, 16 Abb. Pr. (N. Y.), N. S., 291, the last case saying that the rule applied as well when a corporation was not a party to the action as when it was. While these cases seem to be based largely on a strict adherence to the rule that a party should not be forced to give evidence against itself, they are based upon the further ground that the books and papers of a corporation should not be subjected to the hazard of being lost or injured by removal from its office. It is difficult to see why these objections should not apply with equal force to the books and papers of others than corporations; and this is the view taken by the supreme court of Maryland in *Winder v. Diffendeff*, 2 Bland, 166, where it was held that a corporation by its officers may be compelled to produce books and papers in its possession containing matter pertinent to the issue in an action between third parties, as a private person may be. The subpoena in this case, like in the New York case of *Bank of Utica v. Hilliard*, 5 Cow. 419, was served on the cashier of a bank, and the court said: "A bank, as a body politic, is indorsed with many attributes of personality, and acts as an individual in its dealings with all persons. Consequently it can have no pretension to any greater right, arising from its mere character as a body politic, than any individual whatever to withhold any legal evidence that may be in its possession."

But since the New York decisions cited were rendered, by section 868 of the New York Code of Civil Procedure, "The production upon a trial of a book or paper, belonging to or under the control of a corporation, may be compelled in the like manner as if it was in the hands or under the control of a natural person," and for that purpose a subpoena duces tecum may issue to the officers of a corporation in whose custody the book or paper is to compel the production of its books or papers, and this relates as well to foreign as to domestic corporations: *In re Sykes*, Fed. Cas. No. 13,707, 10 Ben. 162. It was further held in this case that as the statute provides the subpoena should be directed to the officer "in whose custody the book or paper is," the vice-president, who is also secretary and treasurer of a railroad corporation, and who has an office in New York, cannot be required to produce books of the company which were at one time in his control, but have since been sent to the home office, in another state, where they are in charge of a co-ordinate officer over whom the officer in New York has no control.

And in *Gibbons v. San Luis Min. Co.*, 125 App. Div. 741, 110 N. Y. Supp. 96, on a reference under Code of Civil Procedure, section 873, the right of the referee to require a corporation to produce its books and records under a subpoena duces tecum was upheld.

So, too, in *Wertheim v. Continental Ry. & Trust Co.*, 21 Blatchf. 246, 15 Fed. 716, it was held that since the adoption of section 868,

Code of Civil Procedure (N. Y.), the officers of a corporation may be compelled by a subpoena duces tecum in a suit in equity to produce its books and papers in evidence, though the corporation is not a party to the suit, where they are necessary to determine the rights of parties to the litigation.

But even before the passage of section 868, Code of Civil Procedure (N. Y.), it was held in *Erie Ry. Co. v. Heath*, Fed. Cas. No. 4513, 8 Blatchf. 413, that an officer of a corporation, party to a suit, can be compelled by a subpoena duces tecum to bring its books before a master to whom the case is referred, the court saying that the doctrine that an officer of a corporation which is not a party to the suit, or even of one which is, will not be compelled to bring from its office its books, on a subpoena duces tecum, has no application to an investigation before a master, as the power to require such production is conferred by rule 77 of the rules in equity prescribed by the supreme court. And the right to compel the production of the books and records of a corporation under a subpoena duces tecum is clearly settled in this country by the decision of the supreme court of the United States in *Hale v. Hinkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370. 50 L. ed. 652.

**d. Form and Requisites of the Writ.**—There is no conflict of opinion over the doctrine announced in the principal case (*American Car & Foundry Co. v. Alexandria Water Co.*, 221 Pa. 529, ante, p. 749, 70 Atl. 867), that "anything in the nature of a mere fishing expedition is not to be encouraged," and that therefore the plaintiff in an action is not entitled under a subpoena duces tecum to have brought into court a mass of books and papers, that he may search through them to gather evidence, but that "The papers and documents to be produced should be described with reasonable precision."

But as there are no specific statutes requiring the exact particularity with which the documents desired should be described, a resort must be had to the cases to show what in each particular instance has been regarded by the courts as the "reasonable precision" which is required. Of course, after a document has been produced under the subpoena, the sufficiency of the subpoena as a means of compelling its production is immaterial: *Starr v. Mayer*, 60 Ga. 546; *Sizer & Co. v. Melton & Sons*, 129 Ga. 143, 58 S. E. 1055.

The following illustrations will serve to show what particularity of description is necessary in order to bind a witness to respond to a subpoena duces tecum. Thus, in *Ex parte Jaynes*, 70 Cal. 638, 12 Pac. 117, it was held that a witness served with a subpoena duces tecum, requiring him to search for and produce all telegraphic messages from a number of persons to many other persons, between certain specified dates, with no further identification of the messages, is not bound to respond.

In *McDonald v. Ideal Mfg. Co.*, 143 Mich. 17, 106 N. W. 279, plaintiff brought the action to recover damages growing out of an alleged breach of contract of employment, claiming that he had been em-



played by the year, and that in addition to his salary was to receive a fixed commission on all sales over a certain amount. A subpoena duces tecum was regularly served on the defendant for the production of its books, but only a portion of the books were produced. It appeared that there were some twenty-one books, of seven hundred pages each, and the lower court refused to require production of them all, but required plaintiff to send some one to check over the statement from the books furnished by defendant. It was held proper to require plaintiff to send someone to examine the books, to ascertain what particular books were necessary, but that it was not proper to limit plaintiff to checking over a statement from the books furnished.

In *United States v. Babcock*, Fed. Cas. No. 14,484, 3 Dill. 565, the petition for an order for the issuing of a subpoena duces tecum described the documents wanted as follows: "Copies of all telegrams received through the office of the Western Union Telegraph Company at Long Branch, in the state of New Jersey, from June 15 to September 15, 1874, and from June 15 to September, 15, 1875, addressed to General Orville E. Babcock, signed John McDonald, John A. Joyce, John, or J., with books showing the delivery of the same, all telegrams sent from Long Branch through said office, during said months, signed O. E. Babcock, O. E. B., Bab., or B., addressed to John McDonald, or John A. Joyce, St. Louis, Mo., or Ripon, Wisconsin, all telegrams sent through the office of said company at the city of New York, upon the 9th, 10th, 11th or 12th days of December, 1874, signed John McDonald, John, Mac., or Mc., addressed to John A. Joyce, St. Louis, Mo., or General O. E. Babcock, Washington, D. C.; also copies of all telegrams received at the city of New York, from said city of St. Louis, on the 25th, 26th, 27th, 28th, and 29th days of October, 1874, addressed to Mrs. John A. Joyce, Mrs. Kate M. Joyce, Mrs. Kate Joyce, Kate Joyce, or Kate M. Joyce, together with books showing delivery of same." It was contended, on a motion to vacate the writ, that it did not sufficiently identify the messages, that this contention was not sustained, Circuit Judge Dillon saying: "The writ describes with sufficient particularity, indeed, with all the particularity that seemed to be practicable, under the circumstances, the very messages that are wanted."

This decision is strongly opposed by the supreme court of Missouri in *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426. Here a subpoena duces tecum had issued from the St. Louis criminal court commanding the manager of the Western Union Telegraph Company at St. Louis to produce before the grand jury all telegraphic dispatches, or messages, or copies of the same, then in the office of the Western Union Telegraph Company at St. Louis, Missouri, described as follows: "Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John

S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between Geo. W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past." The witness appeared in answer to the summons, but declined to search for and produce the telegrams, upon the grounds (1) that they were privileged communications, and (2) that the subpoena did not describe with sufficient particularity the messages wanted. He was adjudged in contempt by the lower court, but was discharged by the supreme court on habeas corpus upon the sole ground that the messages, the production of which was commanded by the process, were not described with sufficient accuracy. The contention that telegraph messages are privileged communications was not upheld, the court holding that in the absence of any statute declaring them so, they were not privileged. As to the insufficiency of the description, Judge Henry, speaking for the court, said that a subpoena duces tecum "shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance or the subject it relates to, and that it shall be shown to the court or authority issuing the process that there is a cause pending in a court, and that the paper is material as evidence in the cause"; and then applying this rule to the present case, continued: "Here, communications, at different times, within a period of fifteen months, sent or received by the parties named, are called for. The date, title, substance or subject matter of none of them is given, and it is utterly impossible that it could have been made to appear, without more, that any of the messages were material as evidence before the grand jury. Moreover, it not only called for all messages between the parties named, but for all which may have been sent or received by either of the parties to or from any person on the face of the earth. A compliance with the order might have resulted in the production of confidential communications between husband and wife, client and attorney, confessor and penitent, parent and child. Matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence in any cause, might thus be disclosed, to the annoyance and shame of the only persons interested. It is no answer to this that the obligation of secrecy imposed by law on grand juries would prevent such exposure. . . . Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private affairs of persons intrusting telegraph companies with messages for transmission to the prying curiosity of idle gossips, or the malice of malignant mischief-makers." He then referred to the case above cited of *United States v. Babcock*, Fed. Cas. No. 14,484, 3 Dill. 566, as sustaining the contention that the messages in the present case were described with sufficient particularity, but said that the opinion of the court in that case, delivered by Judge Dillon, "is totally at variance with our convictions on the subject."

And the decision of the circuit court in the Babcock case (Fed. Cas. No. 14,484, 3 Dill. 566) has not been sanctioned by the supreme court of the United States, for, in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, that court cited the foregoing decision of the supreme court of Missouri with approbation, and held that a general subpoena duces tecum requiring a corporation to produce all understandings, contracts or correspondence between such corporation and six other companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, without specifying the particular papers, documents and records to be examined, "is as equally indefensible as a search-warrant would be if couched in similar terms."

In *State v. Bragg*, 51 Mo. App. 334, a subpoena duces tecum requiring a druggist to produce before the grand jury all prescriptions compounded by him within a certain month was insufficient, and to same effect is *State v. Davis*, 117 Mo. 614, 23 S. W. 759.

In *United States v. Hunter*, 15 Fed. 712, a subpoena duces tecum had been issued and served upon a witness commanding him to appear before the grand jury and to "produce all the telegrams sent from or received at the telegraph office at Holly Springs, and of which he has charge, between the sixth and twentieth days of November last, and including both of said days." A motion to quash this subpoena was granted because it was obnoxious to the proper mode of requiring the production of telegrams under this process, which Judge Hill said was as follows: "When the district attorney, either upon his own motion or at the instance of the grand jury, applies for the subpoena, he should state that there is a question either pending before the grand jury or the court, or which is intended to be brought before the grand jury or court, as the case may be, in which certain telegrams sent from or received at the telegraph office in charge of the witness named are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time should be stated, and the subject matter which the dispatches are supposed to contain, or to which they are supposed to relate, in either case, in order that the court or judge ordering the subpoena may have some means of judging the relevancy of the testimony sought. . . . The subpoena should describe the telegrams required to be produced as described in the application, either naming the parties sending or receiving, if stated, and the subject matter to which they are supposed to relate; or, if the names are not known, then the subject matter and the time or periods between which they were sent or received." But it seems that no absolute rule has been followed by the courts with respect to objections to the form and substance of a subpoena duces tecum, but that in determining their sufficiency the court will take into con-

sideration the circumstances attending the issuance in each particular case. An illustration of this is shown in *Re Storrer*, 63 Fed. 564. The subpoena in this case called for production before the grand jury of telegrams between a number of parties, without describing the messages by date or otherwise, so as to identify the particular messages required. The grand jury was investigating certain alleged violations of the laws of the United States relating to the obstruction of the mails and carriers of the same, and relating to conspiracies in restraint of trade and interstate commerce, during a railroad strike directed by the American Railway Union and executed by the members of that union and others. It appeared from the petition for the order to issue the subpoena that the telegrams related to the railroad strike, and it was held that the subpoena described the telegrams with "such particularity as appears to be practicable," and under all the circumstances of the case were sufficient; the court saying also, that the subpoena in this case followed very closely the one held to be sufficient in *United States v. Babcock*, Fed. Cas. No. 14,484, 3 Dill. 566, and appeared to conform to the opinion in *United States v. Hunter*, 15 Fed. 712.

The court also drew a distinction between this case and that of *Ex parte Jaynes*, 70 Cal. 639, 12 Pac. 117, saying that while the subpoenas in the two cases were in many particulars very similar, the *Jaynes* case was a civil case, and the state court had there said that it "was an evident search after testimony," which, as in this case, was "a very different affair from an examination before a grand jury, involving an original inquiry into the conduct of parties with respect to criminal acts, where the telegraphic messages were probably the effective means of carrying out their unlawful purposes."

In *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. 753, it was held that a general averment in a petition that a large number of books, records and papers of a defendant, specified, are material and necessary for plaintiff's use in a suit, is not sufficient to authorize the issuance of a subpoena duces tecum to compel their production; and this rule also applies when the documents are sought from a witness not a party to the action, and facts that will enable the court to determine that they are prima facie material and relevant must be set out: *United States v. Terminal R. Assn.*, 154 Fed. 268.

But these two decisions are in conflict with those of *United States v. Babcock*, Fed. Cas. No. 14,484, 3 Dill. 566, where no particular description of the telegrams to be produced was stated, but the application alleged that they were material, and the court said: "When the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed and that they are material"; and this language of Judge Dillon's was quoted with approval and followed in *United States v. Terminal R. Assn.*, 148 Fed. 486.

In *Santa Fe Pac. R. Co. v. Davidson*, 149 Fed. 603, it was held that a subpoena duces tecum requiring an officer of a railroad com-



pany to produce before a federal grand jury letters, papers, memoranda and documents relating to certain claims designated by numbers, and all papers, documents, books and memoranda showing the final disposition of the claims and the method by which they were paid and disposed of, is not objectionable as unreasonable.

And a subpoena duces tecum which requires a corporation to produce its minute-books for three years and letter copy-books covering a period of three or four months is not too broad and sweeping: *United States v. American Tobacco Co.*, 146 Fed. 557.

Also, a subpoena duces tecum should be vacated which orders the witness to look through the papers of a decedent of whom the witness was administrator, and select and produce all the papers which, in his judgment, "shall in any wise bear" on the merits of seventeen claims involved in a suit under the French spoliation act: *Elting v. United States* 27 Ct. of Cl. 158.

In *Murray v. Louisiana*, 163 U. S. 101, 16 Sup. Ct. Rep. 990, 41 L. ed. 87, it was held that the district court did not commit error in refusing to grant a writ of subpoena duces tecum directing the registrar of voters to furnish the total number of white and colored voters registered in the parish without specifying any books or documents required. It was also held that refusal to grant what was termed a subpoena duces tecum on the jury commissioners, commanding them to furnish the names and residences of citizens whom they had summoned to qualify as jurors, upon the ground that such writ was not a subpoena duces tecum, was not error.

And even though a subpoena duces tecum describes the documents to be produced with sufficient accuracy, it has been held to be invalid, unless it also commands the witness to appear and "testify." Such was the ruling in *Murray v. Elston*, 23 N. J. Eq. 212, where a subpoena duces tecum was served by the defendant on the complainant commanding him to appear before the master at a certain time and place named in the writ and bring with him a certain book, but omitted the direction to testify. In holding the writ invalid the vice-chancellor said: "The objection is that it did not contain the customary words directing him to testify. It commanded him only to be and appear at the office of the master, and bring with him the book. Of the reason why he was to appear, or what he was to do when he got there, nothing was said. The defendant, doubtless, wanted only the complainant's book, and not his testimony, and hence the omission. But the omission is fatal to the authority of the writ. The power of a court to compel the attendance of a witness is derived from the purpose for which he is to come, viz., to give evidence in some action, suit or proceeding pending before it. An arbitrary or capricious command to go here or go there would obviously be nugatory and vain. This is the difficulty with the present subpoena. Had the complainant appeared with the book no use could have been made of it without his consent, for a person actually present at the trial may refuse to be sworn as a witness, unless he have been duly subpoenaed."

But these views of the vice-chancellor are directly opposed to an early decision of the court of appeals of South Carolina, when it was held that a subpoena duces tecum which directed a witness to bring in court a certain paper, but did not require him to testify, was "all that was required": *Sherman v. Barrett*, 1 McMull. 147.

**e. Service and Return.**—There are very few adjudicated cases which relate to the service and return of a subpoena duces tecum. In *Treasurer v. Moore's Exrs.*, 3 Brev. 550, it was held that the plaintiff in an action has the right to require that a witness who has been served with a subpoena duces tecum should make a return to the subpoena before the case is opened; and to same effect is *Sherman v. Barrett*, 1 McMull. 147.

Also, a second subpoena duces tecum is void while the first is unexecuted and unreturned: *Elting v. United States*, 27 Ct. of Cl. 158.

**f. Payment and Tender of Fees.**—A defendant to whom a subpoena duces tecum has been issued, requiring him to produce his account-books to be used as evidence for plaintiff, who appears, may be compelled to produce the books, though he has received no witness fees: *Cullers v. Birge* (Tex. Civ. App.), 34 S. W. 986. It appears, however, that the ruling in this case was intended to apply only to a party to the action who had appeared, for it was said: "If Thompson [the defendant], as a witness, had failed to appear in answer to the subpoena, the fact that his witness fees had not been paid or tendered might be considered a valid excuse for such failure."

But as there is no statute requiring the United States to tender witness fees in advance, a subpoena duces tecum, requiring a witness to appear before the federal grand jury and bring telegrams, will not be quashed because no fees were tendered in advance: *In re Storrer*, 63 Fed. 564.

#### **g. Compliance with Writ.**

**1. In General.**—A subpoena duces tecum is a writ of compulsory obligation upon the person to whom it is addressed, and he is bound to produce the document required of him, unless he have a reasonable excuse for withholding it: *Bull v. Loveland*, 10 Pick. (27 Mass.) 9; *Chaplain v. Briscoe*, 5 Smedes & M. (13 Miss.) 198; *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790, affirmed in 207 U. S. 541, 28 Sup. Ct. Rep. 178, 52 L. ed. 327; *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 191; *United States v. Terminal Assn.*, 148 Fed. 486.

And the rule that the obligation of a witness to answer by parol does not depend upon his own judgment but that of the court prevails with respect to the production of documentary evidence under a subpoena duces tecum, and therefore, whether a witness has a reasonable excuse for failing to respond to a subpoena duces tecum is to be judged by the court and not by the witness: *Bull v. Loveland*, 10 Pick. (27 Mass.) 9; *Chaplain v. Briscoe*, 5 Smedes & M. (13 Miss.) 198.

Thus in *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790, the grand jury had under consideration certain charges against four members of the state board of cattle commissioners. The Consolidated Rendering Company was a corporation engaged in carrying on a meat and rendering business, and was served with a subpoena to produce all of its books of account, letters, accounts, memoranda, data, copies of bills or statements which related to the matter under investigation against the four persons named. The company failed to produce the documents called for by the subpoena and was adjudged in contempt, but sought by writ of error to avoid this judgment, claiming, among other things that the documents contained no evidence that was relevant or material to the matter under investigation.

In reply to this contention the court said: "It seems well settled that if he [a witness] is required to produce documentary evidence by a subpoena duces tecum it is his duty to produce what is called for, if it is in his possession or control. . . . Whether they would be proper testimony to be used in the case, when produced, is not for the witness to say. Their relevancy is for the court to determine, and not for him."

And the same rule was announced in *United States v. Terminal Assn.*, 148 Fed. 486, where a witness refused to produce certain documents under a subpoena duces tecum before the court, on the ground that they were "wholly immaterial, irrelevant, incompetent and improper evidence to the issues in said cause," Judge Finkelnburg saying: "That would leave the determination of the whole matter with the witness himself and the court would be powerless."

But, while there is no doubt about the general proposition that a witness cannot excuse himself from obeying a subpoena duces tecum upon the ground that the evidence called for is irrelevant or immaterial, still in *Miller v. Mutual Reserve Fund Assn.*, 139 Fed. 864, it was held that a court will not punish a party for contempt for failure to obey a subpoena duces tecum requiring the production of a large list of books and papers, many of which apparently can have no bearing on the issues raised by the pleadings, but the party applying will be required to take out separate subpoenas, each of which may then be considered on the merits. The opinion in this case is brief, and furnishes us no statement of the issues involved or of the form of the subpoena, but the court speaks of it as a "grotesque subpoena" and an "omnibus subpoena," and distinctly states that the decision is based on the subpoena as a whole and will not be taken as an adjudication against any individual item.

But, as we have already shown, it rests within the sound discretion of the court whether production in any particular case will be required, and before a court will order a witness to produce a document called for by a subpoena duces tecum, it must be conclusively shown that the witness has the power to comply with it. It is not sufficient that there is such evidence as would be competent to be submitted to a jury upon the question, and it seems an order will

not be made upon him, in the alternative, until he has been asked whether he has them in his possession: *Hall v. Young*, 37 N. H. 134; hence, the failure of a witness to produce a paper under a subpoena duces tecum is justified by his testimony that he made diligent search for it, and did not know where it was: *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887.

But when a party subpoenaed to produce documents has procured possession of them in order to prevent their being introduced in evidence by others, his excuse for not producing them, that he has lost or mislaid them, will not be regarded: *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226.

It was held to be no ground for the reversal of a judgment, that the court refused to compel a party to obey a subpoena duces tecum: *Manning v. Perkins*, 16 Iowa, 71; but this cannot be correct.

But while the writ is compulsory, where the witness comes into court with the documents required of him, there are a number of grounds upon which the court, in its discretion, will not compel their production. But if the reasons stated by a witness for not producing a paper in compliance with a subpoena duces tecum are overruled, he will be bound to produce the paper and pay the costs occasioned by his former refusal: *Aiken v. Martin*, 11 Paige (N. Y.), 499.

The various excuses given by witnesses why they should not be required to exhibit documents under a subpoena duces tecum, and the rulings of the courts therein, will appear from the following cases:

## 2. Illustrations.

**A. Private Papers.**—In *Re Dunn*, 9 Mo. App. 255, it was held that it is no ground for refusing to produce documents under a subpoena duces tecum, that they are private papers, and to same effect is *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676.

But it would seem that there may be cases when this rule should not be too strictly applied, for in *Ex parte Calhoun*, 87 Ga. 359, 13 S. E. 694, *ex parte* proceedings were begun by a county, through its ordinary, to establish the contents of certain lost public records. A subpoena duces tecum was served upon the official secretary and treasurer of a private abstract company, commanding it to produce certain of its abstract-books. The witness appeared in answer to the subpoena but refused to produce the books, and it was held no error on the part of the trial judge in declining to compel their production. True, the principal ground upon which the decision rests is, that the suit was *ex parte*, a proceeding in rem, so to speak, and the information desired by the county could only be obtained by bill of discovery, a subpoena duces tecum not being a process by which to inaugurate a suit or by which to connect a new party with a pending suit; but speaking to the point raised that the books required were private documents and therefore privileged, the court said: "These abstract-books called for by the subpoena came into existence as the result of private enterprise and labor, and were afterward purchased by this private corporation at great expense. They are its private property,



and are used by it in the conduct of its corporate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished, if not destroyed. The monopoly enjoyed by a closely sealed intelligence office would be broken, and the losses inflicted by free competition would be instantly felt in the exchequer of the establishment. There can be no doubt that the corporation has a vital interest in maintaining the secrecy of these books as a repository of valuable information. And certainly its secretary is under a duty, both legal and moral, not to aid in killing the goose that lays the golden egg if he can help it. His claim of privilege is therefore as meritorious as if his own personal interest were involved. We think the claim protects him."

**B. Public Documents.**—We have already shown in our discussion of the necessities and grounds for the issuance of a subpoena duces tecum that a court will not generally require the production of public documents under this process when official copies thereof can be had, as this would cause great and unnecessary inconvenience without any corresponding advantage.

So, too, when a subpoena duces tecum is served on a public officer, it is a good objection to producing the papers called for that they are of a public nature, and should be withheld on the ground of public policy: *Gray v. Pentland*, 2 Serg. & R. (Pa.) 23.

But the discretion thus granted to a public officer cannot be delegated, for in *United States v. Burr*, Fed. Cas. No. 14,694, it was held that, on a motion to compel the production of a letter written to the President of the United States, and in the hands of the prosecuting attorney, averred to be material to the defense, parts of it cannot be withheld, in the discretion of the prosecuting attorney, on the ground of public interest. The President alone may decide the propriety of withholding them, and he cannot delegate his discretion.

Likewise a public officer will be excused from responding to a subpoena duces tecum when his repeal is based on what he deems to be his official duty. Thus, when a subpoena duces tecum had been served on the governor of the state, commanding him to appear in court and to bring with him a certain document, and he declined to appear, but his refusal to appear was based on what he deemed to be his official duty, the court will not compel his appearance: *Thompson v. German Valley R. Co.*, 22 N. J. Eq. (7 C. E. Green) 111.

And in *Morris v. Creel*, 2 Va. Cas. 49, it was held that an attachment cannot issue against the clerk of the executive council for disobeying a subpoena duces tecum commanding him to bring into

court a paper submitted to the council for the purpose of enabling it to perform its executive functions, for the reason that the clerk ought not to take such paper from the files without the order of the council. But an internal revenue collector is not justified in refusing to produce, in obedience to a subpoena duces tecum issued by a state court, the application or return made by a person to obtain a retail liquor license, either by the nature of such documents or instructions from the commissioner of internal revenue: *In re Hirsch*, 74 Fed. 928. Nor can a postmaster refuse to obey a subpoena to produce in court the record of his office containing the names of box-holders, on the ground that it would be contrary to the regulations of the postoffice department: *Rice v. Rice* (N. J. Eq.), 25 Atl. 321.

**C. Documents Involving a Criminal Charge or Penalty.**—The court will not compel the production of papers under a subpoena duces tecum which would subject the witness to a penalty or forfeiture or to a criminal charge: *United States Express Co. v. Henderson*, 69 Iowa, 40, 28 N. W. 426; *Wilson v. State*, 41 Tex. Cr. App. 115, 51 S. W. 916; *United States v. Reyburn*, 6 Pet. (U. S.) 352, 8 L. ed. 424.

In fact, this rule is recognized by all the cases, for it is a well-known aphorism of the law that you cannot do indirectly that which the law prohibits from being done directly; and these cases only hold that the constitutional provision that a party cannot be required in a criminal case to give evidence against himself applies to the production of private papers as well as to oral testimony. This rule, however, does not excuse a witness for failure to appear, for as a witness cannot refuse to obey a subpoena, and still claim the privilege that his testimony, if given, would incriminate himself, neither can a witness disobey a subpoena duces tecum and refuse to produce books and papers called for, and still claim the privilege that the books and papers, if produced, would tend to criminate him: *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790.

And to excuse a witness from producing papers under a subpoena duces tecum on the ground that they are incriminating, the papers must be such as would tend to render the witness himself criminally liable; hence, the servant of a corporation required by a subpoena to produce certain books of the corporation, for the purpose of showing that the corporation has been guilty of a criminal offense, cannot refuse to produce the books, because they would incriminate his employers: *United States Express Co. v. Henderson*, 69 Iowa, 40, 28 N. W. 426.

**D. Papers Affecting Civil Rights.**—It was said by Chief Justice Shay in *Bull v. Loveland*, 10 Pick. (27 Mass.) 9: "The weight of authority is in favor of the rule that a witness may be called and examined in a matter pertinent to the issue, when his answers will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interest"; and further that there was "no difference in principle between compelling a witness to produce a document

in his possession, under a subpoena duces tecum, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony when facts lie in his own knowledge." This does not mean, however, that a court will not, under certain circumstances, excuse a witness from producing a paper under a subpoena duces tecum, when its production would adversely affect his pecuniary interest. For in this case, the action was on a note. A witness served by plaintiff with a subpoena duces tecum to produce the note testified that defendant, a mechanic, assigned his property to the witness, who was a creditor; that plaintiff and the other creditors put their demands, including the note in question, into the hands of the witness for collection, under an agreement that he might furnish stock to the defendant to work up for the benefit of his creditors, and that the proceeds of all the property should be applied, first, to the repayment of the advances made by the witness, and the surplus to the payment of the demands; and that a large sum was due to the witness on account of his advances. It was held that the witness had such an equitable interest in the note, and such a right to its custody and control under the agreement, that he could not be required to produce it for the purpose of maintaining a suit and thereby fixing a lien on the funds placed in his hands for the benefit of all creditors.

But in an early case in South Carolina, a security on a sheriff's bond was compelled under a subpoena duces tecum, to produce the books of his principal, who had died insolvent, notwithstanding he was apprehensive of danger to himself from the disclosure of the books, by the way of suit on the bond: *Executors of Hawkins v. Sumpter*, 4 Desaus, 446.

In *Cullers v. Birge* (Tex. Civ. App.), 34 S. W. 986, plaintiff served defendant with a subpoena duces tecum, requiring him to produce his books and accounts to be used on the hearing of plaintiff's affidavit controverting an answer by a garnishee. The trial court refused to compel the production of the books on the ground that it would be requiring the defendant to give evidence against himself. This was held to be error.

But where a deed produced under a subpoena duces tecum was left after the trial among the papers in the office, it was subject to the control of the party producing it: *Carter v. Graves*, 12 N. C. 74.

**E. Privileged Communications.**—It has appeared from previous portions of this note that a court will not compel a witness to produce a paper under a subpoena duces tecum which is of a privileged character. Thus an attorney cannot be compelled to produce papers of his clients in his hands any more than he can be compelled to testify to confidential communications between them: *Durkee v. Leland*, 4 Vt. 612. So, too, the books of a physician and surgeon, and the entries contained therein, when made in a private and professional manner, containing information required by him in attending patients in a professional character, and which information was nec-

essary to enable him to prescribe for such patients, are privileged, and are exempt from an inspection or examination by an adverse party: *Mott v. Consumers' Ice Co.*, 52 How. Pr. (N. Y.) 148.

The most frequent excuses for failure to obey a subpoena duces tecum on the ground that the documents called for were privileged communications have been made by the officers of telegraph companies in their attempt to withhold dispatches in their hands when required as evidence. We have already seen that this attempt has not been successful, but that they must be produced when ordered by a subpoena duces tecum: *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426.

It is the duty of the witness served with a subpoena duces tecum to appear and produce the telegrams stated in the subpoena, and "if he has doubts as to whether or not he should produce any telegram called for, he has a right to submit it to the inspection of the court, who will determine whether or not it should be produced": *United States v. Hunter*, 15 Fed. 712.

And we have previously seen that the books, papers and records of corporations generally possess no immunity from the process of the subpoena duces tecum, upon the ground that they are privileged communications, or that their production would work inconvenience upon the corporation required to produce them. "It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of the witness to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted": *Wertheim v. Continental Ry. & Trust Co.*, 21 Blatchf. 246, 15 Fed. 716.

**h. Vacation of Writ.**—When an action against a company and others to recover for the illegal use of patent processes has been dismissed as to the company, leaving only the question as to the amount of profits for which the other defendants are liable to be determined, it is error to refuse to vacate a subpoena duces tecum against the company, the only object of which was to discover its secret processes: *Averill v. Barber*, 63 Hun (N. Y.), 630, 18 N. Y. Supp. 80, 81.

And a subpoena duces tecum issued under the commission of a foreign court to take testimony in the state of New York must be vacated for defect of jurisdiction of the foreign court: *In re Great Northern Const. Co.*, 50 Misc. Rep. 467, 100 N. Y. Supp. 564.

**i. Operation and Effect.**—A subpoena duces tecum gives counsel no right to inspect the books ordered to be produced, but by it the witness is only required to produce his books, so that he can, by reference to them, answer questions pertinent to the inquiry being conducted before the court: *Franklin v. Judson*, 96 App. Div. 607, 88 N. Y. Supp. 904.



## SNYDER v. CORN EXCHANGE NATIONAL BANK.

[221 Pa. 599, 70 Atl. 876.]

**BANKING—Check Drawn by Authority of Attorney.**—If a depositor gives a general authority to his agent to draw checks against his account, the bank upon which the check is drawn is under no duty to ascertain the purpose for which it was drawn, and is as safe in paying the check as if it had been drawn by the principal. (pp. 783, 784.)

**BANKING—Checks, When Deemed Payable to a Fictitious Person.**—A check is drawn in the name of a fictitious person, whether a person of that name exists or not, if the person who drew it used the name as that of a person who should never receive, nor have the right to receive, it. The intent of the drawer of the check in inserting the name of the payee is the sole test of whether he is a fictitious person. (p. 785.)

**BANKING—Checks Drawn in Favor of Nonexisting Person—Forged Indorsement.**—If checks are drawn by an agent payable to a person not in existence and the indorsement of his name is forged on such checks by such agent, such payee must be deemed a fictitious person and the checks as payable to bearer, and the bank on which they are drawn is not liable for paying them on such forged indorsement. (p. 788.)

**BANKING—Checks, Indorsement, Where in Favor of a Fictitious or Nonexisting Person.**—If checks are drawn by the agent of a depositor having authority so to do, but are made in the name of a fictitious or nonexisting person, and his name is forged on such checks, which are then delivered to the proprietor of a "bucket-shop" in connection with a gambling transaction, and the latter deposits them with a trust company for collection, which guarantees the signatures of its depositors and collects the checks of the bank on which they are drawn, such trust company is not answerable for the amount of the checks, for they must be regarded as checks payable to bearer and the indorsement only as a guaranty of the genuineness of the indorsements subsequently made upon them. (p. 788.)

**BANKS, When not Liable for Paying Forged Checks.**—A bank is not liable to a depositor for paying a forged check on a forged indorsement when he has been in fault in intrusting the check to one whom he had reason to suspect would make a fraudulent use of it, or so carelessly filled it up that it might be readily altered, or in issuing the check to a fictitious person. (p. 789.)

**BANKING—Liability for Paying Check Issued in Connection with a Gambling Transaction.**—If a depositor has given his agent a general authority to draw checks in his name, the bank cannot be held answerable for paying checks so drawn, on the ground that they were used by the agent in connection with a gambling or wagering transaction, such use not being known either to the bank or the principal. (p. 789.)

William S. Divine and George S. Graham, for the appellant.

John Cromwell Bell and H. Gordon McCouch, for the appellee.

<sup>601</sup> BROWN, J. In determining whether the rule for judgment for want of a sufficient affidavit of defense was properly discharged by the <sup>602</sup> court below, the following material averments in plaintiff's statement must be first considered: George E. Snyder, the plaintiff, trading and doing business as a broker in the city of Philadelphia, under the name of Harrison, Snyder & Son, was a depositor with the Corn Exchange National Bank, the defendant. He had in his employ a clerk named Edwin S. Greenfield, who was authorized to draw checks in his name against his deposit in the said bank for the special purposes stated in written power of attorney, lodged with the bank. This power of attorney was as follows:

"Know All Men By These Presents, That we, Harrison, Snyder & Son, do make, constitute, and appoint Edwin S. Greenfield, our true and lawful attorney for us and in our name.

"1. To draw checks against our account in the Corn Exchange National Bank.

"2. To indorse notes, checks, drafts, or bills of exchange which may require indorsement for deposit as cash or for collection in said bank.

"3. To indorse any paper we may offer said bank, for discount.

"4. To accept all drafts or bills of exchange which may be drawn upon.

"5. To make substitution in collateral loans, and to do all lawful acts requisite for effecting these premises; hereby ratifying and confirming all that the said attorney shall do therein by virtue of these presents:

"In witness whereof, we have hereunto set our hand and seal, this 19th day of February, in the year of our Lord, one thousand nine hundred and two (1902).

"HARRISON, SNYDER & SON.

"Signed, sealed and delivered in the presence of

"C. MEYER, Jr."

Against plaintiff's deposit with the defendant Greenfield, as attorney aforesaid, drew four checks payable to the order of Charles Niemann, amounting in the aggregate to \$18,387.50. The first, for \$6,000, was drawn on April 18, 1906; the second, for \$1,800, on April 27, 1906; the third, for \$2,587.50, on May 1, 1906, and the fourth, for \$8,000, on May 3, 1906. <sup>603</sup> These checks were paid by the bank and charged to the account of the plaintiff. They purported to have been indorsed by the said Charles Niemann, but the indorsements

of his name were forgeries and were never authorized by him or the plaintiff. The said checks purported to have been indorsed in blank by said forged indorsements to the firm of R. M. Miner & Company, a copartnership, purporting to carry on a stock and grain brokerage business, based upon actual purchases, sales and deliveries, but actually conducting a gambling establishment, popularly known as a "bucket shop." The said four checks were deposited by the said R. M. Miner & Company with the Real Estate Title Insurance and Trust Company, of Philadelphia, which acted as a bank of deposit for the said R. M. Miner & Company. The said trust company indorsed three of the said checks, guaranteeing the previous indorsements, to certain banks in the city of Philadelphia for collection, through which they were collected. The fourth check was also indorsed by the said trust company, but without guaranteeing the previous indorsements. The defendant, the Corn Exchange National Bank, relying upon the guaranty by the Real Estate Title Insurance and Trust Company of the indorsements upon the three checks, and upon its indorsement of the fourth, paid each of said checks to it, through its collecting agents.

Upon the averments that the indorsements purporting to be those of Charles Niemann were forgeries, that the Real Estate Title Insurance and Trust Company collected the proceeds of the checks with actual knowledge of the character of the business of the firm of R. M. Miner & Company, that the defendant had constructive notice of the business of said firm, and that the said checks were not given in due course of business, the plaintiff claims to recover from the appellee the amounts it paid on them.

Turning to the affidavit of defense we find the following averred by the defendant: The plaintiff had in his employ as his confidential clerk and manager, Edwin S. Greenfield, to whom he largely intrusted the conduct and management of his business, particularly that portion of it relating to the finances, and the said clerk or manager had, by virtue of the power of attorney of February 19, 1902, drawn many checks upon the defendant, amounting in the aggregate to many <sup>604</sup> thousand dollars, which checks had been paid by the defendant on presentation and no payment had ever been questioned by the plaintiff. Greenfield, after having drawn to the order of Niemann for four checks set forth in plaintiff's statement, delivered them to R. M. Miner & Company in the regular course of business, in payment of accounts due to the said firm. R. M. Miner & Company, after indors-

ing the said checks, deposited them with the Real Estate Title Insurance and Trust Company in the regular course of business, and the same were paid to the trust company through the agencies set forth in plaintiff's statement. At the time each of the checks was drawn by Greenfield there were no business transactions pending between the plaintiff and Charles Niemann, and there were not due to him the amounts of said checks or any other sum or sums of money whatever. When Greenfield drew the said checks and forthwith delivered them to R. M. Miner & Company, he intended to cheat and defraud the plaintiff to the extent of \$18,387.50 by having the checks paid to the said firm. He intended to write, and actually did write, the name of the said Charles Niemann on the back of the said checks in order to induce R. M. Miner & Company, and all others to whom they might be presented, to accept them as if they had been issued by the plaintiff to the said Charles Niemann in the regular course of business and had been indorsed by him, the payee named in them. When Greenfield, as attorney for the plaintiff, drew the checks to the order of Niemann, he well knew that the latter had no right to them, or any of them, and it was never intended by Greenfield that Niemann should receive them or the proceeds thereof. Niemann was not a real, bona fide payee, but was, in legal contemplation, a fictitious person, a fact well known to Greenfield at the time the checks were drawn. Said checks thereupon became payable to bearer, and the defendant is in no manner affected by the forged indorsements of Niemann's name thereon. Neither R. M. Miner & Company, the said the Real Estate Title Insurance and Trust Company, nor its collecting agents, had any notice or knowledge of any kind of the fraud of Greenfield until long after the checks had been paid by the defendant in due course in the regular order of business, and the said trust company had no knowledge of the character of the business of R. M. <sup>605</sup> Miner & Company as set forth in plaintiff's statement, if such was the fact, and that the checks represented gambling transactions.

It is to be noted that, though the averment in plaintiff's statement is that Greenfield was authorized to draw checks "for the special purposes" stated in the power of attorney, no special purposes are therein named. His authority to draw checks was a general and unlimited one, and upon the presentation of any check drawn by him as attorney for the appellant the bank was under no duty to ascertain the purpose for which it had been drawn. It was as safe in paying



any check drawn by him as attorney for the plaintiff as it would have been if the check had been drawn by the plaintiff himself. By conferring this general power upon Greenfield the appellant made it possible for him to abuse it, and, having been abused by him, the principal now asks that another, the bank which innocently paid the checks, and not he, shall bear the consequences of the fraud of the agent whom he trusted. This result cannot follow unless in the face of the facts as set forth in the affidavit of defense, which for the present we must assume to be true, the appellee paid the checks and charged them to the appellant's account in disregard of a duty which it owed him.

Greenfield had admittedly been authorized to draw checks payable to bearer. A check so drawn and delivered by him to anyone could have been indorsed by the holder to another, and the payment of it by the bank to the indorsee could not have been questioned by the appellant. If, instead of drawing the four checks to the order of Niemann, he had made them payable to bearer and gone to the bank and drawn the money himself, the appellant could not have repudiated the bank's payment to him; or, if having made them payable to bearer he had delivered them to R. M. Miner & Co., and they had been indorsed by that firm to the Real Estate Title Insurance and Trust Company, and collected by it through the agencies set forth in plaintiff's statement, it would have been idle for the appellant to challenge the payments by the appellee in the face of his power of attorney clothing his clerk with unlimited power in drawing checks in his name and lodged by himself with the bank as its authority to pay any <sup>606</sup> checks drawn by virtue of it. Greenfield was responsible to his employer for the abuse of the power conferred upon him, and the employer's concern was that it should not be abused; but it was never any concern of the bank why, or for what purpose, any check had been drawn by the clerk under the broad power given him by the employer. Its sole duty was to pay without question whenever a check so drawn was presented by the party to whom Greenfield intended it to be paid, and his intention every time he drew a check became, as to the bank upon which it was drawn, the intention of the man who had empowered him to draw it.

By our negotiable instruments act of May 16, 1901 (Pub. Laws, 194), a check is payable to bearer "when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." The averment in the affidavit of defense is that Niemann

was not a real, bona fide payee, but it was in legal contemplation a fictitious person, such fact having been well known to Greenfield at the time he drew the checks; that Niemann had no right to them, or any of them, and it never was intended by Greenfield that he should receive them or their proceeds. Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the act of assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. The intent of the drawer of the check, in inserting the name of a payee, is the sole test of whether the payee is a fictitious person, and the intent of the drawer of these checks as attorney for the appellant must, as just stated, be regarded as against the bank upon which they were drawn as the intent of the appellant himself. A fictitious person within the contemplation of the act of 1901 is not merely a nonexisting one, for, if so, the word "nonexisting" would have been sufficient without more. It is clear, then, that when the legislature declared that a check payable to a "fictitious or nonexisting person" is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it, therefore, matters not whether the name of the payee used by 607 him be that of one living or dead, or of one who never existed.

In *Bank of England v. Vagliano*, [1891] L. R. App. Cas. 107, the English bills of exchange act of 1882, after which our act of 1901 was modeled, was construed, and, in answering the contention that the word "fictitious" was only applicable to a creature of imagination, having no legal existence, Lord Herschell said: "If so, there was no necessity for the introduction of the word 'fictitious' in the enactment; the word 'nonexistent' would have sufficed. . . . Where, then, the payee named is so named by way of pretense only without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence." Lord Morris, following, said: "I entirely agree in the conclusion arrived at by my noble and learned friend, Lord Herschell, viz.: that whenever the name inserted as that of the payee is

inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the bills of exchange act, 1882, section 7, subsection 3, and that the bill may be treated by a legal holder as payable to bearer; and, having had the advantage of reading the noble and learned lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at." In this Lord Watson concurred, saying: "I think that the language of the subsection taken in its ordinary significance imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either nonexisting, or, being in existence, has not, and never was intended to have, any right to its contents."

In *Phillips v. Mercantile Nat. Bank of New York*, 140 N. Y. 556, 35 N. E. 982, a case singularly similar to the one now before us, the New York court of appeals, in construing the word "fictitious" in a statute of that state containing the same provision as ours, attached to it the same meaning as is given to it in *Bank of England v. Vagliano*. Bartlett, the cashier of the National Bank of Sumter, South Carolina, had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, with which it had an account. He drew checks upon <sup>608</sup> that bank, making them payable to the order of existing persons, but without their knowledge, and then indorsed the checks in their names to a firm of stockbrokers in New York, who collected them from the Mercantile National Bank. The receiver of the Sumter bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the indorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of known and existing ones, and were, therefore, to be regarded as having been made payable to bearer and intended for delivery to the stockbrokers in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent was said to have been, so far as the New York bank was concerned, the intent of his bank, and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the court said: "Whether indorsing the check in the name of the payee therein was a forgery in the legal sense, or not, is not the important

question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title of rights of the defendant: *Coggill v. American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310. In the case cited, a bill was drawn upon the plaintiff to the order of one Truman Billings and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., said: 'As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a non-entity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer.' The case of *Shipman v. Bank of the State of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371, 12 L. R. A. 791, . . . was a case wholly other than was made out here. It was stated in the *Shipman* case that the maker's intention is the controlling consideration, which determines <sup>609</sup> the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is, that by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's money by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. . . . The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with



some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office, and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence, and gift of powers, made them possible, and not upon others, who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not <sup>610</sup> the agent of the bank to commit a forgery or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from, is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity." If the checks drawn by Greenfield to the order of Niemann as a fictitious person had been drawn by Snyder himself with the same intent as Greenfield's, and he had indorsed Niemann's name on them and handed them to R. M. Miner & Co., it would not be pretended that he would have any claim against the appellee. And yet this is the real situation, for when Snyder lodged with the bank his power of attorney to Greenfield, he in effect said to it: "Any check drawn upon you by Greenfield as my attorney and issued by him is to be paid by you as having been drawn and issued by me." If this is not sufficient to protect the bank from liability for what the appellant now charges were its mis-payments out of his funds, it is not easy to conceive what would be.

The guaranty of the previous indorsements on the checks by the Real Estate Title Insurance and Trust Company was a guaranty of the indorsement of R. M. Miner & Co., for it was the only one upon the checks in legal contemplation when they were deposited with the trust company. When the checks were delivered to R. M. Miner & Co. they were, as shown, payable to bearer, and nothing, therefore, need be said of the contention of the appellant as to the liability of the trust company to the appellee upon the guaranty of the indorsements on the checks, unless it be to repeat what we have said through our brother Fell in recognizing the liability of a bank to its depositor for payment of a check on a forged indorsement: "The rule applies where a check has been lost or stolen and the payee's name has afterward been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious <sup>611</sup> person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank": *Land Title & Trust Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 79 Am. St. Rep. 717, 46 Atl. 420, 50 L. R. A. 75. The allegation that the checks were delivered to R. M. Miner & Co. in connection with gambling or wagering transactions is unavailing, in view of the averments in the affidavit of defense: *Northern Bank v. Arnold*, 187 Pa. 356, 40 Atl. 794.

The assignment of error is overruled and the order of the court discharging the rule for judgment is affirmed.

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*The Effect of a Check Payable to a Fictitious Person* is considered in *Shirley v. Burch*, 16 Or. 83, 8 Am. St. Rep. 273; *Shipman v. Bank of State of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450. If a check is drawn in favor of one whom the drawer supposes to be a real person, but, as a matter of fact, no such person exists, the case does not fall within the statute relating to checks drawn in favor of fictitious persons: *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 126 Am. St. Rep. 467.

*The Rights and Remedies of the Several Parties When a Forged Check* has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; and the liability of one receiving payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641. For recent decisions on these questions, see *Wellington Nat. Bank v. Robbins*, 71 Kan. 748, 114 Am. St. Rep. 523; *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 117 Am. St. Rep. 1014; *Cunningham v. First Nat. Bank*, 219 Pa. 310, 123 Am. St. Rep. 657. If a railway corporation intends to issue its warrant or check in favor of A, but, through the fraud of one of its employes, the paper is issued in favor of B,

probably a fictitious person, and, being paid by a bank in a distant city, is by it forwarded to the bank on which it is drawn, which makes payment without taking steps to ascertain the identity of the payee, it is answerable to the railroad company for the payment so made: *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 126 Am. St. Rep. 467.

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## GREENSBORO GAS COMPANY v. HOME OIL AND GAS COMPANY.

[222 Pa. 4, 70 Atl. 940.]

**CORPORATIONS—Ratification of Contracts.**—A gas company cannot avoid its contract to sell its gas to another company on the ground that the contract is not binding upon it, because not approved at a meeting of the directors when a quorum was present, if the negotiations leading to the contract were known to such board of directors, and the other party has spent large sums of money to convey the gas to its mains, has appointed employes to read meters, has secured rights of way, and both companies have treated the contract as valid and have done everything required by its terms, for a considerable length of time. (p. 792.)

H. L. Robinson, for the appellant.

D. M. Hertzog and Gans & Jones, for the appellee.

<sup>5</sup> **ELKIN, J.** This is an injunction bill filed to restrain the respondent company from selling or disposing of the natural gas produced from certain wells to any person or persons other than the complaining company and from interfering or tampering with the connections and appliances which have been or may hereafter be placed by the complainant on the premises for the purpose of obtaining the gas from said wells. The whole controversy depends upon whether a valid contract was entered into between the parties for the purchase and sale of the gas in the first instance, or, if the negotiations between the parties did not amount to a binding agreement, was there such a ratification by subsequent acts as to make an enforceable contract. <sup>6</sup> The learned court below, sitting as a chancellor, found as a fact that there was not a quorum present at the meeting of the board of directors, October 13, 1906, at the time a proposition was submitted by the complainant company to take all the gas produced by the two wells in question at the rate of four cents per one thousand cubic feet, and concluded as a matter of law that nothing done or attempted to be done at that meeting would be binding on the respondent.

We have concluded that this finding of fact and conclusion of law were justified under the facts and that there was no such manifest error as to warrant a reversal of the decree on this account. The only remaining question is as to a subsequent ratification, and this we think is important. In order to fully understand the situation of the parties it will be necessary to briefly recite some of the facts. The complainant company was in the business of selling gas to consumers. The respondent had developed some gas territory and could supply a limited amount of gas, but had no customers or pipe-lines to supply them. It was deemed advisable to make an arrangement to sell gas to a larger company, and these conditions led up to the negotiations between the parties to this controversy. A meeting was arranged for and held at Smithfield on the date above mentioned, at which were present several members of the board of directors of the respondent company as well as representatives of the complainant company, and of another gas company. At this meeting a resolution was adopted appointing a committee of three to make an agreement with the complainant and report to a future meeting. In this connection, it may be remarked, even if a quorum had been present, we do not agree that a resolution authorizing a committee to make and report an agreement is sufficient authority to authorize a committee so appointed to make and enter into a binding contract without reporting. The resolution evidently intended a preliminary agreement to be arranged by the committee and the final contract to be submitted for approval or disapproval at a future meeting. However, it is just as clear, that the board of directors were not only willing but anxious to make a contract for the sale of gas and took all the preliminary steps looking to the consummation of such an agreement. The committee so appointed, whether with proper authority or without <sup>7</sup> it, did attempt to close a contract with the complainant embodying the terms upon which to sell and deliver all the gas produced from the wells specified. On October 29, 1906, two members of the committee so appointed met the officers of the complainant company and concluded a formal contract, under the corporate seals of the respective corporations, signed by their presidents and attested by their secretaries. The contract thus executed was on its face regular in form, properly executed and attested, and presumptively was what it purported to be, that is, a contract between the parties, and in such a case the burden is on the



corporation attempting to repudiate its terms to rebut the presumption by showing that the officers did not have the authority to bind the company by the contract so executed. This burden is met in the present case as the court below has found, but while the officers were not authorized to execute the contract, they went ahead under the contract and did undertake to carry out its terms. They secured rights of way for complainant to lay its pipes for the purpose of transporting the gas to the mains of complainant, and they permitted the complainant at a cost of more than two thousand dollars to make the connections in order to carry out the terms of the contract and appointed an employé to read the meter in connection with an employé of the complainant company, so as to determine the amount of gas taken daily. The employés reported to their respective companies the amount of gas turned into the mains of the complainant company each day. In other words, both companies treated the agreement as a valid contract and did everything required to be done under its terms for a considerable length of time. The complainant tendered payment for the gas taken, which was refused by respondent on the ground that a valid contract did not exist between the parties because no quorum was present at the time the committee was authorized to make and report a contract. After due consideration we are of opinion that in view of the negotiations between the parties, known to the members of the board of directors, and presumptively to the stockholders, the expenditure of money on the part of complainant necessary to convey the gas to its mains, the appointment of employés to read the meters, the securing of rights of way, and all the other acts done in furtherance of the terms of the <sup>s</sup> agreement, are sufficient in law to constitute a ratification of the contract attempted to be made, and which was in point of fact executed but without proper corporate authority.

Decree reversed and record remitted to the court below with instructions that the injunction be made permanent as prayed for.

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*Although Corporate Acts Required to be Done* or authorized by corporation directors must be at a meeting at which all are present, or have an opportunity to be present, this rule is for the benefit of the shareholders, and acts done by three of the directors thereof at a time and meeting when a fourth director is absent and not notified are binding when such fourth director is a shareholder and director in name only: *Stiewel v. Webb Press Co.*, 79 Ark. 45, 116 Am. St. Rep. 62.

## ROBINSON v. JONES.

[222 Pa. 56, 70 Atl. 948.]

**DEVISES—Construction.**—If there is a devise in fee simple absolute, in the first instance, and the gift is intermediate, words of survivorship will be referred to the death of the testator and not to death generally, whenever it may occur. The first taker is entitled to the benefit of every implication, and his estate will not be cut down unless the intention to do so plainly appears. (p. 793.)

**WILLS—Devises—Construction.**—Under a devise to three children, naming them, to take share and share alike, with direction that if "any one or more of my last named children wishes his or their money out of my estate, it is my will that they choose three disinterested persons to appraise such estate at cash value. It is my will and desire that if either shall die without a lawful heir, his or her or their share of the estate to fall to the last named heir or heirs," the children take an estate in fee simple. (p. 793.)

W. W. Hensel, for the appellant.

M. G. Schaeffer, for the appellee.

57 Per CURIAM. There was no error in holding that the testator's children took estates in fee under the following clause in his will: "I give, bequeath and devise all the rest, residue and remainder of my real and personal estate to my other three children, viz.: Elizabeth Miller, Sarah Jane Miller and Joseph P. Miller, equally share and share alike. In case any one or more of my last named children—wishes her, or his or their money out of said estate, it is my will that they choose three disinterested persons to appraise said estate at cash value. It is my will and desire that if either—shall die without a lawful heir, her or his or their share of the estate to fall to the last named heir or heirs." Where there is a devise of a fee simple absolute in the first instance and the gift is immediate, words of survivorship will be referred to the death of the testator and not to death generally, whenever it may occur. The first taker is entitled to the benefit of every implication and his estate will not be cut down unless the intention to do so clearly appears: *Mickley's Appeal*, 92 Pa. 514; *Mitchell v. Pittsburg etc. Ry. Co.*, 165 Pa. 645; *Richards v. Bentz*, 212 Pa. 93, 51 Atl. 613. Moreover, the direction as to an appraisement in the event that any of his children should desire to convert his share into money indicates an intention that their estates shall be absolute.

The judgment is affirmed.

*The First Taker in a Will* is presumed to be the favorite of the testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147; *Jackson v. Littell*, 213 Mo. 589, 127 Am. St. Rep. 620.

*Words in a Will Referring to Death or Survivorship* usually relate to the time of the testator's death unless possession is actually postponed: *Estate of Alexander*, 149 Cal. 146, 85 Pac. 308; *Estate of Winter*, 114 Cal. 186, 45 Pac. 1063; *Williams v. Lewis*, 100 N. C. 142, 6 Am. St. Rep. 574; *Robinson*, Appellant, 88 Me. 17, 51 Am. St. Rep. 367; *Thorington v. Hall*, 111 Ala. 323, 56 Am. St. Rep. 54.

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### ROBINSON'S ESTATE.

[222 Pa. 113, 70 Atl. 966.]

**HUSBAND AND WIFE.**—Antenuptial Contracts, though not inherently fraudulent, require good faith, but fraud is not presumed in them any more than in other cases, and there must be some evidence of gross disproportion or other fact from which fraud may be inferred before the onus changes. (p. 794.)

**HUSBAND AND WIFE.**—Antenuptial Contracts—Widow as Witness.—After the death of her husband his widow is not competent to testify that in signing an antenuptial contract she was under the impression that she was signing another and different contract previously shown to her. (p. 795.)

J. Q. Hunsicker, J. H. Schwaeke and J. Q. Hunsicker, Jr., for the appellant.

J. G. Johnson and W. E. Rex, for the appellee.

**115 MITCHELL, J.** Antenuptial contracts are not inherently fraudulent nor is there any such presumption. They require good faith, but fraud is not presumed in them any more than in other cases. There must be some evidence of gross disproportion or other fact from which fraud may be inferred before the onus changes. As said by the learned judge below: "The sum given in the present case was an outright gift; the wife took no chance; she was provided for in any and every event; whether her husband died rich or poor, whether he or she survived, was to her, so far as her temporal welfare was concerned, a matter of no moment. A woman about to be married might readily accept outright a sum equal to one-sixth of her husband's estate, and at the same time be willing to accede to a proposition that she would relinquish at the time of his death that which the law would give her and which by right she should have and get."

The widow was clearly not a competent witness. As said by the learned judge below: "The contract did not prove itself; two witnesses were called who identified the signatures of Joseph B. Robinson and of Helen M. Clawson; without this identification, the contract was not in evidence; the widow was then called, and her testimony was in effect a contradiction of the testimony of the two preceding witnesses; true, she did not <sup>116</sup> deny her signature, but she did deny that in placing her signature to the paper in question, she intelligently signed the contract. In brief, her testimony was that Mr. Robinson had promised her the sum of twenty-five thousand dollars as a gift, telling her he was worth one hundred thousand dollars; had never explained to her that she was to renounce any legal rights as to dower, etc., and that the agreement he originally showed her was not as long as the one she was given to sign, in fact, was on one sheet of paper, and that, when she did sign, she did so upon the supposition that it was the previous contract rewritten, and not a new and different one." But even if she had been competent she was claiming against her husband's estate in contradiction of her formal written agreement of which a duplicate had been in her possession for several years. The testimony was entirely inadequate for such purpose.

Judgment affirmed.

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*The Validity of Antenuptial Contracts has Frequently been Recognized:* Warner's Estate, 207 Pa. 580, 99 Am. St. Rep. 804; O'Day v. Meadows, 194 Mo. 588, 112 Am. St. Rep. 542; Unger v. Mellinger, 37 Ind. App. 639, 117 Am. St. Rep. 348. Antenuptial contracts in anticipation of marriage, equitably and fairly entered into, exclude the operation of law in respect to the property rights, so that so far as the contract extends, it, and not the law, furnishes the measure of such rights: Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 710.

*If a Husband and Wife Execute an Agreement of Separation whereby each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is unfair:* Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231. See, also, Appleby v. Appleby, 100 Minn. 408, 117 Am. St. Rep. 709.



## DULL'S ESTATE.

[222 Pa. 208, 71 Atl. 9.]

**WILLS—Construction—Conversion of Realty into Personalty.—**

If a husband bequeaths to his wife "the furniture, pictures, household goods, horses, carriages and house and lot in which we now reside, to have and to hold as long as she may desire to live there, after which time I direct that they be disposed of by my executors and become part of my estate," and, "I also direct the legal share of all my real estate and personal property to be paid to my wife as her share out of my estate," and after giving a money legacy and the balance of his estate to relatives he gives direction to his executors to dispose of all of his estate within three years after his death, the direction in the will to sell works a conversion of the realty into personalty, and the widow takes one-half of the entire estate absolutely as personalty. (pp. 797, 799.)

S. P. Wolverton, M. W. Jacobs, S. P. Wolverton, Jr., and G. Herring, for the appellants.

W. W. Hensel, for the appellee.

<sup>210</sup> STEWART, J. What interest in his estate did the testator intend that his widow should take? The clause in the will relating to her is as follows: "To my beloved wife, Hannah Wiley Dull, I give, devise and bequeath the furniture, pictures, household goods, horses, carriage, and house and lot in which we now reside, to <sup>211</sup> have and to hold and enjoy as long as she may desire to live there, after which time I direct that they be disposed of by my executors and become part of my estate. I also direct the legal share of my real estate and personal property to be paid to my said beloved wife as her share out of my estate." By the next succeeded item a legacy of fifteen hundred dollars is given to a relative, and immediately following occurs this residuary clause: "All the balance of my estate I devise to my three sisters, Mrs. Hannah Criswell, Mrs. Nancy Macklin and Mrs. Magaret Horning, or their heirs, share and share alike, to be paid by my executors as hereinafter named." What is given the widow is her "legal share." These words, standing alone and unqualified by other expressions and provisions in the will, would indicate with much certainty--there being no children--an intention that she should take one-half of the personal property absolutely, and the income of one-half of the real estate during life. Since the law seeks to give effect to the testator's intention as derived from the whole will, the inquiry must be to discover whether any other or different purpose is elsewhere expressed, or indicated with equal or greater certainty. The will contains a posi-

tive, express and unconditional direction to the directors to dispose of all the balance of the estate within three years after the testator's death. This balance evidently embraced all the real estate owned by testator at the time of his death, even the house and lot devoted to the widow's use, in the event of her occupancy of it terminating within the period fixed. It is designated as balance, for the reason that in an earlier part of the same clause, testator had directed that a certain sand property of large value, should be retained and operated by the executors for a period not exceeding five years. This property the testator sold in his lifetime; but it having been set apart in the will from the rest, since it was the only piece of real estate thus distinguished, the direction to sell included all else. What, then, is the legal significance of this direction to sell or dispose of all the testator's real estate; and how does it reflect the testator's intention with respect to the share of the widow? The right of a testator to make land money, to effect his own purpose, is unquestionable; and it follows from this right that persons claiming property under a will directing its sale must take it <sup>212</sup> in the character which the will imposes on it. This results not from the application of any artificial rule, or any equitable doctrine, but solely because it is the testator's expressed desire. How could a testator make it more certain and conclusive that he did not intend his beneficiary to take his real estate, than by directing its sale? In such case it is not the law that works the conversion, but the will that directs it. The law sometimes employs a fiction in aid of a testator's intention, and by use of it, the conversion which the testator ordered is anticipated in such a way, that what is ordered to be done is regarded as actually accomplished; but that fiction is without application here, and the doctrine of equitable conversion, much discussed upon the argument, plays no part. If the question were as to when the conversion arose, whether at the death of the testator, or when the sale was actually made, then the fiction and doctrine would apply; but no such question concerns us here. It is enough to know that there is a positive direction to convert, and the result must have been the same whether actual conversion or equitable was contemplated. The evident purpose of the testator in directing a sale of his land was in connection with the distribution among his beneficiaries; and the presumption is that he knew if his lands were sold as he had directed, the proceeds would be distributed as personalty. It is not pretended that the will gives to the three sisters who take the residue any estate in

the lands. Conversion as to them is admitted, and it is freely allowed that all the interest they have is in the execution of the trust through which they are to receive their shares in money. The effort is to distinguish between them and the widow in this regard. Because the testator has described the interest given the latter as a "legal share," it is argued that his intention must have been to confine her share within the limitations of intestacy; that is to say, one-half of the personal estate absolutely and one-half the income of the real estate during life. That the testator could have so limited and restricted her share is a matter of course; but since the legal share may under certain conditions, when there is real estate, embrace the one-half the entire estate, regarded as personalty, the question remains, What was this testator's understanding as to the meaning of the words used? In this connection the <sup>213</sup> fact that his will directs a conversion of the real estate is of large significance. Under this provision what he was distributing to his beneficiaries was money, not land, and it was the money to be derived from the sale of the land that he had under contemplation. A widow's legal share under conditions we have here, the estate being personalty, would be the one-half absolutely. It is always a legitimate presumption that a testator in framing his will knew the law, and intended such results as would follow through the law, unless he provides to the contrary. Not only does the will contain no contrary provision, but every provision and direction is consistent with the purpose to make the widow's share payable directly to her out of the net result obtained through a sale of the entire estate, divested of all charges. It is as much because of what the will does not contain, as of what it does, that we reach the conclusion that the testator intended his widow to take one-half the whole absolutely. It contains nothing which in the remotest way suggests that her share is to be a charge upon the real estate; or that it shall be held in trust in case the land be sold discharged of it; or that it was income she was to receive; or that her ownership was to be qualified in any way. On the contrary, in express terms it directs that this legal share be paid to her out of the estate, just as it provides that the shares of the three sisters are to be paid to them. This was the will of a man of extensive business experience, owning large estates in land. It shows an anxiety on his part that his lands, when sold, should sell to the largest advantage. It would be apparent to anyone of the most limited experience and observation, that this result would be impossible, were a dower of one-half the whole value to be

charged upon the land. Did he contemplate such a sale? We cannot think so. If he did not, but intended a sale outright, then if appellant's view be correct, we are confronted by this other circumstance so unusual in testamentary dispositions as to be remarkable, that he created a fund for the widow for life without giving any directions at all with respect to its investment, control or management, other than that it was to be paid to her. That he intended a sale which would divest the dower we have no doubt; that he intended the widow to receive but the income of one-half the purchase money during her life is <sup>214</sup> not only inconsistent with the general scheme of the will, but conflicts with the express provision which requires that her share be paid to herself. A careful examination of the will in all its parts has satisfied us that the conclusion reached in the court below awarding the widow the one-half of the entire estate as personalty accords with the expressed intention of the testator.

The appeal is dismissed at the costs of appellants and the decree is affirmed.

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*To Work a Conversion of the Testator's Land into Money* from the time of his death there must be a positive direction to sell, or an absolute necessity to sell to execute the will, or such a blending of real and personal estate by the will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath such fund as money: *In re Cooper's Estate*, 206 Pa. 628, 98 Am. St. Rep. 799, and see authorities in cross-reference note thereto.

*If a Testator Devises Land to His Wife for Life*, in trust for their children, and directs the executor, after her death, to sell the property and divide the proceeds among the children, the effect of this direction is to convert the land into personalty: *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118.

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## SMITH v. METROPOLITAN LIFE INSURANCE COMPANY.

[222 Pa. 226, 71 Atl. 11.]

**INSURANCE, LIFE**—Death of Beneficiary.—If a husband takes out an insurance policy on his life in favor of his wife, without further mention, and pays the premiums and survives the beneficiary, he may change the policy for the benefit of some other person. (p. 801.)

**INSURANCE, LIFE**—Primary Intent of Insurance.—If all the conditions of fact expressly provided for in any contract have failed, and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. A contract of life insurance contemplates a payment by the insurer upon the



death of the insured, and that is the primary intent, while the secondary question, as to whom the payment is due, is contingent on the circumstances. (p. 802.)

**INSURANCE, LIFE—Death of Beneficiary.**—The naming of a beneficiary in life insurance to whom payment is to be made is a gift of a benefit in the future, contingent on the circumstances. It carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums, as that is contingent on his doing so voluntarily, and the nature of the thing given implies that the beneficiary must survive the insured. (p. 802.)

**INSURANCE — Death of Beneficiary — Effect.**—Ordinarily, where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes at his death a part of his estate, to be administered as his will, or in the absence of a will, as the law directs. (p. 803.)

**INSURANCE, LIFE—Death of Beneficiary—Change of.**—If a husband names his wife, without more, as his beneficiary in a life insurance policy, and after her death secures from the insurance company a printed blank designated as a "change of designation," which he executes, substituting his daughter as beneficiary, and this is accepted by the company, which continues to receive the premiums of the policy, it is estopped from disputing the validity of the paper containing the "change of designation," although such paper may have not been executed strictly in accordance with the by-laws of the company. (p. 803.)

**INSURANCE, LIFE—Change of Beneficiary—To Whom Insurance Money Should be Paid.**—A provision in an insurance policy that "the production by the company of the policy and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to it," does not relieve the insurer when it has paid the amount of the policy to the executor of the insured instead of to the beneficiary lawfully entitled to it. (pp. 803, 804.)

J. B. Reilly and G. W. Ryon, for the appellant.

R. H. Koch and G. E. Farquhar, for the appellee.

**227** MITCHELL, C. J. Gordon took out five separate policies of insurance on his own life. No beneficiary or person to whom the insurance should be paid on the death of the insured was named in any of the policies, but in the applications for three of them, in answer to the printed question as to whom the money should be payable, the name of his wife was written. In the other two there was not even this designation of a beneficiary, but it was conceded at the trial that the insurance was intended **228** for her benefit and that the policies were handed to her by the insured. The trial court, therefore, treated all the policies as alike in her favor as beneficiary, and for the purposes of this case no question on this point need be considered.

The wife died first, and subsequently the husband by written order, on a blank "change of designation" furnished by the company, appointed his daughter, the plaintiff, as the beneficiary. She brought suit, and on the trial was nonsuited on the ground that the interest in the policies had vested in the wife, and at her death passed to her administrator as part of her estate.

In support of this result reliance is had principally on the cases of *Anderson's Estate*, 85 Pa. 202, *Brown's Appeal*, 125 Pa. 203, 11 Am. St. Rep. 900, 17 Atl. 419, and *Entwistle v. Travelers' Ins. Co.*, 202 Pa. 141, 51 Atl. 750. The facts, however, in these cases were so different that none of them can be regarded as a controlling authority for the present. In *Anderson's Estate* the policy was payable to the wife, "her executors, administrators or assigns." The insured (husband) having died insolvent the money was claimed by his creditors, but it was held that it was an asset of the wife.

In *Brown's Appeal*, 125 Pa. 303, 11 Am. St. Rep. 900, 17 Atl. 419, the policy was payable to the wife, and in case of her death before that of the insured then to her children. The wife and the husband jointly executed an assignment, and after the wife's death it was held on interpleader that the children had title under the original contract, and it could not be divested by the assignment.

In *Entwistle v. Travelers' Ins. Co.*, 202 Pa. 141, 51 Atl. 750, the insurance was payable to the wife, and if she died before the husband then to the children, but if the husband survived both wife and children then to his legal representatives. By the terms of the policy its value was convertible into cash at the option of the holder after fifteen years. Husband and wife sought to exercise the option, but it was held that the children had a beneficial interest which brought them within the term "holders," and could not be divested without their sanction.

In all the foregoing cases the contingency presented by the state of facts was one expressly provided for in the policy, and it is beyond question that where such is the case the terms of the policy, which is the substantial contract of the parties, must govern. But where, as in this case, a state of facts exists <sup>229</sup> for which the policy makes no express provision, a very different question is presented.

In *Brown's Appeal*, 125 Pa. 303, 11 Am. St. Rep. 900, 17 Atl. 419, it was said that the death of the wife in the lifetime of her husband "extinguished her interest in the pol-

icy," and in *Entwistle v. Travelers' Ins. Co.*, 202 Pa. 141, 51 Atl. 750, "the interest of the wife was wholly contingent upon her surviving her husband. . . . If the wife die before the insured she will take nothing under the policy." These expressions, of course, and the decisions in which they were used were based, as already said, on the language of the policies, but the same result would follow upon general principles. Where all the conditions of fact expressly provided for in any contract have failed and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. The contract of life insurance contemplates a payment by the insurer upon the death of the insured. That is the certain primary intent, and does not admit of doubt. The secondary question, to whom is the payment due, is contingent on the circumstances.

The naming of a beneficiary to whom payment is to be made is a gift of a benefit in future, but is contingent on the circumstances. Thus it carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums. That is contingent on his doing so voluntarily. And the nature of the thing given would seem to imply that the beneficiary must survive the insured. Thus in the present case the gift is equivalent to a provision that when the husband dies, having kept the policy alive, the wife shall be entitled to the money. But the intent is to provide for her, not for any other, and if she has died first, the expressed intent is incapable of fulfillment and we are not at liberty to supply a further intent which the donor did not indicate. He might have done so by naming her executor, or administrator, or children, at his own choice, but as he did not do so we are not authorized to make a choice for him. The natural presumption is that he did not desire such result, nor intend to continue to pay premiums for the benefit of any other person.

At the inception of the contract the whole disposition of the insurance money was within the control of the insured. He <sup>230</sup> might have provided in the policy for its disposition under any and all conditions, but he did not. By the designation of his wife as the party to receive it, he vested a right in her and to that extent parted with his control. But he did nothing more, and on her death before his, the condition failed and the right of control which he had only parted with on condition, returned to him, and in the absence of any further disposition by him would have become an asset of his estate.

The cases relied upon by the learned court below, as already said, differed so entirely in their essential facts that they are not authority for this. No Pennsylvania case has decided the question now raised. Outside of this state the decisions are not in entire harmony, but the weight of authority is with the views above expressed. In 13 American and English Encyclopedia of Law, page 654, the general rule is thus stated:

“Ordinarily, where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes, at his death, a part of his estate, to be administered as his will, or in the absence of a will, as the law directs. . . .

“But where a person, as a husband, takes out a policy on his life, in favor of another, as the wife, without further mention, and pays the premiums, and he survives the beneficiary, he may change the policy for the benefit of any other person, as a subsequent wife”: 13 Am. & Eng. Ency. of Law, 656.

This brings us to the consideration of the plaintiff's claim. The wife, the beneficiary designated in the applications, died in 1897, and the next year the insured substituted his daughter, the plaintiff, as beneficiary. The testimony was, that desiring to do so the insured applied to the agent of the insurance company, was furnished by him with printed blanks, called “change of designation,” which he executed, thereby substituting his daughter, the plaintiff, as beneficiary, in place of his wife who was dead. These changes of designation were delivered to the defendant company and were accepted by it. The company thus recognized the right to change the beneficiary, accepted the method of doing so and for more than seven years the insured continued to pay and the company to receive the premiums on the basis of such change. Whether the papers were strictly in accordance with the requirements <sup>231</sup> of the by-laws of the company is immaterial. So far as the case was developed every element of estoppel exists to prevent the company from now disputing their validity.

As the trial in the court below, however, resulted in a nonsuit no evidence was given for the defendant, but it appears from the affidavit of defense that the company paid the insurance money to one Thomas S. Gordon, executor of the insured, and reliance is apparently placed on a clause in the policies, varying somewhat in expression but substantially to the effect that “the production by the company of this policy, and of a receipt for the sum assured, signed by any



person furnishing proof satisfactory to the company that he or she is the executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied."

Similar clauses are not uncommon in the class known as "industrial insurance," where the amounts and estates are small and the purpose is to avoid the necessity of the expense of formal administration by law. But they are not intended and could not be allowed to override rights fixed by the policies. If, for example, the wife had survived the husband in this case, no such clause as that quoted could make a payment to his executor a valid defense against her vested claim as primary beneficiary. If the plaintiff's substitution as beneficiary was valid, as prima facie it appears to be, the payment to Thomas S. Gordon, as executor of the insured, is no defense. But it is intimated that the fact as well as the good faith of the nominal substitution as between father and daughter are open to question. As the case did not reach the stage for evidence on that point, we express no opinion upon it.

Judgment reversed and procedendo awarded.

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*The Effect of the Death of a Beneficiary Before the Insured* is discussed in the note to *Hooker v. Sugg*, 11 Am. St. Rep. 721; *Estate of Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123. In *Perry v. Tweedy*, 128 Ga. 402, 119 Am. St. Rep. 393, it is decided that where a husband designates his wife as beneficiary in his life insurance policy, and she dies before he does, her vested interest in the policy is a part of her estate, and those entitled to share in her personal property at the time of her death under the law of succession will be entitled to share in the proceeds of the policy on his death.

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### RIELLY v. STEPHENSON.

[222 Pa. 252, 70 Atl. 1097.]

**WATERS, SURFACE—Right to Shut Out.**—The owner of a city lot in grading and improving it may shut out the surface flow of water upon his lot with no obligation to prevent it from flowing over adjacent lots, provided he does not proceed negligently so as to do unnecessary damage to others, nor obstruct a natural channel for the flow of the water, nor a channel that has acquired the character of an easement, nor can he gather surface water into a body and discharge it on the adjoining land. (p. 807.)

**WATERS, SURFACE—Right to Shut Out.**—The right of a city lot owner to shut out the surface flow of water from his lot is not accompanied by an obligation to prevent it from flowing over the adjacent land and to lead it by artificial or other means to a sewer or other avenue of escape. (p. 808.)

M. J. Mulhall and W. L. Raeder, for the appellant.

J. McGahren, for the appellee.

<sup>254</sup> MITCHELL, C. J. The parties own adjoining lots on an opened and paved street in the city of Wilkes-Barre. The land was on a sloping hillside so that the surface drainage from rain, etc., ran over both lots from the rear to the front. The defendant improved his lot first, and in so doing raised the grade in parts. He did not change the character or direction of the flow nor add to the volume of it, except that in consequence of the raised grade the water which had previously spread over the surface of both lots now ran over plaintiff's. It was a natural and inevitable result of the defendant's improvement of his lot, and it is not charged that it was negligently done.

It was averred in the bill that defendant's lot had a dip or hollow which made a natural channel through which the water from plaintiff's lot was accustomed to flow, and that this had been filled up. But the court below expressly refused to find that there had been a channel, and the evidence would not have sustained a finding of such fact. The land in its natural state was uneven with occasional depressions, in which the water would collect temporarily and then gradually drain off. There was nothing that could properly be called a channel.

The learned judge below found all the facts in favor of the defendants, including the following:

"3. The land, of which both lots are a portion, was originally undulating land used for farm purposes, and it has been laid out in building lots and streets for many years.

"4. The opening and grading of streets, the construction of sewers, and the erection of buildings in the natural expansion of the city, adjacent to the plaintiff's and defendant's lots, have changed the surface of the land as it existed in a state of nature."

"7. The opening of Jones street and Essex lane, and the erection of buildings thereon, changed and increased the natural flow of the surface water on the land adjacent to the plaintiff's and defendants' properties."

He also found as matter of law "that the defendants had the right to grade their lot in the manner described without

255 regard to the natural drainage of the locality." But he added the qualification that "in doing so, however, the owner of a lot must take care of the drainage of the surface water by means of artificial appliances so as not to injure or damage the other or adjacent land holders." The correctness or error of this rule is the question in the case.

The ruling of the learned judge below was made in deference to the language and supposed decision of Kennedy, J., in *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265, and the cases of *Davidson v. Sanders*, 1 Pa. Sup. Ct. 432, and *McMahon v. Thornton*, 5 Pa. Sup. Ct. 495, which were based upon it. But the decision in *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265, was upon a much narrower point, and the language of Justice Kennedy has been extended to apply to a state of facts to which it was never applicable. The plaintiff in that case claimed the right to turn the rain water which fell upon his lot, and also the water of a spring on his lot, onto the lot of defendant. The latter placed an obstruction on his own lot which turned the water back on the plaintiff's lot. The trial judge charged the jury that the plaintiff had established his right to an easement. On this point the case was reversed, Kennedy, J., saying, "It does not appear to us that any facts have been testified to going in the slightest degree to establish the plaintiff's right to an easement such as he claims in this case." That is the whole extent of the actual case decided. But Justice Kennedy then proceeds to discuss a feature of the case that had evidently been argued, and his language is certainly as favorable to the defendants in the present case as to the plaintiff: "In the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has ever been understood, and such has been the practice and usage, too, that the natural formation of the surface will, and indeed must, necessarily, undergo a change in the construction of buildings and other improvements that are designed and intended to be made. In doing this it would seem to be right that the common benefit and convenience of the respective owners of adjoining lots should be consulted and attended to, but certainly no one ought to be restrained from improving his lot in such a manner as to make it answer the purpose for which it was laid out, sold and purchased, if practicable, without overreaching 256 upon his neighbor's lot. He ought to be permitted to form and regulate the surface of it as he pleases, either by excavating or filling up, as may be requisite to the convenience and enjoyment of it, taking care, however, not

to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot." So far this is sound law and in accordance with all the decisions. But when the learned justice adds: "It is of great importance that the water from each lot arising from rain or other cause should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it to a sewer or other place appropriate for the receipt and discharge of the same, and not be turned or let onto an adjoining lot, . . . and it appears to me to be the duty of the owner of each lot if he improves it to do it in such way, if practicable, as to lead and conduct the water that happens to fall upon it off in the way mentioned." This is mere dictum not authorized by sound general principles and not consistent with the rules previously established in the same opinion.

The owners of lots in cities and towns buy and own with the manifest condition that the natural or existing surface is liable to be changed by the progress of municipal development. All such owners have equal rights neither lessened nor increased by priority of improvement, and the primary right of each owner is to protect himself and his lot from loss or inconvenience from the flow of surface water. The owner at the foot of the slope is under no obligation to allow his lot to continue as a reservoir for the surplus water of the neighborhood. He may shut it out by grading or otherwise, and the fact that thereby he may incidentally increase the flow on the adjoining lot neither makes him answerable in damages nor affects the adjoining owner's right in his turn to shut out the original, plus the increased flow on his lot. The owner cannot be coerced as to time or manner of improvement by risk of having put upon him the burden of providing for the flow upon others.

Some things of course he may not do. He may not proceed negligently so as to do unnecessary damage to others. But so far as he acts upon his right to protect his enjoyment of his own property, any incidental loss to his neighbor is *damnum absque injuria*. It is clearly settled, however, first, that he may not obstruct a natural channel for the flow of the water, <sup>257</sup> or a channel that has acquired the character of an easement; and, secondly, he may not gather surface water into a body and discharge it on the adjoining land. His right is to shut out the invading water, as a common enemy, for the protection of his own land.

Notwithstanding the dictum in *Beutz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265, and the questionable ap-



plication of it in a few later cases, these principles are fundamental and have never been successfully questioned. The latest case on the subject is *Strauss v. Allentown*, 215 Pa. 96, 63 Atl. 1073, in which it was sought to charge a municipality with damages for loss of value of land by increased flow of water from the change of surface conditions. It was practically conceded throughout the case that an individual owner would not be answerable, and it was held that the municipality was equally exempt from liability from increased flow of water incidental to surface changes in the course of municipal development.

The qualification applied in this case, that the right of the owner to shut out the surface flow from his lot is accompanied by an obligation to prevent it from flowing over the adjacent land and to lead it by artificial or other means to a sewer or other avenue of escape, is totally irreconcilable with the conceded right of protection of his lot already discussed, and is not sustained by authority or on general principles. The cases in New Jersey, Connecticut and Massachusetts which have considered this exact question are uniformly against any such obligation.

Decree reversed and bill directed to be dismissed with costs.

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*The Right of a Land Owner to Interfere with the Flow of Surface Water* to the injury of his neighbors is considered in the note to *Mizell v. McGowan*, 85 Am. St. Rep. 730. As a general rule, a person in improving his property may accelerate the flow of surface water from his premises to those of adjacent proprietors, without becoming liable for the results, if he does only what is necessary to accomplish the improvement and is not negligent in doing it: *Rhoads v. Davidheiser*, 133 Pa. 226, 19 Am. St. Rep. 630; *Brown v. Winona etc. Ry. Co.*, 53 Minn. 259, 39 Am. St. Rep. 603; *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546; *Ginter v. St. Mark's Church*, 95 Minn. 14, 111 Am. St. Rep. 438. The owner of the dominant estate may, in the interests of good husbandry, and in the good faith improvement and tillage of his land, fill up sag-holes thereon, so that no water will accumulate or stay in them, even if the water arising from rainfall or melting snows should thereby, in natural processes, find its way upon the servient estate and incidentally increase the flow thereon: *Launstein v. Launstein*, 150 Mich. 524, 121 Am. St. Rep. 635.

## COMMONWEALTH v. PALMER.

[222 Pa. 299, 71 Atl. 100.]

**MURDER—Self-defense—Burden of Proof.**—On a murder trial, “if there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit, but if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, to show that it was excusable as an act of self-defense. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades of manslaughter at least.” (pp. 809, 810.)

**MURDER—Insanity as Defense—Burden of Proof.**—If the state clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed, and if the defense is insanity, the burden of sustaining it is upon those having charge of the defense, for the accused is presumed to be sane, and his insanity must be established by a fair preponderance of the testimony. (pp. 810, 811.)

**MURDER—Self-defense—Burden of Proof.**—A person accused of murder is not bound to show beyond all doubt that he was compelled to take human life, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise be saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense, is not to be satisfied that it was so taken, and when this affirmative defense is left in doubt it has not been established at all as a basis for acquittal. (p. 811.)

R. G. Bushong and D. N. Schaeffer, for the appellant.

H. D. Schaeffer, district attorney, for the appellee, was not heard.

300 **BROWN, J.** The victim of this homicide was a woman with whom the prisoner had lived in illicit relations. He admitted the killing, but attempted to justify it as an act of self-defense. His story on the trial was that they had quarreled a number of times; that on the evening of the killing they went to a lonely spot in the city of Reading, where they again quarreled; that she there drew a revolver upon him, which he took from her and threw away; that she then grabbed him and struck him with some object; that before he started with her to the place of the killing, he had put a razor in his pocket for his protection, thinking she would attempt to do him bodily harm, and that when she grabbed him a second time, believing his life was in danger, he threw his arm around her neck and, holding her head back, cut her throat; that without releasing him she sank down, and he then, sitting upon her stomach, cut her throat a second time. The uncontradicted evidence was that there were five cuts upon her body.

On this appeal two errors are alleged to have been committed by the court below, the first in the following instruction to the jury: "As to whether a reasonable doubt shall establish the existence of a plea of self-defense, the law is this: If there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit, but if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not the commonwealth, to show that it was excusable as an act of self-defense. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades, of manslaughter at least." Those are the exact words of Agnew, J., in his charge to the jury when specially presiding in *Commonwealth v. Drum*, 58 Pa. 9. That charge was accepted at the time by his associates in this court as a clear and correct exposition of the law of homicide and as a precedent<sup>301</sup> and guide in the trial of such cases. We have since frequently approved it, the present chief justice very recently saying of it: "Its substantial accuracy has never been challenged": *Commonwealth v. Pease*, 220 Pa. 371, 123 Am. St. Rep. 699, 69 Atl. 891, 17 L. R. A., N. S., 795.

When the commonwealth clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed. If the defense be insanity, the burden of sustaining it is upon those having charge of the defense, for the accused is presumed to be sane and his insanity must be established by a fair preponderance of the testimony: *Ortwein v. Commonwealth*, 76 Pa. 414, 18 Am. Rep. 420; *Meyers v. Commonwealth*, 83 Pa. 131; *Coyle v. Commonwealth*, 100 Pa. 573, 45 Am. Rep. 397; *Commonwealth v. Barner*, 199 Pa. 335, 49 Atl. 60. And so of self-defense, for there is no presumption, in the face of clear evidence of intentional killing with a deadly weapon, that life was taken that life might be spared. The presumption is otherwise, in the absence of anything developed to the contrary in the commonwealth's presentation of its case, and when the attempt is made to rebut that presumption by the affirmative plea of self-defense, it must be made out by a fair preponderance of evidence. The guilt of the accused must be established in the first instance beyond a reasonable doubt, and when so established he is not to be acquitted because the jury, after hearing him or his witnesses, may be in doubt whether he acted in self-defense. In making that defense, he admits his intentional killing of

another—a crime under divine and human law, unless it appear in the proof of the killing that it was excusable—and the burden is righteously upon him to show that it could not be avoided. “We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of law, excused on the account of accident or self-preservation, or alleviated into manslaughter by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom are to decide whether the circumstances alleged are proved to have actually existed, <sup>302</sup> the former how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence”: 4 Blackstone’s Commentaries, 201. The burden of proving self-defense is not placed heavily upon one accused of taking life. Sacred as is human life, he is not bound to show beyond all doubt that he was compelled to take it, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise have been saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense, is not to be satisfied that it was so taken, and when this affirmative defense is left in doubt it has not been established at all as a basis for acquittal.

There was nothing in the case justifying the presentation of the prisoner’s sixth point, and it was therefore properly declined and not read to the jury.

Both assignments of error are overruled, the judgment is affirmed and the record remitted for the purpose of execution.

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*The Law of Self-defense* is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717. It is said that in a case of homicide all that is necessary for the accused to show to make out a case of self-defense is that the conduct of his assailant induced in him a reasonable and well-grounded belief that he was at the time of the killing in apparent danger of losing his life or suffering great bodily harm, and he is not required to show that he acted as a man of “ordinary judgment and courage would have acted under the circumstances”: *People v. McGinnis*, 234 Ill. 68, 123 Am. St. Rep. 73.



**DIGNAN v. ALTOONA COAL AND COKE COMPANY.**

[222 Pa. 390, 71 Atl. 845.]

**MINES—Right to Support.**—In a grant of all the coal underlying a tract of land, the grantor, in the absence of an express waiver, is entitled to have his surface reasonably supported by the coal stratum granted. (p. 812.)

**MINES AND MINING—Right to Surface Support.**—A grant of all the coals or other minerals lying in or being in, upon, or under a tract of land described in a deed does not deprive the grantor of the right of surface support, nor is such right waived by a provision in the deed providing that all these said mining rights, liberties and privileges are to be used and exercised without any liability for damages arising and resulting from their use. (p. 813.)

**MINES AND MINING—Right to Surface Support.**—If in a grant of all the coal underlying a tract of land the grantor in express terms enumerates what surface privileges are to be enjoyed by the grantee, such as sinking air-shafts, erecting buildings for a pumping station, and then provides that such mining operations, however, are "not to interfere with the surface of the land," the grant indicates an intention to reserve all surface rights, including sufficient support not expressly granted. (p. 813.)

D. L. Krebs, M. D. Kittell and P. N. Shettig, for the appellant.

P. J. Little, for the appellee.

<sup>393</sup> **ELKIN, J.** In Pennsylvania the rule has always been that in a grant of all the coal underlying a tract of land, the grantor, in the absence of an express waiver, or, which is the same thing, the use of words which by necessary implication mean a waiver, is <sup>394</sup> entitled to have his surface reasonably supported by the coal stratum granted. This rule has never been departed from, and as late as *Weaver v. Berwind-White Coal Min. Co.*, 216 Pa. 195, 65 Atl. 545, was reasserted and followed. Nor do we understand this rule to be questioned by the learned counsel for appellant, but it is contended that the words of the grant in the present case are such as by necessary implication must be construed to mean a waiver of surface support. The grant is for "all the coal and other minerals lying or being in, upon, or under" the tract of land described in the deed of conveyance. It has been uniformly held that the grant of all the coal does not affect the rule which imposes the servitude of surface support upon underlying strata. We can discover no words in the present grant sufficient to modify or change the general rule.

It is further argued that the language used in the grant of mining rights and privileges is broad enough to waive the

right of surface support. In answer, it may be stated that the words of the grant relating to mining rights are of the same general import as those ordinarily used in conveyances of coal and other minerals. The words of the grant relied on to support this contention are "all these said rights, liberties and privileges, to be used and exercised without any liability for damages arising and resulting from the use and exercise of the same as aforesaid." It is argued that in addition to the grant of all the coal, there is an express release of damages arising and resulting from the use and exercise of the mining rights to the extent of releasing any damage that may result to the surface by failure to give it sufficient support. Clearly this was not the intent of the parties. The release of damages in the covenant relied on refers to the proper exercise of the mining rights and privileges in the development and operation of the mines and have no bearing upon or relation to the rule of law requiring surface support. Nor can we agree that *Scranton v. Phillips*, 94 Pa. 15, *Madden v. Lehigh Valley Coal Co.*, 212 Pa. 63, 61 Atl. 559, and *Miles v. Pennsylvania Coal Co.*, 217 Pa. 449, 66 Atl. 764, relied on by appellant, are authority for a different doctrine. In each of these cases the grant contained either a release of damages for injury to the surface by the removal of all the coal, or provided <sup>395</sup> for the execution of a full and unconditional release and discharge from any liability for damages to the surface. The principle of surface support was recognized in each case, but it was held to have no application because the parties themselves had covenanted for a different rule by waiving the right, which they not only could do, but did in those cases. In the case at bar there is nothing to indicate an intention to waive surface support, and it has always been held that this absolute right is not to be taken away by implication from language which does not necessarily import such a result. Indeed, the present grant contains what amounts to a reservation of the right to surface support, because the grantor in express terms enumerates what surface privileges are to be enjoyed by the grantee, such as sinking air shafts, erecting buildings for a pumping station, and then provides that "such mining operations, however, are not to interfere with the surface of said land." All of which indicate an intention to reserve all surface rights, including sufficient support, not expressly granted.

The only material question involved in this appeal is that which affects the appellee's right to surface support, and we

agree with the learned trial judge in the construction of the deed of conveyance in this respect.

Judgment affirmed.

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*In Case of a Horizontal Division of Land*, the owner of the subjacent estate, coal, or other mineral owes to the superincumbent owner an absolute right of support arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if it is necessary to that end to leave every particle of the mineral untouched under his land: *Noonan v. Pardee*, 200 Pa. 474, 86 Am. St. Rep. 722; *Western Indiana Coal Co. v. Brown*, 36 Ind. App. 44, 114 Am. St. Rep. 367.

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### LYTTLE v. DENNY.

[222 Pa. 395, 71 Atl. 841.]

**INNKEEPERS—Liability of.**—The duty imposed by law upon an innkeeper requires him to furnish safe premises for his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. (p. 815.)

**INNKEEPERS—Liability—Folding-beds—Burden of Proof.**—If the heavy top of a folding-bed in a hotel, without apparent cause, falls forward and down over a guest while he is quietly lying upon the bed, injuring him severely, the burden of proof is upon the innkeeper to show that the bed was in proper condition for use to relieve him from liability. (p. 816.)

**TRIAL—Evidence—Rules of Court.**—Although a rule of court provides for the taking of depositions of ancient, infirm and going witnesses, such witnesses must be shown to be within the meaning of the rule, or that their presence in court cannot be obtained, before their depositions can be admitted. (p. 817.)

Thomas H. Greevy, J. C. Davies and E. G. Brotherton, for the appellant.

M. D. Kittell and H. M. Myers, for the appellee.

**397** **POTTER, J.** From the history of this case it appears that in May, 1903, the plaintiff was a guest at the hotel of the defendant in Johnstown, Pennsylvania. In the room which was assigned to him there was an old style folding-bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in use. The top of the bed was heavy, weighing about three hundred pounds. The plaintiff occupied the bed during the night, and early the next morning as he was about to rise the top or upright portion of the

bed fell forward upon him, crushing his head down upon his breast and inflicting severe injury. To recover damages for the injury thus caused the plaintiff brought this suit against the proprietor of the hotel. Upon the trial at the conclusion of plaintiff's testimony the court entered judgment of compulsory nonsuit, and from the refusal to strike it off the plaintiff has appealed.

The main question raised is as to the liability of an innkeeper to his guests. We find the general rule of law in this respect is thus stated in Beale on Innkeepers and Hotels, sections 162, 163: "The innkeeper is bound to provide reasonably safe premises. . . . Both in original safety of construction and in maintenance the premises must be such as reasonably to secure the safety of the guest. So the innkeeper has been held liable for injury to the guest by the ceiling falling upon him, owing to its defective condition; by the elevator falling with him, after having been negligently inspected, although the innkeeper himself had employed a proper inspector and was not personally negligent; by the breaking of a defective railing by reason of which <sup>398</sup> the guest fell into an area; and by the guest falling off an unguarded stairway."

The authorities are in substantial agreement that while the duty of an innkeeper requires him to take reasonable care of the persons of his guests, he is not to be regarded as an insurer of their safety. His liability has sometimes been declared to be similar to that of a common carrier, but the better opinion seems to be that the degree of care required of an innkeeper is not so great as that which is imposed upon those who carry passengers for hire. In discussing this question in *Clancy v. Barker*, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653. Judge Sanborn says: "While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation, fraught with no extraordinary danger." It may be as-



sumed, then, that the duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. Did the defendant, then, in this case, use such reasonable care in the discharge of this duty to the plaintiff who was his guest? The testimony introduced showed the fact and manner of the accident, but stopped short of pointing out the exact defect in the bed which caused it to fall down upon and entrap the plaintiff. The trial judge thought it was incumbent upon the plaintiff to show in detail just what was wrong with the bed, and the reason for its falling; and because this did not appear from the testimony offered by the plaintiff, judgment of nonsuit was entered. We do not agree <sup>399</sup> with his view in this respect. Bearing in mind the duty of the innkeeper to guard with reasonable care the safety of his guests, proof of the happening of such an extraordinary accident casts the burden of explanation at once upon the defendant. The accident was so far out of the usual course that no fair inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps to close upon and catch the confiding guest. Yet the bed furnished by the defendant to the plaintiff in this case proved to be just such a dangerous trap. Without any apparent cause the heavy head fell forward and down over the plaintiff while he was quietly lying upon the bed, and injured him severely. This could not have occurred had the bed been in proper condition for use. We think the facts bring the case within the rule laid down in *Scott v. London etc. Docks Co.*, 3 Hurl. & C. 596, and often applied by this court, as in *Delahunt v. United Tel. etc. Co.*, 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515, where the principle is stated as follows: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The circumstances under which this accident occurred were certainly such as to call for full explanation by the defendant. The facts indicate a lack of reasonable care upon his part, and it is for him to show why he should be relieved from liability.

Counsel for appellant also complain of the exclusion of certain depositions which were offered in evidence. But it appears that no rule of the lower court authorized the taking of the depositions of the witnesses in question, and they were therefore properly excluded. The rules of the Cambria county court provide for taking the depositions of ancient, infirm and going witnesses, but it was not shown that these witnesses were within this classification, or that their presence in court might not be obtained.

The first, second and third assignments are overruled, but as <sup>400</sup> we deem the facts shown sufficient to take the case to the jury upon the question of the defendant's negligence, the fourth assignment of error is sustained, and the judgment is reversed with a procedendo.

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*The Duties of a Hotel-keeper to His Guests* are similar to the common-law obligation of a common carrier to his passengers: *Clancy v. Barker*, 71 Neb. 83, 115 Am. St. Rep. 559. The general rule governing the liability of an innkeeper, as stated in *Weeks v. McNulty*, 101 Tenn. 495, 70 Am. St. Rep. 693, is that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through his negligence.

*Presumption of Negligence* from the happening of an accident is the subject of a note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986; and the presumption of care is the subject of a note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

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## WALLACE v. PENNSYLVANIA RAILROAD COMPANY.

[222 Pa. 556, 71 Atl. 1086.]

**NEGLIGENCE—Damages for Pain and Suffering.**—In an action to recover for pain and suffering, the jury may and should award compensation for pain and suffering whenever the evidence furnishes just ground for the belief that such pain and suffering will likely or probably ensue. (p. 818.)

**NEGLIGENCE—Damages for Future Pain and Suffering.**—If a passenger on a railroad train has his leg broken and it is set in such a way as to make a second operation necessary, and if such second operation is performed in good faith before the recovery of the patient from the original injury with a view to promote and insure complete recovery, or to mitigate the patient's pain either by correcting what has been done, or by supplementing it, by a surgeon in whose skill and judgment an ordinarily prudent person would have a right to rely, the consequences following the operation and directly resulting therefrom are, in a legal sense, the result of the original accident, and no compensation can be recovered for the future pain and suffering resulting therefrom. (pp. 820, 821.)

O. L. Jackson, C. B. Fernald and C. R. Davis, for the appellant.

R. K. Aiken, for the appellee.

<sup>560</sup> STEWART, J. The evidence fully warrants the conclusion reached by the <sup>561</sup> jury in this case that the injuries sustained by the plaintiff were severe to an unusual degree. Whether they all were legally chargeable to defendant's negligence is a matter to be considered later on. Under instructions of the court the jury were allowed, in determining the plaintiff's damages, to take into consideration the pain and suffering he would probably in the future endure, as a sequence of his injuries, as well as that he had already suffered. This instruction is complained of as introducing an element of damage too remote and speculative to form a basis of legal recovery, and it is the subject of the first assignment of error. Nothing is better settled than that in cases of personal injury pain and suffering are to be reckoned as distinct elements for which compensation is to be allowed. It is equally well settled that this rule admits of compensation for future as well as past pain and suffering. With what degree of certainty must it be made to appear that the future pain and suffering will ensue before compensation for them can be allowed? That is the question raised by the assignment; and it might well call for consideration if no rule existed with respect to it, or the rule were of questionable authority. But neither is the case. In the multitude of cases of like character which have come before this court for review, one unvarying rule has been observed regarding the quantum of proof required, and it is this—the jury may and should award compensation for future pain and suffering whenever the evidence furnishes just ground for the belief that such pain and suffering will likely or probably ensue. This standard has met with the approval and sanction of this court in every case, and that without qualification. It is sufficient to refer to the cases of *Schneider v. Pennsylvania Co.*, 2 Cent. Rep. 74; *McLaughlin v. City of Corry*, 77 Pa. 109, 18 Am. Rep. 432; *Scott Township v. Montgomery*, 95 Pa. 444; *Lake Shore etc. Ry. Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; *Smedley v. Hestonville etc. Ry. Co.*, 184 Pa. 620, 39 Atl. 544. Many others as distinctly recognizing and enforcing the rule could be cited were it necessary. In the case of *Scott Township v. Montgomery*, 95 Pa. 444, an instruction to the effect that the "jury shall allow for pain and suffering the plaintiff had already endured, bodily and mentally,

and which he is likely to experience," <sup>562</sup> was assigned for error. This court held in a per curiam that the measure of damages was correctly stated. In *Lake Shore etc. Ry. Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389, the trial judge in his charge had allowed the jury to consider the pain and suffering "the plaintiff has undergone and may undergo in the future." This was specifically assigned as error. This court, while disapproving of the expression "may undergo," affirmed the judgment on the ground that in the connection in which it was used it could not have been misleading to the jury, in view of the subsequent instruction that recovery was to be limited to "that already experienced and likely yet to be experienced." With such explicit and repeated recognition by our own courts of a rule which admits compensation for pain and suffering likely to ensue, it comes to nothing to show that in some jurisdictions recovery for these is allowed only when it is made to appear that they are reasonably certain to result. We are not called upon to vindicate the justice or reasonableness of the rule which obtains with us; it is only necessary to assert it and express our continued adherence to it. All that is required with us is, that there be sufficient evidence from which the jury may fairly derive the conclusion that the chances that the plaintiff will endure future pain and suffering preponderate over those that he will not. Such preponderance denotes probability or likelihood, and that is sufficient.

The plaintiff, while a passenger, was injured in a collision between two of defendant's trains, sustaining a fracture of both bones of his left limb between the knee and ankle. This occurred September 7, 1905. He was at once removed to a city hospital where he was placed in charge of a physician and surgeon in the employ of the defendant company, who proceeded without delay to place the injured limb in alignment and apply splints. The plaintiff remained in the hospital under treatment for nearly a month when, being able to go about on crutches, he was taken to his home. About the middle of November following, the same surgeon removed the plaster cast and directed moderate use of the limb. Plaintiff testified that after the removal of the cast he suffered pain in his limb so severe that he was scarcely able to endure it. It is not alleged <sup>563</sup> that this pain resulted from any undue or immoderate use of the limb. Because of its continued severity plaintiff procured radiographs to be taken of the injured part, and in view of what these were supposed to disclose, he employed Doctor Swope, a surgeon of repute



residing and practicing in the city of Pittsburg. From an examination of the radiographs and the patient, Doctor Swope concluded that what caused the pain was an overriding of the fibula to the extent of three-fourths of an inch, and that an operation was necessary to make the small bones unite squarely, and thus relieve the pressure upon the vessels and nerves of the foot resulting from the overriding. The operation involved not only an incision, but a severance of the bones which had partially united, the removal of the oblique ends, and the bringing them into a more perfect apposition and securing them in proper place by artificial tendons. This operation was performed by Doctor Swope with the assistance of another surgeon, and in the presence of several, at the same hospital where the patient was first treated. Doctor Swope testified that he found the conditions to be just as the radiographs represented them, and in addition he found the tissues about the place of fracture devitalized, the blood supply having been interfered with by the pressure of the bone. Several months later another operation was required for the removal of a piece of dead bone which resulted from the devitalized tissues. At that time it was observed that the tissues were doing no good, not healing, not throwing off the broken-down processes. Doctor Swope gave it as his conclusion from a very recent examination of the patient, that there had been but little improvement in his condition; that necrosis was still going on, and that another operation would be required for the removal of dead bone. The effort on part of the defendant was to show that the operation performed by Doctor Swope was wholly unnecessary; that plaintiff's limb was in good condition at the time the operation was performed, and that the healing processes were steadily going forward; that if there was any overriding of the bone it was so slight as to be of no consequence, nothing beyond what is ordinarily looked for in such cases, and the necrosis which <sup>564</sup> subsequently set in, and is the admitted cause of plaintiff's present disability and suffering, is due wholly to the operation performed by Doctor Swope. This view of the case was expressed by Doctor Wilson, the surgeon who first treated the plaintiff, and he was fully supported in it by several others called by the defendant. Into this controversy we need not enter. Every point submitted by the defendant which bore relation to it was affirmed by the court with a single exception. Defendant's fourth point was as follows: "If the jury find that the operation of Doctor Swope caused the dead bone, and that this dead bone was

not a sequence or result of the original injury, they should not take this dead bone into account in making up their verdict." In refusing this point the learned trial judge said: "While it is true the plaintiff cannot recover for injuries which were not the sequence of the original injury received in the accident, yet if he exercised care, caution and good judgment in the selection of a skillful and competent surgeon, he has discharged his duty in this respect, and is not responsible for an error in judgment or unskillful treatment on the part of the surgeon who has been selected with care. Where a person has used reasonable care in selecting a physician or surgeon, but owing to the unskillful treatment the injury has been increased, the party causing the injury will be held liable for the latter." Putting it somewhat differently, the point was refused because it did not comprehend sufficient matters of fact to justify the conclusion sought to be drawn; and this was clearly right. If the operation was performed in good faith, before the recovery of the plaintiff from the original injury, with a view to promote and insure complete recovery or mitigate plaintiff's pain, either by correcting what had been done or by supplementing it, by the surgeon in whose skill and judgment the ordinarily prudent person would have a right to rely, the consequences following the operation and resulting directly therefrom are in a legal sense the sequence and result of the original accident. The affirmation of the point would have involved an assumption that there was no evidence from which the jury could find such conditions as those we have indicated, and which, once established, would legally refer the <sup>565</sup> consequence to the accident as the proximate cause. Instead of this being the state of the evidence, there was not only abundant testimony in support of every contention we have above referred to, but there was no attempt whatever on the part of the defendant to controvert it. This testimony, if accredited, established not only a connection between the pain and suffering caused by the presence of the dead bone and the original accident, sufficient in law to make the accident the proximate cause, but it linked the two together in such a way as to make a natural whole. Any consideration of this matter must start with the fact that before the fractured parts had healed, while the process was going on, and after plaintiff had been virtually released from the surgeon's care and supervision, he was subjected to intense pain and suffering in the region of the fracture. If such were not the fact, or if it resulted from something else than the original

injury, defendant should have made some effort to controvert the testimony with respect to it. It is enough in this connection to know that the testimony was undisputed. The natural connection between the pain, if it existed, and the original accident, is too obvious to call for remark. It was just as natural that the plaintiff, in his desire to be released from the pain to which he was subjected, should have recourse to surgical skill and submit to whatever treatment such skill should determine upon. The suffering which followed the treatment, whether that treatment was wise or unwise, is as directly and naturally traceable to the original accident as that which attended the setting of the fractured limb in the first place; both were parts of the connected whole, and of course it is of no consequence that one is further from the beginning of the chain of events than the other. What we have here said applies as well to the fourth assignment, which is the answer of the court to the defendant's fifth point, which asked the court to say, "that defendant is not liable for damages arising from the fault, mistake or negligence of plaintiff's surgeon which produced injury and loss to plaintiff that could under no circumstances have resulted from the injury plaintiff received in the collision." The court affirmed the point, and followed the affirmance with a qualification <sup>566</sup> or explanation which set out the same considerations which led to a refusal of the fourth point. It is the qualification that is assigned for error. Like the point itself it assumes a case where the injury under no circumstances could have resulted from the original accident, and acquits from liability the party causing the accident. It goes on to say, however, that though injury was caused by unskillful treatment, yet, if the plaintiff exercised ordinary care in the selection of the surgeon, the defendant, if liable legally for the original injury, would be liable for the increased injury as well. The point submitted should have been refused for reasons which we have stated in considering the former point; the explanation left the affirmance without advantage to the defendant, but so far as it went it was a correct statement of the law under the facts of the case.

It was entirely proper to allow the witness, Doctor Swope, to state the grounds on which he based his conclusion as to what caused the pain from which the plaintiff suffered, and prevailed with him in determining that an operation was necessary. His conclusions were based largely upon what the radiographs revealed. This circumstance made the ra-

diographs admissible. While, as we have stated, it was not a material inquiry in the case whether the operation was a prejudicial one or not, if made in good faith by one on whose skill the plaintiff had a right to rely, yet it was around this question that the controversy was waged, the defendant insisting that no excuse whatever existed for the operation. Under such circumstances it would have been most unjust to the witness to refuse him permission to show by the radiograph what directed his judgment. He testified that when operating he found the conditions to be just as the pictures represented. In view of this testimony the objection that they were not taken by a professional comes to nothing. The sixth assignment of error for the reasons given cannot be sustained. The remaining assignment complains of the inadequacy of the charge in that it does not sufficiently call the attention of the jury to the evidence on the part of the defendant as to plaintiff's ability to make use of the injured limb—this in connection with the question of <sup>567</sup> compensation. This assignment is without merit. The charge is not only a full and adequate presentation of the evidence, but strictly impartial.

The judgment is affirmed.

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*Future Pain and Suffering, if Reasonably Certain to Occur, form a proper basis for damages in an action for personal injuries: Smith v. Milwaukee B. & E. Exchange, 91 Wis. 360, 51 Am. St. Rep. 912; Heddes v. Chicago etc. Ry. Co., 77 Wis. 228, 20 Am. St. Rep. 106.*

*If an Injured Person Uses Ordinary Care in Selecting a Physician and in the employment of other means to effect a cure, the law regards an injury resulting from the mistake of the physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the original injury: Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 104 Am. St. Rep. 218, and see cases cited in the cross-reference note thereto.*

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## COMMERCIAL NATIONAL BANK v. KIRK.

[222 Pa. 567, 71 Atl. 1085.]

**PENAL LAWS of Another State—Enforcement.**—The courts of one state will not enforce the penal laws of another, in an action brought in the former state, especially when the courts of the state where the statute was enacted have declared such statute to be penal in its nature. (pp. 821, 822.)

O. L. Jackson, Hartman & Hartman and C. R. Davis, for the appellant.

J. N. Martin, for the appellees.



569 ELKIN, J. The appellees were stockholders in and directors of a mining corporation of Montana. Under a statute of that state, it is made the duty of the corporation to make an annual report showing the amount of capital stock authorized, the proportion of the capitalization paid in, and the existing indebtedness, which report is required to be filed in the office of the clerk of the county where the principal place of business is located. In the present case the annual report was not made nor filed as required by the statute. Failure to make and file the report imposes upon the directors a statutory liability to jointly or severally pay the indebtedness of the corporation then existing or any that shall thereafter be contracted until such report shall be made and filed. This suit was instituted in Pennsylvania to enforce against certain of the directors here the collection of an indebtedness of the corporation due the appellant bank in Montana. The right to recover as a personal obligation against directors in this state depends upon the nature of the liability under the Montana statute, which, if penal, must be enforced in that jurisdiction. The earlier cases in most jurisdictions regarded such statutes as penal, and suits upon them as actions for penalties, but the later cases, especially those of the federal courts, which perhaps declare the sounder view of the law, hold that the liability in such cases is contractual in its nature, and 570 such statutes remedial. The leading case declaratory of this doctrine is *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123. We have carefully considered this case and the numerous other cases cited by the learned counsel for appellant, and we agree that the weight of authority sustains the general principle announced, but we are not convinced that it can have controlling force in the decision of the present case under the circumstances. It must not be overlooked that the liability sought to be enforced here arises under a Montana statute, and in the first instance we must look to the law of that state to determine its nature, limitation and extent. If the courts of that state had not passed upon the question involved here, it would then be our duty to consider and decide it according to the general principles of law applicable to such cases. But the supreme court of Montana has passed upon the question in several cases by holding the statute under which the alleged liability in this case arises to be penal, and that its provisions must be strictly construed: *Gaus v. Switzer*, 9 Mont. 408, 24 Pac. 18; *Elkhorn Trading Co. v. Tacoma*

Min. Co., 16 Mont. 322, 40 Pac. 606; Wethey v. Kemper, 17 Mont. 491, 43 Pac. 716; State Savings Bank v. Johnson, 18 Mont. 440, 56 Am. St. Rep. 591, 45 Pac. 662, 33 L. R. A. 552. We do not feel at liberty to disregard these decisions of the Montana courts and must conform our administration of the law to them, and this is true independently of what our views on the question involved might be: Ball v. Anderson, 196 Pa. 86, 79 Am. St. Rep. 693, 46 Atl. 366. This view of the case makes it unnecessary to discuss the question raised as to the necessity of filing an affidavit of defense. If penal no affidavit is required. The argument of the learned counsel for appellant is able and exhaustive, and if presented to us in the first instance, perhaps convincing, but we are bound by the Montana decisions as to the penal character of the statute; and if penal, the disposition of the case by the learned court below was clearly right.

Judgment affirmed.

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*The Personal Liability of Stockholders* is by the generality of authorities regarded as contractual and not penal: Kulp v. Fleming, 65 Ohio St. 321, 87 Am. St. Rep. 611, and cases cited in the cross-reference note thereto. According to Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 862, the liability of stockholders to the creditors of the corporation is not a contract, but a statutory liability to be enforced primarily at the home of the corporation and in the state creating the obligations: See, also, Clark v. Knowles, 187 Mass. 35, 105 Am. St. Rep. 376; Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301.

*The Statutory Liability of Officers of a Corporation* is regarded as contractual by some authorities, and hence actions thereon can be brought in any state: Farr v. Briggs, 72 Vt. 225, 82 Am. St. Rep. 930. Other authorities regard such liability as penal in its nature: See the note to Attrill v. Huntington, 14 Am. St. Rep. 352.

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## COMMONWEALTH v. MACKEY.

[222 Pa. 613, 72 Atl. 250.]

### **COLLATERAL INHERITANCE TAXES—Illegitimate Children.**

Under an act regulating and defining the legal relations of an illegitimate child or children, its or their heirs with each other, and the mother and her heirs, and making such child or children as legitimate as to her as if born in lawful wedlock, the expressed intention of the act to be to legitimate an illegitimate child and its heirs as to its mother and her heirs, an illegitimate child inheriting property from her mother is under no liability to pay a collateral inheritance tax thereon. (p. 827.)

**COLLATERAL INHERITANCE TAXES—Illegitimate Children.**—A statute regulating and defining the legal relations of an

illegitimate child or children, its or their heirs, with each other and the mother and her heirs, and making such child or children as legitimate as to her as if born in lawful wedlock, the expressed intention of the legislature being to legitimate an illegitimate child and its heirs as to its mother and her heirs, gives sufficient notice of exemption from a collateral inheritance tax of estates passing from mothers to their illegitimate children. (pp. 828, 829.)

T. H. Greer, J. B. Greer and J. M. Greer, for the appellant.

W. D. Brandon and A. E. Reiber, for the appellee.

<sup>614</sup> BROWN, J. Sarah Mackey died June 4, 1902, the owner of real estate which she devised to the appellee, her natural son. The commonwealth's claim to collateral inheritance tax upon this devise <sup>615</sup> is based upon the act of May 6, 1887 (Pub. Laws, 79), which imposes such tax upon all estates passing under the intestate laws or by devise to any person or persons "other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife, or widow of the son of the person dying seised or possessed thereof." The appellee was not born in lawful wedlock, and but for subsequent legislation removing from him the taint of illegitimacy as to his mother, the commonwealth would take from her devise to him, as from one to a stranger to her blood, the tax imposed by the statute.

A child born out of lawful wedlock may not know its father, but always knows its mother, and instead of the harsh rule of the common law, denying it the right to inherit, and recognizing only such rights as it can acquire, our statutes have humanely given it inheritable blood from the mother. For more than fifty years an illegitimate child and its mother have had capacity to take or inherit from each other. Recent legislation has gone still farther, and, by the act of July 10, 1901 (Pub. Laws, 639), entitled: "An act to regulate and define the legal relations of an illegitimate child, or children, its or their heirs, with each other and the mother and her heirs," it is provided that illegitimate children shall take and be known by the name of their mother and the common-law doctrine of nullius filius shall not apply as between the mother and her illegitimate child or children; that the mother and her heirs, and her illegitimate child and its heirs, shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner and to the same extent as if the said child or children had been born in lawful wedlock; that the mother

of an illegitimate child, her heirs and legal representatives, and said illegitimate child or children, its or their heirs and legal representatives, shall have capacity to take or inherit from or through each other personal estate, as next of kin, and real estate as heirs in fee simple, or otherwise, under the intestate laws of this commonwealth in the same manner and to the same extent, subject to the distinction of half-bloods, as if said child or children had been born in lawful wedlock; and the expressed <sup>616</sup> intention of the legislature is to legitimate an illegitimate child and its heirs as to its mother and her heirs.

One of the rights of a child born in lawful wedlock is to inherit property from its mother or to take a bequest or devise from her free from any collateral inheritance tax, and all the rights and privileges of such a child are expressly given by the act of 1901 to a child whose mother was never wedded to its father. Not only are all the rights and privileges of a child born in lawful wedlock conferred upon an illegitimate child, as between it and its mother, but these rights and privileges are to be enjoyed "in the same manner and to the same extent, as if the illegitimate child had been born in lawful wedlock." If from the devise to this appellee the commonwealth may take five per cent of its appraised value, will he take it as he would take it if he had been born to his mother in lawful wedlock? Will his right to it be the same? Will he be permitted to exercise one of the rights and privileges of a child born in lawful wedlock "in the same manner and to the same extent" as if he had been so born? But one answer can be made to these questions. By the act of 1855 an illegitimate child could inherit from its mother, subject to the payment of collateral inheritance tax, and the act of 1901 was not needed to give it that right. The expressed purpose of the act is to legitimate an illegitimate child as to its mother, and, as a proper, logical and humane incident to such legitimation, to confer upon such child every right and privilege enjoyed by a child born to wedded parents. Its terms are so free from ambiguity and doubt, and the intention of the legislature is so clearly expressed, that we need not notice the authorities cited by counsel for appellee, that a law imposing taxes like this is to be construed in favor of the subject.

The view we have expressed as to the effect of the act of 1901 upon the commonwealth's claim to a tax upon the devise to the appellee was entertained by our predecessors in *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198, when



a special act of assembly was before the court legitimating children and conferring upon them all the rights and privileges of children born in lawful wedlock. The defendants in error in that case, George <sup>617</sup> Humphrey Stump and Abraham Harrison Stump, were two sons of Jane Pearson, who had been the housekeeper of their reputed father, Abraham Stump. Some time after their birth their mother and reputed father were married. He died in May, 1853, and by his will, executed in the preceding month, devised and bequeathed all of his estate, except two small legacies, to his wife and the above-named two sons. By his marriage to their mother they were not legitimated, for no statute up to that time had so provided. On April 28, 1854, about a year after the father's death, an act of assembly was passed, conferring upon the said George Humphrey Stump and Abraham Harrison Stump, "the illegitimate sons and only children of Abraham Stump and Jane, his wife, of the township of St. Thomas, in the county of Franklin, who were born before the marriage of their said named parents, all the rights, privileges, benefits and advantages of legitimate children," and rendering them "capable in law to inherit and transmit any estate whatever as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock." These words are no more comprehensive than those of the act of 1901. The claim made by the commonwealth for collateral inheritance tax upon the devise to the two sons by their father was allowed, because at the time it took effect they were illegitimate children and not within the exempting clause of the collateral inheritance tax act of April 7, 1826, which was then in force. But, in allowing the claim of the commonwealth, Woodward, C. J., said: "The act of assembly removed the taint from their blood for all ordinary purposes, but not so as to exempt their estate from the collateral inheritance law, which in terms includes lineal descendants not born in lawful wedlock, as well as collateral heirs or devisees. Had the legitimating act been passed before the devise took effect, the devisees would, I take it, have held the estate exempt from the collateral inheritance law, for they would have been as capable in law of taking as if they had been born in lawful wedlock, but their estate vested at the death of the testator, which was in May, 1853, and if illegitimate then, the commonwealth's right to the tax vested then also."

<sup>618</sup> Objection is made that the title to the act of 1901 gives no notice of exemption from collateral inheritance tax of estates passing from mothers to their children legitimated by

it. This exemption, as was properly held by the learned judge below, is the result of the act, and the constitutional requirement is not that the title must set forth what will legally and logically follow as a consequence of the proposed legislation. The title to the act of 1901 gave notice that it was for the purpose of regulating and defining the legal relations between an illegitimate child and its mother. The words used in declaring what these relations now are would be meaningless if they did not carry with them the exemption which the commonwealth would deny to the appellee.

Judgment affirmed.

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*The Taxation of Inheritances* is the subject of a note to Crenshaw v. English, 127 Am. St. Rep. 1035.

**CASES**  
IN THE  
**SUPREME COURT**  
OF  
**SOUTH CAROLINA.**

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**MAN v. BOYKIN.**

[79 S. C. 1, 60 S. E. 17.]

**CORPORATIONS—Increase in Capital Stock.**—If corporations are permitted by law to increase their capital stock, mere irregularities will not invalidate the increased issue. (p. 831.)

**CORPORATIONS—Transfer of Stock.**—Under a statute providing that no transfer of corporate stock shall be valid, except as between the parties, until it shall have been regularly made and entered upon the books of the corporation, such books must show the date of surrender, the number of the new certificate and the date of reissue, or at least something to show a proper transfer, and if this is not done, the original holder of the stock is liable to a creditor of the bank, but has an action against the transferee for reimbursement. (pp. 832, 833.)

**CONSTITUTIONAL LAW—Effect on Corporate Charters.**—If a constitution provides that it shall apply only to corporate charters or grants of corporate franchises under which organization has not in good faith taken place at the time of the adoption of such constitution, it does not affect in any way charters previously granted in good faith. (p. 835.)

**CORPORATIONS—Insolvency—Stockholders.**—If a bank is insolvent, judgment should be entered for their full liability against the stockholders, and such assessments should be made from time to time as are found to be necessary. (p. 835.)

Smith & Kirkland, for the plaintiff-appellant.

Buist & Buist, for the Carolina Savings Bank.

Simons, Seigling & Cappelman, Burke & Grekman, Nathans & Sinkler and W. Austin, for certain stockholders, appellants.

Lee & Moise, for certain transferee stockholders, appellants.

<sup>3</sup> POPE, C. J. This action, begun in September, 1904, by the plaintiff, Nellie C. Man, on her own behalf and for other creditors who might come in and share the expenses of the suit, grew out of the failure of the Farmers' and Merchants' Bank of Camden, South Carolina. All issues <sup>4</sup> of law and fact were referred to L. A. Wittkowsky, master for Kershaw county. To his report, filed on September 12, 1905, numerous exceptions were taken by certain of the defendants. The report having been modified by the circuit court, the plaintiff and several of the defendants appealed to this court.

As it was said by the circuit court, the report of the master is full, clear and comprehensive. In no particular have we been able to find any material error of fact. His conclusions of law, too, are generally well supported; therefore our consideration of the questions raised will be brief.

Numerous exceptions question the validity of a certain issue of stock. It appears that the bank in question was chartered on December 23, 1891, with a capital stock of thirty thousand dollars. From January 31 to February 28, inclusive, 1893, notice was regularly published as required by the act of 1886 (19 Stats. 542), calling for a meeting of the stockholders on March 2, 1893, to vote upon a resolution for increasing the capital stock from thirty to fifty thousand dollars. The evidence tended to show that the meeting was held accordingly and that the stock was duly increased. No certificate, however, was filed with the Secretary of State. For that reason the defendants seek to have the new stock declared invalid. We do not deem it necessary to go into the statute law of the state on the subject. The authorities are practically unanimous in holding that where corporations are permitted by law to increase their capital stock mere irregularities will not invalidate the increased issue. The stock is a nullity only where there is absolutely no power to increase: Cook on Corporations, 5th ed., 288; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; 26 Am. & Eng. Ency. of Law, 852; Handley v. Stulz, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. ed. 227; Veeder v. Mudgett, 95 N. Y. 295. In the case here under consideration, a large part of the increased stock was purchased by the original corporators and dividends were paid on it; the certificates of stock showed the capital of the corporation to be fifty thousand dollars, and for a <sup>5</sup> period of about ten years the institution published itself to the world as having a capital of that amount. Certainly, therefore, the stockholders were estopped from denying their



liability. It is objected, however, that a two-thirds vote of the stockholders for an increase of stock was not shown, and this being essential to its validity there was no increase. This contention cannot be sustained. In such cases there is always a presumption in favor of regularity. Here the presumption is especially strong. The duty, therefore, devolved upon the stockholders to rebut it. They having failed to do so, we must hold the increase properly voted.

The question next arises as to what is a proper transfer of stock. Section 1894 of the Code of Laws of 1902, volume 1, provides: "No transfers of stock shall be valid except as between the parties thereto until the same shall have been regularly entered upon the books of the corporation." The Farmers' and Merchants' Bank kept no regular stock ledger, but only a scrip or stock book which contained certificates of stock and stubs for making entries and transfers, the following being a copy of a blank stub of said stock-book.

No. ....	.....
.....	shares
Issued to .....	.....
of .....	.....
Date .....	.....
Received the above-described certificates	.....
.....	.....
.....	189.....
Surrendered .....	189.....
New Certificate No. ....	.....
Issued .....	189.....

Therefore for a transfer of stock to be regularly entered upon the books of the Farmers' and Merchants' Bank, the date of surrender, the number of the new certificate, and the date of the reissue must appear, or at least something <sup>6</sup> to show a proper transfer. There can be no doubt in the present case that no such transfer was made.

The question, therefore, is whether the original stockholders are liable under the statute. This point we think can no longer admit of doubt in this state. In the case of *White v. Commercial & Farmers' Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94, the statute here under consideration was discussed and construed. One of the defendants, E. B. Mobley, in that case set up the same plea that the Carolina Savings Bank and several other defendants set up here, namely, that he had done all a careful and prudent man could do to effect a transfer on the books of the bank. The

court, however, denied this, holding that Mr. Mobley could by process of law have compelled the transfer on the books. This holding seems to be consistent with the overwhelming weight of authority.

Thus in the case of *Young v. McKay*, 50 Fed. 394, it is said: "As a general rule, deducible from all of the authorities bearing directly upon the question under consideration, it may be safely stated that, in all cases between the creditors of a bank and the person standing on the books of the bank as a shareholder, the person who allows his name to remain on the books of the bank as a shareholder is estopped from denying that he is a shareholder, and that his individual liability to the creditors continues after he has made a bona fide sale of his stock until the transfer of the stock is entered on the books of the bank, and that such transfer cannot be made, as against creditors, after the bank is known to be insolvent." The same principle is recognized in the following cases: *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601; *Shellington v. Howland*, 53 N. Y. 371; *Cutting v. Damerel*, 23 Hun. 339; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Conant v. Reed*, 1 Ohio St. 298; *Stewart v. Walla Walla P. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605; *Weston v. Bear River etc. Min. Co.*, 5 Cal. 186, 63 Am. Dec. 117.

An apparently dissenting view is that of *Whitney v. Butler*, 118 U. S. 665, 50 Fed. 394, 7 Sup. Ct. Rep. 61, 30 L. ed. 266, followed by the case of *Young v. McKay*, 50 Fed. 394, 7 Sup. Ct. Rep. 61, 30 L. ed. 266, in which it was held that where the transferrer<sup>7</sup> had delivered the certificates to the bank with the request that the transfer be made on the books of the bank, he had done all that could be expected of him, and, therefore, would be relieved from liability.

Both on reason and authority we prefer to follow our own decisions. The statute provides that the transfer shall be "regularly entered" on the books of the corporation. The meaning is so clear that any other construction than that put upon it in the case of *White v. Commercial & Farmers' Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94, would seem to be a violation of the plain intention of the law-making power of the state. Certainly it would be going a long way for this court to conclude that body did not mean what it said and thus relieve transferrers from liability, to the injury, perhaps, of unsuspecting creditors.

The assignor, however, has his remedy. It is well settled that between him and his assignee the transfer is valid, even

though not entered upon the corporation books. The contract as to them is complete. Therefore, in order to adjust all the equities of the case, it is necessary to hold that the transferrer has a right to recover from the transferee any amount he is compelled to contribute by reason of his name appearing upon the books of the corporation after the transfer has been made. As was said in the case of *Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891: "The object of sale of the stock must have been to denude himself (the transferrer) of all interest in it, and to transfer it to the purchaser. Henceforth all of the advantages arising from the ownership were to accrue to the purchaser, and all burdens arising therefrom were to be borne by him. It is simply impossible to suppose that, in making the contract of sale, the parties intended that the seller would pay future assessments for the benefit of the purchaser. It would be just as reasonable to infer that he was to receive any future dividends which might be declared. If, then, the seller was compelled by legal proceedings to pay assessments properly chargeable to the ownership of the stock, he paid them for the benefit of the purchaser, and, *ex aequo et bono*, he ought to be reimbursed." <sup>8</sup> Other cases to the same effect are *Bailey v. Shroyer* (Pa.), 1 Atl. 717; *Johnson v. Underhill*, 52 N. Y. 203; *Gordon v. Parker*, 10 La. 56; *Kellogg v. Stockwell*, 75 Ill. 68. This is likewise the English rule: *Evans v. Wood*, 5 Eq. Cas. 9; *Paine v. Hutchinson*, [1867-68] L. R. 3 App. Cas. 388; *Crissell v. Britstone*, 3 C. D. 112; *Hawkins v. Matby*, 4 App. Cas. 200. Its equity is too apparent to require comment.

It is further contended that the liability of the stockholders is governed by the constitution of 1895, and, therefore, only the claims of depositors should be paid. This position must be overruled. The constitution itself provides (section 16, article 9) that it shall apply only to charters or grants of corporate franchise, under which organizations have not in good faith taken place at the adoption of this constitution. In other words, the constitution was not to be retroactive. It was not intended to affect in any way charters previously granted in good faith. In the case of *Lauraglen Mills v. Ruff*, 52 S. C. 448, 30 S. E. 587, the court held that in order to make charters in existence at the time of the adoption of the constitution of 1895 subject to its provisions, it was necessary that there should be legislation to that effect. We think it was not intended that the case of *Newton Cotton Mills v. Springs*, 56 S. C. 534, 35 S. E. 222, should convey the

inference that the court was of the opinion that the provisions of the constitution of 1895 did apply to banks chartered prior to that time. On the contrary, the language seems to indicate merely that the difference between the law as to banks prior to and subsequent to the constitution had not been pointed out. If the Farmers' and Merchants' Bank had surrendered its charter and obtained one under the new constitution, or if there had been some legislative act making banks chartered prior to 1895 subject to the constitutional provisions, the contention of the defendants might be sustained. But in the absence of such action we must hold the constitution of 1895 inapplicable.

<sup>9</sup> The only other question which we will consider has reference to the proper amount of the judgments found against the stockholders. Certain of the defendants contend that the report of the master shows that judgments for the ultimate liability of the stockholders will be much more than sufficient to pay all the creditors of the bank, and that, therefore, the master should be compelled to estimate the amount necessary, which amount should be prorated among the stockholders and judgment entered accordingly. From the very nature of the case such a method would be highly impracticable. The method sanctioned by reason, and we believe sustained by authority, is that suggested by the circuit judge, namely, that judgment for the full liability be entered against the stockholders and that such assessments be made from time to time as are found to be necessary. It can be readily seen that no harm to either side can result from this method. The entire winding up of the affairs of the bank is, practically speaking, in the hands of the court, and it will so exercise its power as to preserve harmless the rights of all parties.

All other questions raised are overruled and the judgment of the circuit court thereon is affirmed.

It is the judgment of this court that the judgment of the circuit court be modified as herein indicated.

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*An Increase in the Capital Stock* of a corporation is a fundamental change in its affairs, which can be accomplished only by a substantial compliance with the law therefor providing: *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Theis v. Dun*, 125 Wis. 651, 110 Am. St. Rep. 880; *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228; *Navajo Min. etc. Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 176.

*A Transfer of Stock may be Accomplished* as between the parties without an entry on the corporate books: *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115. See, too, *White River*



Sav. Bank v. Capital Sav. Bank etc. Co., 77 Vt. 123, 107 Am. St. Rep. 754; Lipsecomb v. Condon, 56 W. Va. 416, 107 Am. St. Rep. 938; Westminster Nat. Bank v. New England Elec. Works, 73 N. H. 465, 111 Am. St. Rep. 637. But creditors of an insolvent corporation are ordinarily entitled to hold him liable as a stockholder who appears to be such on the books: Sherwood v. Illinois etc. Sav. Bank, 195 Ill. 112, 88 Am. St. Rep. 183; Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17.

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## STATE v. BROOKS.

[79 S. C. 144, 60 S. E. 518.]

**HOMICIDE.**—Evidence of Previous Quarrels, ill-feeling, or hostile acts between the parties is admissible to show the animus probably existing between them at the time of the homicide. (p. 837.)

**HOMICIDE, Justifiable—Duty to Retreat.**—If a person is forbidden by an owner to enter premises, but he does enter, the owner is justified in using sufficient force to expel him, and he may repel force by force in the defense of his person, habitation, or property against one who manifestly intends and endeavors by violence to commit a felony on either. In such case he is not bound to retreat, but may pursue his adversary until he has secured himself from danger, and if he kills his adversary it is excusable homicide. (pp. 838, 839.)

**HOMICIDE—Duty to Retreat.**—One within the curtilage of his dwelling is in fact and in law within his dwelling, and is not bound to retreat before the violent assault of a trespasser. (p. 840.)

Townsend & Hamer, for the appellant.

J. M. Spears, for the appellee.

<sup>145</sup> JONES, J. The defendant, Oscar Brooks, charged with the murder of Harrison Alford, in Marlboro county, March 4, 1906, was found guilty, with recommendation to mercy, and received sentence of life imprisonment.

The difficulty had its origin in a controversy as to the custody of Etta Brooks. This girl, who was about nine years old, was the daughter of the defendant by his first wife, Molly Alford. Defendant moved to Georgia and his wife died there. About two years later, when Etta was about three years old, she was taken charge of by Helen Alford, her grandmother, and reared as one of her family. The deceased was a son of Helen Alford and lived with her. In January, 1904, defendant returned to Marlboro county and later married a daughter of Helen Alford, a half-sister of his first wife, and for some time lived in her home. While living at this place, defendant expressed an intention to take Etta with him when he moved, and testimony was admitted,

over objection by defendant's counsel, to show that there was an altercation between defendant and Helen Alford about it, during which defendant struck Helen Alford, and that some days later the subject came up again and defendant cursed the oldest daughter of Helen Alford, whereupon the deceased, who was present, jerked defendant down and got on top of him and was pulled off by some member of the family. The defendant then threatened to kill Harrison.

<sup>146</sup> Exception 8 assigns error in the admission of this testimony as to difficulties occurring eight months before the homicide and in thus impeaching the character of the defendant by showing specific acts of violence when his character was not put in issue. The evidence was properly admitted under the well-settled rules admitting evidence of previous quarrels, ill-feeling or hostile acts between the parties, to show the animus probably existing between them at the time of the homicide: *State v. Adams*, 68 S. C. 421, 47 S. E. 676; *State v. Emerson*, 78 S. C. 83, 58 S. E. 974.

One Sunday evening, March, 1906, Etta was accompanying the defendant to his home, at the command of defendant, according to Etta's statement, but at her own request according to the defendant's version, and they stopped at the home of Willie Johnson, about two hundred yards from the house of defendant, to which he had moved after leaving Helen Alford's. The deceased and two others, after calling at the house of the defendant and not finding him there, went to Johnson's house. Harrison, standing with knife in hand, addressed defendant, who was sitting down, asked why he had brought Etta off up there, to which defendant replied that he had not done so. The deceased declared that he had done so and that he would carry Etta back home that night. The defendant, fearing trouble and as a pretext for getting away, asked for a drink of water and stepped out of the door and ran to his home, leaving his wife and Etta at Johnson's. The defendant was soon heard to call for his wife and Etta to come home, and was heard cutting wood. Johnson testified that deceased declared: "I came after Etta." "I am going to carry her home to-night or Oscar Brooks will kill me or I will kill him." Defendant declared to Evander McClellan and Henry Sports before deceased (who was approaching) arrived, "I want you to bear witness that if Harrison Alford comes in my yard to-night there will be bloodshed, for I am going to forbid him coming in." When they reached the entrance to the yard

of defendant's dwelling, defendant ordered deceased and his <sup>147</sup> two companions, Coot Turner and Henry McDowell, not to enter. Defendant was then standing at his woodpile, near his dwelling, with ax in hand, with which he had been cutting wood. Deceased's two companions stopped and advised him not to enter, but deceased went on in, declaring that he would go where he damned pleased, further saying, "I will go in you yet, old man." The deceased went around by the pump and after pumping once or twice he continued around toward the doorsteps, near which the defendant was then standing.

State witness, Evander McDowell, testified: "Harrison continued on around and got something near the doorstep and Mr. Brooks. . . . Harrison was venturing on toward Mr. Brooks and Mr. Brooks said, 'Stand off; if you do not I will hurt you.' " That the parties cursed each other and about that time Brooks struck Alford with the ax. Defendant testified that he was going toward his door intending to get in the house first, that deceased came on him cutting at him with a knife when he struck with the ax to save his own life. No other witness testified to seeing any knife in deceased's hand at the time of the fatal blow. There was testimony that deceased put his knife in his pocket before entering the yard and that his knife was found closed in his pocket after his death, about two days later. There was also testimony that Evander McDowell and Henry Sports, state witnesses, who testified that they saw no knife in deceased's hands, declared before the trial that deceased was cutting at defendant with a knife when defendant struck him with the ax. All the witnesses agree that the fatal blow was struck within the yard of defendant's dwelling and within a few feet of his doorsteps, at night, after warning not to enter the yard and not to come on defendant. The deceased was younger, heavier and stouter than defendant.

The defendant sought to excuse the homicide on the ground of self-defense and defense of his dwelling.

Judge Gage charged all the requests presented by defendant's counsel on the law of self-defense except the following <sup>148</sup> request, the refusal of which is the ground of appellant's main contention: "3. When a trespasser enters upon the premises or land of a party, it is his duty to gently lay his hands upon him and bid him leave, and if he refuses he is justified in using sufficient force to expel him. But the dwelling-house of a man, where he lives, is his home, or

castle, and he may repel force by force in the defense of his person, habitation or property, against one who manifestly intends and endeavors by violence to commit a felony or either; and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills his adversary, it is excusable homicide."

In response to this request the court said: "Now, you have heard, in the argument of counsel and in the requests to charge, another defense, called the defense of the castle. That law is this: It is a law which requires a man to defend his own home—or, more accurately, his own dwelling-house. If a man is in his dwelling-house, and another man offers to break into it by force, the man in the house has the right to keep him out, even to the extent of killing him. But that belongs to the man's dwelling-house; it does not belong to his yard; and, under the testimony of the case here, that doctrine has no application. And even in a man's house, if a person enters, if he enters without violence, and is in, it was decided one hundred years ago, in this state, that the occupant of the house could use only such force as was necessary to put him out; and his unlawful presence without violence would not justify an occupant of the house in killing him to get him out. He can kill him to keep him from coming in there. If he is in peaceably, he can use only such force as is necessary to put him out. As I have told you, the doctrine of the castle has no application in this case because it is not claimed that the killing was done in the dwelling-house."

We think it was harmful error to refuse the instruction. The court, neither in response to this request nor in any <sup>149</sup> other portion of his charge, instructed the jury as to the right of defendant to defend himself without retreating against a violent assault of a trespasser within his dwelling-house yard, but, on the contrary, the case was submitted to the jury under the rules ordinarily governing the law of self-defense, including the duty of defendant to retreat, if there be a probable means of escape.

For the purpose of this question, only, we must assume as a possible theory of the case that the deceased was struck while assaulting defendant with a knife, for such was the testimony of defendant.

In the case of *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. Rep. 962, 39 L. ed. 1086, after a review of numer-



ous authorities, the court held that a person on his premises outside his home, in his orchard lot fifty or sixty yards from his dwelling, if assaulted by another with a deadly weapon, is not bound to retreat, but may stand his ground and meet such attack even to the killing of his assailant, if in other respects he brings himself within the ordinary rules of self-defense. The court quotes, among other authorities, from East's Pleas of the Crown, 271, Foster's Crown Cases, 273, 2 Wharton's Criminal Law, paragraph 1019, language substantially the same as the second sentence of the request which was refused.

In *State v. Bodie*, 33 S. C. 117, 11 S. E. 624, the court recognized as correct instructions to the jury substantially in accordance with appellant's request in this case.

The case of *State v. Rochester*, 72 S. C. 194, 51 S. E. 658, holds that one on his land, adjoining a public road, if assaulted by another who is on such road, is bound to retreat before taking the life of his adversary, if there is probability of his being able to escape without losing his life or suffering grievous bodily harm. The court declares the reason of this distinction to be that, under the circumstances, he would not have the right to eject his adversary from the place where he had a right to be. In the case at bar the deceased was a trespasser and the defendant had a right to eject him.

<sup>150</sup> If one on his own premises, not a part of his habitation precincts, is not bound to retreat before the violent assault of a trespasser, for a greater reason one within the curtilage of his home is not bound to retreat.

There is much reason and authority for holding that one within the curtilage of his dwelling is in fact and law within his dwelling: *Lee v. State*, 92 Ala. 15, 25 Am. St. Rep. 17, 9 South. 207; *State v. Bartmess*, 33 Or. 110, 54 Pac. 167; note to *State v. Sumner*, 74 Am. St. Rep. 739; 25 Ency. of Law, 278.

We do not regard it important to consider at length any of the remaining exceptions to the charge as to self-defense and manslaughter. Considering the charge as a whole, the law declared as to manslaughter and as to self-defense, except in the particular above discussed, was free from error.

For the error indicated, the judgment of the circuit court is reversed and the case is remanded for a new trial.

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*The Law of Self-defense* is considered at length in the notes to *State v. Sumner*, 74 Am. St. Rep. 717; *State v. Gordon*, 109 Am. St. Rep. 804. A property owner may use all reasonable and necessary force to

resist a trespass upon his premises: *Hannabalsen v. Sessions*, 116 Iowa, 457, 93 Am. St. Rep. 250, and note; *Taylor v. State*, 47 Tex. Cr. 122, 122 Am. St. Rep. 675; *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61; but he must not go to the extent of taking life: *Utterback v. Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 328.

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### COLEMAN v. WHITTLE.

[79 S. C. 212, 60 S. E. 523.]

**DEEDS—Dower—Fraud—Abatement of Price.**—If a vendee knows when he accepts a deed from a husband without his wife's dower right renounced, and gives a bond and mortgage for the balance of the purchase price, that the dower right is outstanding, it is immaterial that he has previously been led to believe that such wife was the owner, nor is it such a fraud or estoppel as to entitle him, in an action to foreclose, to an abatement of the price for the outstanding dower right. (p. 843.)

**DEEDS—Dower—Fraud—Abatement of Price.**—If the vendee accepts the deed of a husband with covenants of warranty, without his wife's dower renounced, and gives a bond and mortgage with full knowledge of the facts, he must be presumed to have waived his rights to have the dower renounced and to have chosen to rest upon the warranty, and he cannot recover damages or have abatement of the purchase price because of such outstanding encumbrance until he has extinguished it or been thereby evicted, unless for fraud. (p. 844.)

B. T. Rice and R. C. Hallman, for the appellant.

The Hendersons, for the appellee.

**213 JONES, J.** The complaint in this action contained the usual allegations for foreclosure of a mortgage, securing a bond, executed by defendant to plaintiff on certain lands in Barnwell county. The answer, without denying any of the allegations of the complaint, allege that the lands in question were conveyed to defendant by plaintiff and that the bond and mortgage were given to secure the purchase money thereof, in pursuance of a previous agreement made by the defendant through and by his wife, Mrs. Coleman, acting as his duly authorized agent, wherein plaintiff agreed to execute to defendant a good and perfect title to the premises free of encumbrances; that at the time of executing the deed the premises were not free from all encumbrances but were subject to the inchoate right of the dower of plaintiff's wife, and that plaintiff, in violation of his agreement, has refused to free said premises of such encumbrance, and

defendant prayed that in event such encumbrance be not removed defendant have credit on the purchase price for the value of the inchoate right of dower.

Judge Hydrick announced that he would sustain the demurrer under the authority of *Childs v. Alexander*, 22 S. C. 169, and *Lesly v. Bowie*, 27 S. C. 193, 3 S. E. 199, but at defendant's request suspended formal judgment to give him opportunity to move to amend his answer by alleging fraud on the part of the plaintiff and his wife in imposing upon him a defective title. Accordingly defendant moved to amend answer by adding the following allegations:

"Eighth. That Mrs. W. M. Coleman, wife of the plaintiff, ought not to be admitted to say that she has any claim, right or interest of any kind or nature in the lands conveyed by plaintiff to the defendant, for the reason that all the negotiations leading up to the consummation of the purchase of said lands by the defendant from the plaintiff was transacted entirely with the wife of W. M. Coleman; and this<sup>214</sup> defendant was induced by Mrs. Coleman, wife of the plaintiff, to consent to purchase said lands, the said Mrs. Coleman, by her letters addressed to defendant, saying that she would sell said lands to the defendant, using the words in her said letters to defendant, 'I would not require heavy cash payment,' and such like terms, causing defendant to believe at the time that the title to the said lands was vested in her; and the defendant was induced, by the conduct and representations of said Mrs. W. M. Coleman, wife of plaintiff, to enter into the agreement with the plaintiff for the purchase of said lands, and the defendant alleges that he relied upon the conduct and representations of Mrs. W. M. Coleman in purchasing said lands from the plaintiff as to the title of the same, and defendant alleges that the said plaintiff and his said wife are attempting to defraud him to the extent of the value of the right of dower existing in the said wife of the plaintiff.

"Ninth. That Mrs. W. M. Coleman is a necessary party to this action in order that her outstanding right of dower may be determined in this proceeding, as the same is a cloud on the title of defendant and prejudices the marketable value of same."

Judge Hydrick, after hearing the motion to amend, made decree formally overruling the demurrer, refusing the motion to amend and granting foreclosure as prayed for in the complaint.

Exception is taken to the ruling of Judge Hydrick that the proposed amendment did not set out facts from which might be inferred such fraud or equitable estoppel as would vindicate the following remarks in the decree:

“It is not alleged that defendant was misled, or that there was any misrepresentation or concealment of any fact with regard to the dower. He does allege that he was led to believe that Mrs. Coleman was the owner and that she would give him a perfect title to the land. If she were now claiming an interest in the land, proof of that allegation might avail the defendant; but she is not claiming any interest in the <sup>215</sup> land. In fact, there is no allegation or pretense that she claims any interest in the land. Admitting that defendant was misled into believing that Mrs. Coleman was the owner of the land, and that she was the person with whom he was dealing and from whom he was to get the titles, was he not fully informed of the truth, on the 14th of September, 1905, when he entered into the written contract with the plaintiff for the purchase of the land? If he believed, up to that time, that Mrs. Coleman owned the land, he was certainly informed then, by the terms of the contract, that Mr. Coleman was the owner. By the terms of the contract, he had two weeks to investigate. After that investigation, which he is presumed to have made, he accepted a deed from Mr. Coleman alone and gave him the bond and mortgage for the balance of the purchase money. Indeed, I do not understand defendant's allegation to be that he believed, at the time that he made the contract of purchase or at the time he accepted the deed and gave the bond and mortgage, that Mrs. Coleman was the owner of the land. If he thought so, surely he would not have accepted a deed from the husband. What he had previously been led to believe about the matter is not material, for he was, at that time and before he had taken any steps by which he could be prejudiced, informed of the truth. He knew that plaintiff was the owner and that he had a wife, and, therefore, he knew that his wife had an inchoate right of dower in the land. There is no allegation of any misrepresentation or concealment of any fact as to the dower or as to the relation of husband and wife between Mr. and Mrs. Coleman.

“It is alleged that they promised to make him a perfect title. A promise unperformed is not, ordinarily, a ground of relief on the score of fraud or estoppel: 11 Am. & Eng. Ency. of Law, 2d ed., 425.



"The defendant had it in his power under the terms of his contract to enforce the performance of the promise to give him a perfect title. For, under *Payne v. Melton*, 69 S. C. 370, 48 S. E. 277, he could have compelled specific performance, <sup>216</sup> notwithstanding the refusal of Mrs. Coleman to renounce her dower, and he would have been protected against it by being allowed to withhold its value from the purchase money.

"It is not alleged that, at the time he accepted the deed and gave the bond and mortgage, he did not know that the dower had not been renounced on the deed. Without allegation to the contrary, it must be presumed that he knew it. By accepting the deed, without the dower renounced, and giving the bond and mortgage, with full knowledge of the facts, he must be presumed to have waived his rights to have the dower renounced, and to have chosen to rest upon the warranty in the deed: *Mitchell v. Pinckney*, 13 S. C. 203. It was admitted at the hearing by the defendant's counsel that the deed contains full covenants of warranty."

In proceedings to enforce an executory contract for the sale of land, abatement may be had in the purchase price to the extent of the value of an inchoate right of dower: *Payne v. Melton*, 69 S. E. 370, 48 S. E. 277; *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665. But where the contract is executed and the vendee has accepted a deed with general covenant of warranty, the vendee cannot recover damages or have abatement of the purchase price because of an outstanding encumbrance until he has extinguished it or been thereby evicted, unless by fraud: *Childs v. Alexander*, 22 S. C. 169; *Lesly v. Bowie*, 27 S. C. 193, 3 S. E. 199; *Whitworth v. Stuckey*, 1 Rich. Eq. 404; *Van Lew v. Parr*, 2 Rich. Eq. 321.

But there was no fraud or concealment in this case, since it is undisputed that the defendant had full knowledge of the outstanding encumbrance when he accepted the deed.

These views require that the exceptions be overruled, and it is not necessary to notice them in detail.

The judgment of the circuit court is affirmed.

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*One Who Bargains and Sells Property* and is then unable to secure his wife's relinquishment of dower, fails to make a marketable title, and becomes liable in damages to the other party to the contract: *Vaughan v. Butterfield*, 85 Ark. 289, 122 Am. St. Rep. 31. The existence of dower as a breach of the covenant of seisin is considered in the note to *Eames v. Armstrong*, 125 Am. St. Rep. 453.

## AMOS v. WESTERN UNION TELEGRAPH COMPANY.

[79 S. C. 259, 60 S. E. 660.]

**TELEGRAPH COMPANIES—Damages.—Mental Anguish** for distress suffered by a father by reason of his failure to reach his sick daughter in law, caused by the delay in the delivery of a telegraphic message cannot be recovered for anguish, unless the company had notice of the affectionate relations existing between such father and his daughter in law, and such relations must be alleged in the complaint. (p. 847.)

G. Fearons, J. G. Evans and J. C. Jeffries, for the appellant.

Butler & Osborne, for the appellee.

<sup>260</sup> GARY, J. This is an action for damages alleged to have been sustained by the plaintiff as a result of the defendant's failure to deliver a telegram.

There was a demurrer to the complaint, and, as it will be necessary to refer to it, for the purpose of ascertaining the exact cause of the action therein alleged, we reproduce it.

The first paragraph alleges the corporate existence of the defendant.

The other allegations are as follows: "That on May 31, 1905, plaintiff was, and had for a long time been, living at Gaffney, South Carolina, and his son, Hazel Amos, at Jonesville, South Carolina. That on said day, in the afternoon, said Hazel Amos delivered to the agent of the defendant at Jonesville, South Carolina, for transmission and delivery by the defendant to the plaintiff at Gaffney, South Carolina, a certain telegraph message addressed to plaintiff, in the following words: 'My wife is dying. Come at once,' signed 'Hazel Amos,' and then and there duly prepaid to the defendant's agent at Jonesville aforesaid the amount charged for the transmission and delivery of said message, and defendant, by its agent, then and there received said message and agreed and undertook to forthwith transmit and deliver the same to plaintiff, at his said address, with all reasonable dispatch.

<sup>261</sup> "That by the inattention, carelessness and negligence of the defendant said message was not delivered until about 9:30 A. M. the next day, although same could easily have been transmitted and delivered to plaintiff the afternoon of the 31st of May.

"That if said message had been delivered to plaintiff promptly, or with reasonable dispatch, as it was defendant's

duty to do, plaintiff would have received the same in due time to have reached his son's wife the next morning, but that by reason of the delay in the transmission and delivery of it, he did not reach there till the night of the next day, and in consequence thereof he was, during said period, caused to suffer great mental pain, distress and anguish, being all the while in great mental pain, distress and anguish for fear lest his said daughter in law should die before he could reach her, and that said pain, distress and anguish were due to the aforesaid gross and wanton carelessness and negligence of the defendant, to his damage in the sum of two thousand dollars, for which he asks judgment."

The grounds of demurrer were as follows: "Because the telegraph company had no knowledge from the telegram of any tender, affectionate relations existing between the plaintiff and daughter in law, which would put it on notice of any mental anguish or distress as a consequence of delay in the delivery of the same. Neither does the complaint contain such allegations.

"Under the mental anguish act, the law does not presume suffering or mental anguish to result to a father in law by reason of a delay in a telegram informing him of the condition of his daughter in law. Such damages are recoverable only between near blood relations."

The allegation is, that if the message had been delivered promptly, the plaintiff would have received it in time to have reached his son's wife the next morning, and that anguish which, it is alleged, he suffered was, "for fear lest his daughter in law should die before he could reach her." There is no allegation that he suffered mental anguish by <sup>262</sup> reason of the fact that he could not be with his son, to console him during his distress on account of his wife's sickness.

In the case of *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757, the court, after citing a number of authorities, uses this language: "From the foregoing authorities it will be seen: 1. That a plaintiff can only recover such damages as are the direct and proximate result of a wrongful act on the part of the defendant; 2. That mental anguish by a brother in law may be the result naturally and reasonably to be anticipated, from the failure to deliver a telegram, but there is no presumption that such injury has been sustained; 3. That if in the particular case one related merely by affinity sustains damages, they are special, and the defendant must have notice of the facts, from which it may be reasonably ex-

pected they would arise at the time the message is delivered for transmission."

It will be thus seen that the damages which the plaintiff sustained by reason of the fact that the failure of the defendant to deliver the message promptly prevented him from going to the bedside of his daughter in law were special.

As the damages were special, they are not recoverable unless the defendant had notice of the facts giving rise to them, nor are they recoverable unless they are expressly alleged in the complaint: *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67; *Traywick v. Southern Ry. Co.*, 71 S. C. 82, 110 Am. St. Rep. 563, 50 S. E. 549; *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757.

The complaint in the case under consideration fails to allege any facts tending to show that the relations which existed between the plaintiff and his daughter in law were of a tender and affectionate nature.

The demurrer, therefore, should have been sustained.

This court granted permission to the appellant's attorneys to review the case of *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757, but we adhere to the principles therein announced.

The next question that will be considered is, whether there was error in refusing the motion for nonsuit.

The plaintiff did not claim punitive damages.

<sup>263</sup> The motion was made "on the ground that there is no competent testimony to go to the jury to support a claim for damages caused by suffering mental anguish, and the further fact that the evidence shows that the telegram was sent for the benefit of the dying wife, and that if he suffered any mental anguish it was incidental to the receipt of the telegram, and not the kind that can be recovered for."

The record shows that the following took place during the examination of the plaintiff: "Q. Your son has testified you thought a great deal of your daughter in law—state whether or not that is true? A. Yes, sir. Mr. Jeffries: We object, There is no allegation in the complaint as to that. Court: I think not, Mr. Osborne."

It will thus be seen that when the plaintiff undertook to testify as to the tender and affectionate relations between himself and his daughter in law, objection was made to such testimony, and his honor, the presiding judge, ruled that it was incompetent, as there were no allegations to that effect in the complaint. There was error, also, in refusing the motion for nonsuit.



It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

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*Damages Recoverable Against Telegraph companies for negligence in the transmission or delivery of messages are considered in the note to Kagy v. Western Union Tel. Co., 117 Am. St. Rep. 305. As to the measure of damages where the company has no notice from the contents of the message that its delay will be attended by loss or mental suffering, see Kagy v. Western Union Tel. Co., 37 Ind. App. 73, 117 Am. St. Rep. 278; Western Union Tel. Co. v. Merritt, 55 Fla. 462, 127 Am. St. Rep. 169; Kirby v. Western Union Tel. Co., 77 S. C. 404, 122 Am. St. Rep. 580.*

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## KIRKLAND v. CHARLESTON AND WESTERN CAROLINA RAILWAY.

[79 S. C. 273, 60 S. E. 668.]

**RAILROADS—Passengers—Expulsion from Excursion Train.**—A railway company is liable for negligence in willfully ejecting a passenger from an excursion train operated by its servants for another who has fixed the rate of fare, simply because he refused to pay the excursion round-trip rate, but offered the usual rate. (p. 849.)

**RAILROADS—Excursion Trains—Notice.**—Whether the public is invited to become passengers on an excursion train upon condition that each person who gets on board must purchase a round-trip ticket, and the question whether a certain passenger had notice of such requirement, are questions for the jury. (p. 851.)

L. T. Izlar, J. F. Izlar and J. A. Willis, for the appellant.

Davis & Best and Hendersons, for the appellee.

**274 GARY, J.** This is an action for damages alleged to have been sustained by the plaintiff through the negligence and willful misconduct of the defendant in ejecting him from an excursion train.

The complaint alleges: That on the 21st of August, 1903, he boarded one of the defendant's passenger trains at Varnville, to go to Allendale, another station on defendant's line, and was a passenger on said train; that after the train had passed Hampton and Brunson the conductor demanded the fare; that he did not have a ticket, as the office at Varnville was not open a reasonable time before the train arrived; that he tendered the conductor the legal fare from Varnville to Allendale, which was refused, and the conductor insisted that he pay one dollar and a quarter, a sum greater than the

legal fare, and this he refused to do, whereupon he was willfully, wantonly and maliciously ejected at Fairfax, and was treated with indignity by the conductor and a crowd of drunken passengers whom he called to his aid, though he made no resistance.

The defendant denied the allegations of the complaint and alleged that the train which the plaintiff boarded at Varnville <sup>275</sup> was not one of defendant's regular passenger trains, but a train which had been chartered by one R. L. Hughes, and which defendant had agreed with Hughes to run from Robbins to Beaufort; that it sold no tickets and collected no fares for passage on said train, but that this was done by Hughes, who fixed his own prices and sold his own tickets, and that it, the defendant, had no right to sell any tickets or collect any fares for passage on said train, and that it did not collect any fares, except at the instance of Hughes, and then only as his agent; the conductor and other agents of the defendant upon said trains were there solely for the purpose of running and operating the train safely for Hughes, for the failure to do which the defendant alone would be responsible.

The jury rendered a verdict in favor of the plaintiff for thirteen hundred and fifty dollars and the defendant appealed.

The first question that will be considered is, whether his honor, the presiding judge, erred in refusing a motion for a nonsuit.

At the close of the plaintiff's testimony the defendant made a motion for a nonsuit on the ground that the plaintiff had knowledge that it was an excursion train, and having refused to pay the fare demanded by the parties in charge of the train, the railroad company was not liable. The nonsuit was properly refused, as the plaintiff testified that he did not know it was an excursion train until he had been riding on it for some time and had nearly reached his destination.

There is, however, another reason why his honor, the presiding judge, could not have granted the motion. Under the decisions in this state, the parties who entered into the contract with the defendant relative to the excursion train were the agents of the defendant.

In the case of *Harmon v. Columbia & G. Ry. Co.*, 28 S. C. 401, 13 Am. St. Rep. 686, 5 S. E. 835, the principle is thus stated: "When a railroad company accepts a charter it as-

sumes the performance of all the duties to the public which are imposed upon it by the charter <sup>276</sup> or the general laws of the state, and it cannot be permitted to escape from the obligations thus imposed upon it by transferring its chartered rights and privileges either to an individual or to another corporation. A corporation must of necessity always act through individuals, and whether such individuals are called its officers or agents or its lessee cannot affect the question of its liability to perform the obligation which it has incurred in consideration of its chartered rights and privileges. It cannot be permitted to enjoy the benefits conferred by its charter without incurring the responsibilities incident thereto." This doctrine is affirmed in the cases of *National Bank of Chester v. Atlanta etc. Ry.*, 25 S. C. 216, *Bouknight v. Charlotte C. & A. R. R. Co.*, 41 S. C. 415, 19 S. E. 915, *Parr v. Spartanburg U. & C. Ry. Co.*, 43 S. C. 197, 49 Am. St. Rep. 826, 20 S. E. 1009, *Davis v. Atlanta etc. Ry. Co.*, 63 S. C. 370, 41 S. E. 468, *Smalley v. Atlanta etc. R. R. Co.*, 73 S. C. 572, 53 S. E. 1000, and *Franklin v. Atlanta etc. R. R. Co.*, 74 S. C. 332, 54 S. E. 578.

The court uses the following language in the case of *Reed v. Southern R. R.*, 75 S. C. 162, 55 S. E. 218: "The theory of the law is that a railroad company chartered by the state and afterward making a lease of its franchises is still regarded as operating the road through the lessee as its agent whenever the lessee commits an act resulting in damages against which the law, for reason of public policy, will not allow the lessor to contract. A railroad company has the power to enter into a great many special agreements, but it cannot make a valid contract whereby it will be exempt from liability for negligence: *Wallingford v. Columbia & G. R. R. Co.*, 26 S. C. 258, 2 S. E. 19; *Johnstone v. Richmond & D. R. R. Co.*, 39 S. C. 55, 17 S. E. 512. This principle is applied even when the action is by an employé based on negligence: *Johnson v. Charleston & S. R. R. Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; 20 Ency. of Law, 154, 155. The reason for the rule is that such contracts are against public policy. The defendant could not, therefore, escape liability by leasing its road."

The defendant did not have the power to enter into such a contract as would exempt it from liability for negligence <sup>277</sup> and willful misconduct in ejecting a passenger from its train of cars.

When a person gets aboard a train for the purpose of traveling he has the right, generally, to presume that he will only be required to pay the usual fare, and if the railroad imposes conditions with which he is compelled to comply before he can become a passenger, it is incumbent on the railroad to show that he had notice of such conditions, by advertisement or otherwise, which conditions could be waived by the company: *McCarter v. Greenville Traction Co.*, 72 S. C. 134, 51 S. E. 545; *White v. Norfolk & S. R. R. Co.*, 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191; *Fitzgibbon v. Chicago & N. W. R. R.*, 108 Iowa, 614, 79 N. W. 477; *Texarkana etc. Ry. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673; *Moore v. St. Louis etc. R. R.*, 67 Ark. 389, 55 S. W. 161; *Collins v. Texas & P. R. R. Co.*, 15 Tex. Civ. App. 169, 39 S. W. 643.

The public was invited to become passengers on the excursion train upon condition that each person who got on board purchased a round-trip ticket, and the question whether the plaintiff had notice of such requirement was properly submitted to the jury.

The case of *State v. Wyse*, 33 S. C. 582, 12 S. E. 556, shows that the twelfth exception cannot be sustained.

These views practically dispose of all question presented by the exceptions.

Judgment affirmed.

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*A Railway Corporation cannot Relieve Itself from Liability* by placing its road, trainmen, and cars under the control of a stranger. Therefore, if a passenger is wrongfully ejected from a train, the corporation cannot escape liability therefor by proving that the train had been hired for an excursion, and was not in charge nor under the control of the corporation at the time the wrong was done: *Chesapeake etc. Ry. Co. v. Osborne*, 97 Ky. 112, 53 Am. St. Rep. 407. The fact that a carrier of passengers hires its train or steamboat manned by its own crew, under its pay, to the managers of an excursion does not relieve it from liability for injuries to an excursionist, caused by the negligence or wrongful acts of its servants, unless it delegated to such managers the exclusive right to discharge its servants and hire others, although the contract of carriage is between the managers and the excursionists, and the liability of the carrier is not affected by the fact that the train or boat is chartered to run between points not upon the carrier's regular lines: *White v. Norfolk etc. R. R. Co.*, 115 N. C. 631, 44 Am. St. Rep. 489.



## BERNARD v. BERNARD.

[79 S. C. 364, 60 S. E. 700.]

**JUDGMENTS**—Effect on Contingent Remaindermen.—Contingent remaindermen, not in esse, are bound by a decree, when the holder of the preceding estate is a party to the cause. They, as well as the purchaser, are bound after their birth, by a sale based on such decree. (p. 854.)

Nathans & Sinkler and Von Kohnitz & Waring, for the appellant.

Smythe, Lee & Frost, for the appellee.

**365** GARY, J. Mrs. Clementine H. Bernard departed this life years ago, seised and possessed of a considerable real estate in the city of Charleston, which she devised to her children for life, with remainders to the children of each child living at the time of her child's death.

The facts are not in dispute, and are thus set out in the decree of his honor, the circuit judge:

"It appears that on April 1, 1897, W. Gibbs Whaley, then one of the masters of this court, recommended the sale of certain parcels of property belonging to the said estate, and also recommended that the proceedings should be kept open for the purpose of making such subsequent sales as might be deemed advisable by the trustees. In conformity with this report, Judge Witherspoon, presiding judge of the court, on April 2, 1897, made an order which contained inter alia the following provisions:

" 'Ordered, adjudged and decreed that the said report be, and is hereby, confirmed, and the master is directed to carry into execution the recommendations therein made.

" 'Further ordered, adjudged and decreed that the master proceed to sell the property set forth in the report on the terms therein set out.

" 'Further ordered, adjudged and decreed that these proceedings be kept open, so that, from time to time, such changes may be made in the office of the trustee, under the will of Mrs. C. H. Bernard, as may be necessary, and any other changes or alterations in the management, disposition or control of said trust property, as may from time to time be deemed advisable.

" 'Further ordered, adjudged and decreed that upon suggestion of plaintiff's attorney, the master shall have leave to report to the court such additional descriptions of the prop-

erty belonging to the said trust estate as may be deemed necessary, and also to report the advisability of selling or disposing of the same, and to sell or otherwise dispose of the same from time to time as may be directed by this honorable court, or a judge thereof.'

366 "It appears that at the time the said order was taken all parties who were then in esse, and who had any interest in the said property under the terms of the will of Mrs. C. H. Bernard, were made parties to this proceeding. Since that time, however, certain minors have been born who hold interest in the remainders of the said estate, and certain parties have died whose children have fallen heirs to their interest in the property. The purchasers object to compliance with their bids, on the ground that these subsequently born parties are not before the court, and that, consequently, they will not be bound by the order of the court decreeing a sale of the property.

"There is a distinction in the question which arises as to various properties. The George and King street property, which is under contract of sale to A. G. Rhodes, and the King street property, under contract of sale to John McAllister, were specifically mentioned in the master's report of April 1, 1897, and were ordered to be sold under the decree of Judge Witherspoon dated April 2, 1897.

"On the other hand, the Broad street property, which is under contract of sale to Joseph Maybank, M. D., and the Magazine street property, which is under contract of sale to A. H. and H. W. Silcox, copartners as Silcox & Co., were not specifically mentioned in the report, and consequently were not ordered to be sold by the court in the order of April 2, 1897."

Master H. W. Mitchell, Jr., who succeeded Master Whaley, made a report on the 28th of October, 1907, to the effect that an offer to purchase the property on Broad street had been made by Dr. Joseph Maybank, and he recommended that a sale be ordered by the court, which order was made on the 13th of November, 1907.

The only objection urged by the purchasers why they should not be required to comply with their bids was, that the subsequently born remaindermen are not parties to the action, and therefore will not be bound by the order of the court that the property be sold.

367 There are several exceptions, but they are dependent upon the view which the court takes of the objection just mentioned.

In the case of *Moseley v. Hankinson*, 22 S. C. 323, Mr. Chief Justice McIver, in behalf of the court, uses this language:

"The general rule in equity undoubtedly is, that all persons who are materially interested in the subject of the suit must be made parties, but it is equally true that this rule is subject to some exceptions, and the practical inquiry is, Does this case fall within any of the exceptions? Without undertaking anything like a review of the cases, we think the authorities show that the contingent remaindermen, who were in esse and within the jurisdiction of the court, were necessary parties. In Mitford's Equity Pleadings, 174, it is said: 'Contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights' (citing numerous authorities). These authorities establish the doctrine that while, as a general rule, the contingent remaindermen are necessary parties, yet where they are not in esse at the time, and there is before the court a person entitled to a prior vested estate of inheritance, and, perhaps, if there is no prior vested estate of inheritance, then if the person entitled to the prior life estate and the trustees are parties, the court may make a decree that will conclude the rights of such contingent remaindermen; but they do not warrant the idea that contingent remaindermen who are in esse and can be made parties can be safely dispensed with. . . . The very object of applying to the court is to obtain authority for disposing of the interests of others, and those really entitled to such interest must, if practicable, be made <sup>368</sup> parties to any proceeding by which it is proposed to dispose of their interests."

This language is quoted with approval in *Rutledge v. Fishburne*, 66 S. C. 155, 97 Am. St. Rep. 757, 44 S. E. 564, which case is conclusive of the question under consideration.

Conceding that the subsequently born remaindermen have the right to intervene, they nevertheless would be bound by all orders in the case before they were made parties, and for a stronger reason the purchasers are bound by such orders.

Furthermore, even if the return to the rule to show cause should be construed as an application for a supplemental

pleading on the part of the purchasers, alleging material facts subsequently occurring, the right to an order allowing such supplemental pleading rests in the discretion of the court, and there are no facts in the record tending to show that the discretion was abused in this instance: *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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*Judgments Against Persons not in Being* are discussed in the note to *Rutledge v. Fishburne*, 97 Am. St. Rep. 762.

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### JERNIGAN v. STICKLEY.

[80 S. C. 64, 61 S. E. 211.]

**ACTIONS.**—Plea of Pendency of Another Action in a tribunal having concurrent jurisdiction must distinctly show that the same parties and the same subject matter are before it. (p. 858.)

**QUO WARRANTO** is a civil remedy in which the state is a necessary party. (p. 859.)

**QUO WARRANTO—Injunction—Bar.**—An action in equity to restrain a person from exercising the duties of a certain office is not the same cause of action as a proceeding by quo warranto to try the title to such office. Therefore, the maintenance of one such action is not a bar to maintaining the other. (p. 859.)

**ACTIONS.**—Plea of another action pending cannot be sustained if the prior action is dismissed for want of jurisdiction before the other action is commenced. (p. 859.)

**OFFICE, PUBLIC—Resignation.**—A public officer who has tendered his resignation unconditionally may withdraw before its acceptance. (p. 860.)

**OFFICERS, PUBLIC—Resignations.**—A meeting of part of the voters of a town, without any regular call for a mass meeting, has no power to accept the resignation of a public officer and elect his successor, and such officer may subsequently withdraw his resignation and hold the office, although his successor has been elected. (p. 861.)

W. J. Thomas, for the relator.

T. J. Talbird, for the respondent.

<sup>65</sup> JONES, J. This was a proceeding in the original jurisdiction of this court in the nature of a quo warranto against defendants, requiring them to answer to the state and show by what warrant or authority they claimed to hold the offices of intendant and wardens of the town of Port Royal.

The relators allege that at the regular election held for municipal officers in the town of Port Royal on the ninth



day of January, 1907, the respondent, John Stickley, was elected intendant and relators, I. McP. Gregorie and M. Herman, together with John L. Wall, respondent, and Robert Mare, now deceased, wardens, for the term of two years, as provided by law; that the said intendant and wardens qualified and entered upon the discharge of their respective duties; that on the twentieth day of September, 1907, during the trial before the town council of a policeman for violation of the dispensary law, the said John Stickley wrote out and handed to the clerk and treasurer, F. W. Scheper, Jr., the following paper:

“Port Royal, S. C., Sept. 20, 1907.

“To the Honorable Body of Wardens, Town of Port Royal:

“Gentlemen: Please accept my resignation, to take effect at once.

Your respectfully,

(Signed) “JOHN STICKLEY.”

That immediately thereafter three wardens, Gregorie, Herman and J. L. Wall, handed the clerk and treasurer papers of like import and, with the intendant, left the meeting.

Subsequently, and before the said resignations were acted upon, Gregorie and Herman withdrew their resignations from the hands of the clerk. On October 15, 1907, relators Gregorie and Herman and Robert Mare, constituting a quorum of the wardens of said town, attended by the clerk and treasurer, held a meeting in the town hall and adopted a resolution accepting the resignations of said John Stickley, intendant, and John L. Wall, warden, and ordered a special election for intendant and warden to fill said vacancies; that this action was taken under protest of John Stickley.

That after Stickley resigned, and before the same was acted upon, an election for four wardens was ordered by said Stickley, and as a result thereof, John L. Wall, Pat Wall, M. B. Cope and J. L. Paul were declared elected as wardens, who, claiming under said election, took charge of said offices of wardens.

The relator, J. J. Jernigan, was duly elected intendant, and Dr. S. B. Thompson warden, of said town at an election held on the fourth day of November, 1907, and duly qualified and entered upon the discharge of their duties as such officers, and that the relators have continued to act as intendant and wardens until now, except in so far as they have been interfered with by respondents.

On hearing read and filing the foregoing petition January 22, 1908, this court issued a rule to respondents requiring them to show cause before the supreme court at Columbia,

South Carolina, January 27, 1908, by what warrant or authority they <sup>67</sup> claimed to hold the office of intendant and wardens of the town of Port Royal.

Respondents made return to the rule alleging that there is an action pending between the same parties for the same cause in the court of common pleas for Beaufort county which has never been terminated, so far as respondents know or have been advised, and asked that the cause be dismissed.

And, for a further return, respondents admit the incorporation of the town of Port Royal under the law, the regular election of intendant and wardens on January 9, 1907, and the trial of a policeman on September 20th of that year, during which trial the intendant, Stickley, and wardens, Gregorie, Herman and J. L. Wall, offered their resignations, and allege that during said meeting warden Mare also offered his resignation.

"Respondents allege . . . that the resignations tendered by all the wardens of said town on the 20th of September, 1907, were acted upon and accepted by the people of the town of Port Royal in mass meeting on the night of the twenty-third day of September, 1907, there being no officers of said town to act, the people deemed it necessary to act for themselves, and said action by the people was done publicly and notoriously, and with the full knowledge of relators and before any effort, so far as these respondents are aware, was made to withdraw said resignations, and said F. W. Scheper, Jr., acting clerk and treasurer, stated at this meeting that no resignations had been withdrawn."

That some kind of a meeting was had by relators Gregorie, Herman and Robert Mare on the fifteenth day of October was admitted, but any action taken was done over the protest of respondent Stickley, and after a new board of wardens was elected and had qualified. Respondents denied that relators Jernigan and Thompson were elected as intendant and warden respectively, or that they have acted in said capacity other than as intruders while these respondents <sup>68</sup> were restrained by order of Judge Gage of the circuit court. Respondents admitted they had been exercising the duties and functions of said offices ever since the injunction issued by Judge Gage was dissolved.

For a further defense, respondents allege that relators Gregorie, Herman and said Robert Mare, as wardens, tendered their resignations unconditionally, to take effect at

once, on September 20, 1907, and, having no power to withdraw same thereby, said offices became vacant.

The first question presented for our consideration is whether the petition should be dismissed because of the pendency of an action in the court of common pleas for Beaufort county between the same parties for the same cause of action.

On this point W. J. Thompson made affidavit "that he, as attorney for defendants, . . . nor otherwise, had no notice or knowledge of any order dismissing said action or of any withdrawal of said action, and, therefore, says said action is still pending." The certificate of S. H. Rogers, clerk of court, was to the effect that no order was filed in his office dismissing the said cause, and that no notice of taxation of cost or payment of cost had been made.

Petitioners, in reply, also submitted the certificate of the clerk of court, S. H. Rogers, that the case was marked "ended" on the docket in the handwriting of Judge Hydrick, who sustained the demurrer to the complaint, and that the case was also marked "ended" in the minutes of said court kept by him as clerk. Thomas Talbird, attorney for petitioners, made affidavit "that on the call of the said case at the January, 1908, term of the court of Beaufort county . . . W. J. Thomas, attorney for defendants in that case, interposed a demurrer to the complaint on the ground that the complaint showed that the action was in the nature of a quo warranto, and that the state was a necessary party, and that the court of equity would refuse to grant injunction. His honor, Judge Hydrick, took this view of the case, holding that the state was a necessary party, and, upon deponent's request to be allowed to amend, he stated that he did not think he had the power to amend the proceedings, as the court had no jurisdiction of the case, as the state was not a party, and he could not allow amendment to be made, making the state a party, and in answer to Mr. Thomas' questions as to whether it was necessary to take an order dismissing the case, he replied that it was not necessary."

The plea of pendency of another action in a tribunal having concurrent jurisdiction must distinctly show that the same parties and the same subject matter are before it: Bliss on Code Pleading, sec. 410. The parties to the action in the court of common pleas for Beaufort county are not the same as the parties to this action. That action was brought by Robert Mare, as warden and acting intendant,

and I. McP. Gregorie and M. Herman, as wardens of the town of Port Royal, against John Stickley, John L. Wall, Pat Wall, M. B. Cope and J. L. Paul, defendants. This proceeding is in the name of the state after its leave to be made a part had been granted by the attorney general on the relation of J. J. Jernigan, as intendant, and I. McP. Gregorie, M. Herman and Dr. S. B. Thompson, as wardens of the town of Port Royal, against the same defendants. The proceeding here is in the nature of a quo warranto, now regarded as a civil remedy, in which the state is a necessary party, since it has a direct interest in the title to the public office affected: *State v. Hutson*, 1 McCord, 240; *State v. Schnierle*, 5 Rich, 299; *State v. Bowen*, 8 S. C. 400; *Wallace v. Anderson*, 5 Wheat. 291, 5 L. ed. 91, and notes; 23 Ency. of Law, 614; 17 Ency. of Pl. & Pr. 428.

The cause of action is not the same. Here it is a quo warranto to try title to a public office; there it was for an injunction to restrain defendants from exercising the duties of the said office. Even if the cause of action should be considered the same, the evidence is conclusive that the action below had been dismissed, and was so treated by the court and attorneys. True, there was no formal order passed by Judge Hydrick, who sustained the demurrer to the complaint in the court of common pleas, but the case was marked "ended" on the docket in his handwriting, and when asked by attorney for respondent if it was necessary for a formal order, he replied that it was not necessary.

In the case of *Smith v. Walke*, 43 S. C. 381, 21 S. E. 249, it was held that the plea of another action pending cannot be sustained where the prior action was dismissed for want of jurisdiction before this action was commenced though the formal order of dismissal was of later date.

The remaining questions presented by the petition and return all depend upon whether a public officer who had tendered his resignation unconditionally can withdraw the same before acceptance; or what is the effect of an unconditional resignation? On this question the authorities are not in accord.

There is a line of cases maintaining the proposition that an unconditional resignation tendered to the authority entitled to receive it cannot be withdrawn: *State v. Fitts*, 49 Ala. 402; *State v. Hauss*, 43 Ind. 105, 13 Am. Rep. 384; *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 696, 20 S. W. 651; *State v. Clarke*, 3 Nev. 566.



On the other hand, at common law and in a great number of the states, the doctrine prevails that the resignation of a public officer is not complete until it is either expressly or by implication accepted by the proper authorities: *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148; *State v. Ferguson*, 31 N. J. L. 107; *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314; *Hoke v. Henderson*, 4 Dev. (15 N. C.) 1, 25 Am. Dec. 677; 1 Dillon on Municipal Corporations, 3d ed. 249.

<sup>71</sup> In the case of *State v. Aucker*, 2 Rich. 245, this rule was applied to the resignation of certain officers and members of a church, the court saying: "The question is whether such a resignation has been made and accepted according to law and in a way obligatory on all the parties to this controversy. To make it so there must have been both a resignation, cum animo, and an acceptance of it on the part of the acting and responsible government at the time."

In the absence of statute this rule is supported by the better reasoning and the greater weight of authority, and has been adopted by the supreme court of the United States: *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314.

Until the tender or offer to resign is accepted by the proper authority it can be withdrawn: Dillon on Municipal Corporations, 3d ed., 249; *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418, and note.

Applying the foregoing principles of law to the undisputed facts of the case, the resignation of Stickley as intendant was made to the proper authority to receive it—the wardens of the town—and if it had been promptly accepted by them, it could not have been recalled; but there was no attempted acceptance until nearly a month thereafter. In the meantime, certainly on the night of the third day after his resignation was tendered, Stickley, at the request of a majority of the qualified voters of the town, in mass meeting and in the presence of F. W. Scheper, Jr., clerk and treasurer, withdrew his resignation as intendant. True, he did not get possession of the paper on which his resignation was written; this was in the custody of Scheper, the clerk and treasurer, but the wardens of the town had notice of the public withdrawal of Stickley's resignation, and it was not necessary, to make his withdrawal effectual, that the formal paper resignation be secured by him. Stickley, having withdrawn his resignation before its acceptance by the wardens, of which they had notice, under the principle here-

tofore <sup>72</sup> announced, he holds his position as intendant as against any election held after such withdrawal.

We next notice the claims of J. L. Wall, Pat Wall, M. B. Cope and J. L. Paul. Whatever authority they have depends upon the legality of the election held pursuant to the meeting of citizens held September 23, 1907. This was not a meeting after notice and call for a mass meeting, but was composed of the friends of Stickley. Such a body had no power to order an election, and the election held under the managers appointed by Stickley and by authority of said meeting was illegal.

Under section 3 of the charter of the town of Port Royal, the intendant alone has no authority to order an election and appoint managers to conduct the same to fill vacancies in the town offices, but that can be done only by a quorum of the intendant and wardens or of the wardens, and no such authority could be conferred by a meeting, without notice, of a portion of the electors of said town. Therefore, respondents J. L. Wall, Pat Wall, M. B. Cope and J. L. Paul, not having been legally elected as wardens, have no title to said office.

We next consider the status of petitioners Mare, Gregorie and Herman. We are satisfied from the evidence that Mare never tendered his resignation, and so remained in office as warden until his death, which occurred after the commencement of said action in the circuit court and before this proceeding was begun.

Wardens Gregorie and Herman filed their resignations on the 20th of September, but withdrew the same before acceptance by anybody whose duty it was to receive and accept the same. It appears that their resignations were not withdrawn on September 23d, when the members of the Stickley party met. If this meeting had been a duly constituted mass meeting of the electors of the town of Port Royal, with power to accept the resignations of the town officers and provide for an election of their successors, there <sup>73</sup> would be force in the position that the resignations of Gregorie and Herman had been accepted before withdrawal; but, as already shown, this meeting had no such power, and wardens Gregorie and Herman had the right afterward to withdraw their resignations, which they chose to do. Their withdrawal before acceptance leaves them in the same status as Stickley, and under section 3 of the charter of Port Royal, referred to above, they, with warden Mare, then living, had the right to accept the resignation of J. L. Wall, which had

not been withdrawn, and to order an election to fill the vacancy caused thereby, but they did not have authority to accept the resignation of Stickley and order an election to fill his place, since his resignation had been in reality withdrawn, of which fact they had notice.

The vacancy for warden created by Wall not having withdrawn his resignation before acceptance was filled by the election of Dr. S. B. Thompson on November 4, 1907, at an election for intendant and warden, ordered by wardens Mare, Gregorie and Herman, after the notice required by law. J. J. Jernigan was voted for as intendant at said election, but his election is void, as there was no vacancy in the office of intendant.

The judgment of the court is that respondent John Stickley, as intendant, and relators I. McP. Gregorie, H. Herman and S. B. Thompson, as wardens, are entitled to hold said offices and constitute the lawful town council of Port Royal.

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*The Acceptance of His Resignation* is said to be necessary in order to relieve a public officer from responsibility and to create a vacancy in the office: *State v. Superior Court for Kitsap County*, 46 Wash. 616, 123 Am. St. Rep. 948. He has no power of his own motion to resign his position: *People v. Williams*, 145 Ill. 573, 36 Am. St. Rep. 514. A resignation, however, need not be in any particular form: *Farmers' Loan etc. Co. v. Wilson*, 139 N. Y. 284, 36 Am. St. Rep. 696.

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### HUNT v. GOWER.

[80 S. C. 80, 61 S. E. 218.]

**EQUITY—Construction of Will.**—An executor who, as a devisee, is entitled to at least a life estate thereunder, and who is also sole heir, and as such presumably in possession of the land, may maintain a suit to have the will construed, to the end that partition may be decreed if the claim of others in the land is adjudged valid, and if not, to remove the cloud which arises from the terms of the will from the plaintiff's title. (pp. 864, 865.)

**Judgments—Equity—Remaindermen not in Esse.**—The rights of remaindermen not in esse may be finally adjudged in equity when the remaindermen in esse are made parties as representatives of the class. (p. 865.)

W. P. Conyers, for the appellant.

Morgan & Morgan, for the appellees.

<sup>81</sup> WOODS, J. By a contract dated March 4, 1907, plaintiff, T. F. Hunt, agreed to make the defendant, T. C. Gower, a good fee simple title to a tract of land described in the

complaint, free from all liens and contingencies, for six thousand dollars. Defendant, having paid one thousand dollars and entered into possession under the contract, declined to accept the title and pay the remainder of the purchase money on the ground that plaintiff could not make a good fee simple title, free from liens and encumbrances. Thereupon the plaintiff instituted this action for specific performance. The circuit court held the title good and made a decree requiring the defendant to carry out his contract.

Both parties agree that Emma W. Mayberry had a good title to the land at the time of her death, June 2, 1899. She left as her sole heirs her husband, William W. Mayberry, and her son, Edward F. Mayberry. By her will she disposed of her real estate as follows: "2d. I desire that my husband, William W. Mayberry, and my son, Edward F. Mayberry, share equally the rents, profits and income of my real estate for the period of their natural lives. 3d. In the event of the death of either one, the surviving one shall then enjoy the entire income for his natural life. 4th. Should my son at the time of his death leave children, then his rights in the real estate shall descend to them and their children; and the same as to my personal property left to him in this will. 5th. Should my son die without heirs, I bequeath my real estate to the vestry of Christ Church, Greenville, the rents and profits to be held or used by them for a second Episcopal Church in the city of Greenville."

<sup>82</sup> William W. Mayberry and Edward F. Mayberry were appointed executors of the will, but the latter alone qualified. By his deed of January 25, 1900, William W. Mayberry conveyed to Edward F. Mayberry all his interest in the real estate devised by Emma W. Mayberry. Though it is not specifically stated in the record that the plaintiff has acquired the title of Edward F. Mayberry, we assume that to be the fact, as it is agreed the case depends on the soundness of his title.

On June 8, 1900, Edward F. Mayberry brought an action against his wife, Alicia Mayberry, and his two minor children, Alicia R. Mayberry and Emma Westfield Mayberry. In his complaint, after setting out the will, he alleges the real estate to be subject to a mortgage for three thousand dollars, and to be so unproductive as to afford scarcely sufficient revenue to pay the taxes and interest on the mortgage debt. He further alleged that, under the terms of the will of his mother and the conveyance from his father, he had



an absolute fee simple title to the land. There were other allegations not germane to this controversy. The prayer of the complaint was: "That the will of his mother, the said Emma W. Mayberry, may be construed by this honorable court and the rights of all parties in the premises be determined; that if it should be held that the plaintiff holds said premises, or any part thereof, in common with any other person or persons, then that said premises may be partitioned, and, if partition be impracticable, that the said premises be sold for division; and if it be held that plaintiff's interest in the said premises is less than a fee simple therein, then that he may be allowed to sell said premises for the purpose of paying the said mortgage and for a change of investment, and for such other and further relief as to the court may seem proper." Before the hearing of the cause the infant child, Alicia R. Mayberry, died. E. M. Blythe was duly appointed guardian ad litem of the other child, Emma W. Mayberry, and appeared and answered in her behalf.

<sup>83</sup> Upon hearing the cause, Judge Buchanan decreed that under the will and by virtue of his father's conveyance to him, Edward F. Mayberry held a fee conditional title, and having issue of his body could convey a good title in fee simple. In this case, Judge Klugh held the title of Edward F. Mayberry to have been adjudicated by the decree of Judge Buchanan in the former action, and on this ground required the defendant to comply with his contract.

By his first exception, the defendant submits Judge Klugh erred "in not holding that the case of Edward F. Mayberry v. Alicia R. Mayberry et al. was a proceeding merely to obtain a construction of the will of Emma W. Mayberry, without any element of trust or other equitable feature, and that equity had no jurisdiction to entertain such a suit, and that the decree rendered therein bound only those persons who were actually parties to that action." The objection is without foundation. The land was encumbered and unprofitable, because of the doubt as to the rights of the parties. The plaintiff being the executor of the will of his mother, a devisee entitled to at least a life estate, and also the sole heir after the conveyance from his father, was presumably in possession of the land. The action was, therefore, not on the law side of the court for the recovery of possession, but was purely equitable to have the will construed, to the end that partition should be decreed if the claim of the others to an interest in the land should be

adjudged valid; and if not, to remove the cloud which arose from the terms of the will from the plaintiff's title: *Gibbes v. Elliott*, 5 Rich. Eq. 327.

It is well settled that the rights of contingent remaindermen not in esse may be finally adjudged when the remaindermen in esse are made parties as representatives of the class: *Van Lew v. Parr*, 2 Rich. Eq. 321; *Bofil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627; *Faber v. Faber*, 76 S. C. 156.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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*The Partition of Estates Held in Reversion or Remainder* is the subject of a note to *Fitts v. Craddock*, 113 Am. St. Rep. 55. Recent cases on this question are *Lawson v. Bonner*, 88 Miss. 235, 117 Am. St. Rep. 738; *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. Rep. 997; *Collins v. Crawford*, 214 Mo. 167, 127 Am. St. Rep. 661.

*Judgments Against Persons not in Being* are discussed in the note to *Rutledge v. Fishburne*, 97 Am. St. Rep. 762.

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## WILSON LUMBER COMPANY v. ALDERMAN & SONS COMPANY.

[80 S. C. 106, 61 S. E. 217.]

**DEEDS TO TIMBER.**—A deed conveying “all the pine trees and timber suitable for milling purposes” conveys a fee simple in such trees at the date of the deed and in so much of the land as is necessary to sustain them, and the fact that the grantee exercises part of his right under the deed does not deprive him or his grantees from again entering upon the land and cutting such trees as were suitable for milling purposes at the time of the execution of the deed, and the terms thereof being unconditional, he is not required to cut the timber within a reasonable time. (p. 867.)

Charlton, Du Rant, Shand & Shand and Kelley & Fairey, for the appellant.

Willcox & Willcox, H. E. Davis and Lee & Askins, for the appellee.

<sup>108</sup> JONES, J. Plaintiff brought this action for permanent injunction restraining defendant from cutting the timber on the tract of land described in the complaint.

On the twenty-ninth day of March, 1893, plaintiff's grantor, Thomas Wilson, purchased from J. E. McElveen “all

the pine trees and timber suitable for milling purposes on all that tract of land situate, lying and being in said county, containing two hundred acres, more or less [giving boundaries], . . . together with the right of ingress, egress and regress for the purpose of cutting and removing such trees and timber, and also the right to cut roads across said premises for the purpose of removing such timber and trees, and the right to make and construct tramways, railroads and all such other roads or ways as may be necessary or convenient through and upon said premises, for the purpose of removing such trees and timber, or for the purpose of going to and reaching the land and premises adjoining the said tract of land; and also the right to do any and all things whatsoever that may be necessary or convenient for cutting and removing the said timber and trees." Habendum to Thomas Wilson and his heirs and assigns forever, with general warranty.

It appears that within a year thereafter Thomas Wilson built a tramway to the property purchased, cut a quantity of the trees growing upon the land, sawed the same into lumber and within a year after entering upon the land removed his tramway and milling machinery therefrom. Subsequently, in February, 1904, Thomas Wilson conveyed all of his interests in timber and lumber to the Wilson Lumber Company. In July, 1904, the heirs of McElveen, Wilson's grantor, conveyed to D. W. Alderman & Sons Company all the timber on this tract of land for a term of fifteen years and some time thereafter the defendant entered upon and cut some trees from this land. This action was commenced on the 27th of March, 1907, for injunction to restrain the cutting of said timber. A jury was impaneled and heard all the evidence. At the close of the testimony it was agreed <sup>109</sup> that after the deed from McElveen had been construed by the court nothing remained for the jury to consider.

The court (Judge Prince presiding) in a very clear and able decree decided that the deed to Wilson conveyed to him all the pine trees and timber of every description suitable for milling purposes at the time of its execution in 1893, and that as the deed was in form a fee simple conveyance without conditions or limitations, it conveyed the timber described to Wilson as real estate, together with so much of the land on which the trees were growing as was necessary to sustain them, and the fact that Wilson exercised part of his right under the deed did not deprive him or his grantees

from again entering upon the land and cutting such trees and timber as were suitable for milling purposes at the time of the execution of the deed to him, and the terms of his deed being unconditional, he was not required to cut and remove the timber within a reasonable time. The court rested its decree upon the authority of *Knotts v. Hydrick*, 12 Rich. 314, which holds that where one sells growing timber without limiting the time in which the timber has to be removed, the purchaser acquires such interest in the land as is necessary to sustain the timber until it is removed, and acquires an interest in the timber as real estate.

The court further held that defendant under the terms of its deed had the right to enter upon the land and cut any timber that was not at the time of execution of the deed to Wilson in 1893 suitable for milling purposes and had since become suitable; defendant was permanently enjoined, however, from cutting timber that in 1893 was suitable for milling purposes and had been left on the land. From this decree defendant appeals.

The controlling question raised by the exceptions is whether the circuit court erred in the construction of the deed from J. E. McElveen to Thomas Wilson, executed January 26, 1893. The deed was an absolute conveyance in fee simple of the trees and timber suitable at that time for milling purposes, and under the authorities of this state, <sup>110</sup> particularly *Knotts v. Hydrick*, 12 Rich. 314, the estate in the trees and timber was a fee simple estate, the only limitation being that plaintiff's right was restricted to trees suitable for milling purposes in 1893. Plaintiff was not required to remove said timber within a reasonable time, but could at any time enter upon the land and remove all timber suitable for milling purposes at date of deed. The rule in *Knotts v. Hydrick*, 12 Rich. 314, has not been questioned or modified by any later decisions that we have been able to find.

It may be said that under the terms of the deed difficulty would now be experienced in determining just what trees were suitable for milling purposes in 1893, but such inconvenience and difficulty is no ground for disregarding the express terms of the deed which the court must construe as the parties have made it.

The judgment of the circuit court is affirmed.



**DEEDS TO TIMBER AND THEIR EFFECT.**

- I. Time Within Which Timber must be Cut and Removed When Time is Specified, 868.**
- II. Time Within Which Timber must be Cut and Removed if No Time is Specified, 870.**
- III. Size of Timber, 872.**
- IV. Conveyance of Timber is Conveyance of Interest in the Land, 874.**
- V. Statute of Frauds, 875.**
- VI. When Void for Indefiniteness, 876.**
- VII. What Timber Conveyed, 876.**

**I. Time Within Which Timber must be Cut and Removed When Time is Specified.**

If conveyance of timber requires it to be cut and removed within specified time, it must be cut and removed within that time: *Bryant Lumber Co. v. Christ* (Ark.), 112 S. W. 965. A grant to cut trees within a certain time is not executed if the trees are not cut within the time stipulated: *Noyes v. Gooding*, 104 Me. 453. A deed to cut and remove timber within a certain time is binding on the vendee or his assignee: *Walker v. Johnson*, 116 Ill. App. 145. If a deed requires timber to be removed within a specified time, it must be removed within that time: *Hollensteiner v. Missouli Lumber Co.*, 37 Mont. 278, 96 Pac. 420. If a time is set within which timber must be removed, it must be cut and removed within that time: *Hurst v. Taylor*, 32 Ky. Law Rep. 1051, 107 S. W. 743; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 South. 742. Or if there is a deed of trees to be cut and removed within ten years, they must be removed within that time: *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631. If the grantee agrees to remove trees from the land within two years from the date of the grant and fails to remove them within a reasonable time after the expiration of that period, his right to the timber is forfeited: *Bell Co. Land & Coal Co. v. Moss*, 30 Ky. Law Rep. 6, 97 S. W. 354. An instrument executed in the form of a deed conveying all the timber and logs suitable to be manufactured into cross-ties on certain lots, and providing that the contract shall expire after one year from its date, does not pass to the vendee the absolute title to the timber, but only a license to use it for the purpose named during the period specified in the deed: *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135. A deed of timber, without giving the time for its removal, gives only a reasonable and not an unlimited time: *Carson v. Three States Lumber Co.*, 108 Tenn. 681, 69 S. W. 320. If there is nothing in the deed for the sale and removal of the lumber which can be construed as making the removal of the timber a condition precedent to the passage of the title and the instrument an absolute sale of the timber, an agreement to remove the timber within a specified or reasonable time and to pay rent if he does not do so must be deemed merely a covenant, and the timber remains the property of the purchaser, although not removed within the specified time: *Peterson v. Gibbs*, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121.

If a deed is given to remove timber within a limited time, and the purchaser is prevented by the seller from removing it within such time, the purchaser should be allowed a reasonable time to remove the timber in question: *Jackson v. Hardin*, 27 Ky. Law Rep. 1110, 87 S. W. 1119. Under a deed of timber on a tract of land to be removed and cut by the vendee within a specified time, and measured and paid for each month before removal as the work progresses, title vests in the purchaser as the timber is cut down, and the vendor has a lien thereon for the purchase money: *Buskirk Brothers v. Peck*, 57 W. Va. 360, 50 S. E. 432. An instrument in the form of a deed conveying all the timber and logs, suitable to be manufactured into described logs, and providing that the contract shall expire after twelve months from its date, does not pass to the purchaser the absolute title to the timber, but only a license to use it for the purpose stated during the time specified in the contract: *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135. Under a sale of timber providing that the vendee shall have a certain time in which to cut and remove it, he is at least bound to begin to cut and remove it within the stipulated time or forfeit his rights: *Norfolk Lumber Co. v. Smith*, 146 N. C. 158, 59 S. E. 543. Under a deed of standing timber giving the vendee fifteen years within which to cut and remove it, the cutting need not be continuous, but must be completed within the term, and if the size of the timber is to be above twelve inches in diameter when cut, the vendee is entitled to cut and remove such trees as attain that size within the term mentioned: *Hardison v. Dennis Simmons Lumber Co.*, 136 N. C. 173, 48 S. E. 588; *Hawkins v. Goldsboro Lumber Co.*, 139 N. C. 160, 51 S. E. 852. Under a deed of all the hemlock bark "now on the trees standing" on certain premises, under which the purchasers agree to have all of said bark peeled by a certain day, "piled, measured and settled for in full, and are to have the right, liberty and privilege of free ingress and egress to enter at any time and all times upon such premises, cut, fell and pile such bark and to draw it away," such purchasers are not entitled to any bark except such as is peeled and piled before the date specified: *Kellam v. McKenstry*, 6 Hun, 381. Or if the owner of land conveys, by deed, all of the timber trees standing thereon, and in the deed gives to the vendee two years within which to take off the timber, this is a transfer of only so much of the timber as the vendee may take off in the two years: *Pease v. Gibson*, 6 Me. 81. A sale of a certain description of standing timber, to be taken off within a specified time, is a sale only of so many of the trees specified as the vendee may take off within the time limited: *Howard v. Lincoln*, 13 Me. 122. A grant of the right to enter and cut during two seasons all the pine timber fit for saw-logs growing upon certain land is a contract for the sale only of so much timber as the grantee shall cut during such two seasons: *King v. Merriman*, 38 Minn. 47, 35 N. W. 570. A deed of timber to be removed within one year limits the right of removal to that time: *Golden v. Glock*,

57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12. A deed of all the pine timber on a certain tract of land, with a stipulation that it is to be cut and removed from the named premises on or before a certain date, only conveys all the designated timber which shall be cut and removed within the time specified: *McIntyre v. Barnard*, 1 Sand. Ch. 52; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133. In other words, under a deed of standing timber to be cut and removed within a specified time, the grantee has no right to timber uncut at such specified time: *McIntyre v. Barnard*, 1 Sand. Ch. 52. A deed of growing timber with a provision that it shall be removed within a certain time conveys only such timber as is cut within that time. What remains uncut at the expiration thereof belongs to the grantor or his grantee: *Strasson v. Montgomery*, 32 Wis. 52.

Timber on a tract of land sold to be removed from the land within a specified time, and which remains uncut or unremoved at the expiration of the time limited, generally reverts to the owner of the realty: *Kemble v. Dresser*, 1 Met. 271, 35 Am. Dec. 364; *Green v. Bennett*, 23 Mich. 464. If under a contract providing for the sale of standing timber, the purchaser is to enter on the land at once and cut and remove the timber within a specified time, all the timber remaining on the land after that time reverts to and becomes the property of the seller: *Gamble v. Gates*, 92 Mich. 510, 52 N. W. 941; 97 Mich. 465, 56 N. W. 855. If a land owner sells the timber on his land, to be removed within a specified time, and the timber remains uncut after the expiration of that time, it reverts to the owner of the realty, but the timber cut within such time becomes the personal property of the licensee, and remains such though it is not removed from the land within the time agreed upon: *Macomber v. Detroit etc. R. R. Co.*, 108 Mich. 491, 62 Am. St. Rep. 713, 66 N. W. 376, 32 L. R. A. 102. Under a deed of timber on certain lands to be removed at certain specified times, if the deed is construed as making an absolute sale, the timber will remain the property of the purchaser, though not removed within the time provided: *Green v. Bennett*, 23 Mich. 464; but this construction, as the decisions hereinbefore cited manifestly show, is not the one usually adopted.

## II. Time Within Which Timber must be Cut and Removed if No Time is Specified.

Usually, when lumber is conveyed by deed without stipulating the time within which it must be removed, it need only be removed within a reasonable time, and what is a reasonable time is one of fact, and must be determined by all the facts and circumstances surrounding each particular transaction, and as the facts are so variant, a wide margin is shown; *Liston v. Chapman etc. Lumber Co.*, 77 Ark. 116, 91 S. W. 27; *Garden City Stave etc. Co. v. Sims*, 84 Ark. 603, 106 S. W. 959; *Goette v. Lane*, 111 Ga. 400, 36 S. E. 758; *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873; *Warren v. Ash*, 129 Ga. 329, 58 S. E. 858; *Bowerman & Co. v. Taylor*, 32 Ky. Law Rep. 671, 106 S.

W. 846; Evans v. Doobs, 33 Ky. Law Rep. 1053, 112 S. W. 667; Oates v. Yeargin (Ky.), 115 S. W. 794; Hall v. Eastman etc. Co., 88 Miss. 588, 119 Am. St. Rep. 709, 43 South. 2; Kidder v. Flanders, 73 N. H. 345, 61 Atl. 675; Carson v. Three States Lumber Co. (Tenn.), 91 S. W. 53; Keystone Lumber etc. Co. v. Brooks (W. Va.), 64 S. E. 614. As before remarked, in determining what is a reasonable time to remove the timber purchased, no time being set, all of the facts and circumstances surrounding the case must be considered: Garden City Stave Co. v. Sims, 84 Ark. 603, 106 S. W. 959; McNair & Wade Land Co. v. Adams, 54 Fla. 550, 45 South. 492.

A vendor of timber is not entitled to a cancellation of the deed of warranty thereof on the ground that the purchaser has not entered and removed it within a reasonable time: Butterfield Lumber Co. v. Guy, 92 Miss. 361, 46 South. 78, 15 L. R. A., N. S., 1123. But it has been decided that under a deed of timber giving the purchaser a certain time in which to cut and remove it, the cutting must be continuous, and the timber must be removed within such term, and after its termination the purchaser has no right to return and cut such timber as has become suitable for his purposes since he began to cut: Allison v. Wall, 121 Ga. 822, 49 S. E. 831. But generally a deed in fee simple to the timber on certain land is a conveyance of the timber as an interest in the land with the right to cut and remove it at any time: Lodwick Lumber Co. v. Taylor (Tex. Civ. App.), 99 S. W. 192. Under a deed making an absolute conveyance in fee simple of all the timber on certain land with the right of ingress and egress, and the right to construct roads for the purpose of removing the timber, the grantee is entitled to all the trees suitable for milling purposes at the date of the deed as specified, with the right to remove the timber part at one time and part at another time: Wilson Lumber Co. v. Alderman & Sons Co., 80 S. C. 106, ante, p. 865, 61 S. E. 217. A deed to all timber suitable for sawmill purposes to be cut and removed within a reasonable time admits of evidence of what is a reasonable time: McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513. If a conveyance of standing timber contains no stipulation concerning the time within which it shall be removed, a reasonable time only is open to the purchaser to enter on the premises and remove it, and an entry fifty-one years after the conveyance is not an entry within a reasonable time: Goodson v. Stewart (Ala.), 46 South. 239. A purchaser of all the stave timber on certain land, who, after cutting timber, moves away, abandons the right to cut further, and must not return to the land and cut other timber: Hurt v. Chess etc. Co., 33 Ky. Law Rep. 767, 111 S. W. 285. If the purchaser of growing trees enters on the land within a reasonable time and cuts all the timber apparently worth taking, and abandons the premises for a number of years, his right to again enter and cut timber is gone: Patterson v. Graham, 164 Pa. 234, 30 Atl. 247. A contract for the sale of standing timber which allows the purchaser a certain number of years to cut and remove the timber from the time when he first begins to manufacture such timber into lumber is



void for uncertainty, since it constitutes a lease, but fails to fix a time for the commencement of the term, and the rights of a purchaser under such a contract giving him a certain time in which to remove the timber is waived by his failure to commence to remove it within a reasonable time: *Gay Mfg. Co. v. Hobbs*, 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26. It has been decided that a contract for the sale of all the timber, etc., on a tract of land, providing that the purchaser is to have two years to take off and remove such timber, and not later, does not authorize the purchaser to cut and take off any timber standing on the land after the two years' limit has expired: *Null v. Elliott*, 52 W. Va. 229, 43 S. E. 173. But a deed to one giving the right to cut growing timber from land within a certain time has the whole of the period specified in which to remove it: *Walker v. Johnson*, 116 Ill. App. 145. Yet if a conveyance is made to all the timber on a tract of land, the right to cut and remove it is, from its nature, determinable, and if the vendee refuses to exercise his right within a reasonable time after notice to do so, his right will be terminated and his privilege of cutting gone: *Boults v. Mitchell*, 15 Pa. 371. If a deed to timber authorizes the grantee to enter on the land for the purpose of cutting and removing the timber for the period of five years, timber cut prior to the expiration of such time becomes personal property, and the owner of the land cannot recover for the value of the logs already cut, though removed after the expiration of the term, but only for the unauthorized act of the vendee in entering on the land: *Indiana etc. Lumber Co. v. Eldridge* (Ark.), 116 S. W. 1173. If the grantee of the absolute title to growing timber enters and removes it after the expiration of a reasonable time for its removal, he is liable in trespass to the owner of the land for such entry and for the damage done to the land thereby, but not in that action for the damage done to the owner of the land by the trees remaining upon the land after the reasonable time for their removal: *Hoit v. Stratton Mills*, 54 N. H. 452.

### III. Size of Timber.

Under a deed of timber of a certain size the purchaser has the right to cut only such trees as have reached the stipulated size at the time of the grant and not such trees as may reach that size thereafter: *Isler v. Goldsboro Lumber Co.*, 146 N. C. 556, 60 S. E. 503. A conveyance of all the timber on a tract of land then growing and measuring a certain amount in diameter includes only the timber of that dimension when the conveyance was executed: *Warren v. Short*, 119 N. C. 39, 25 S. E. 704. The word "now" in the phrase, "now being on the various tracts," implies the present time, and the deed conveys only the timber of the specified size at the time it was executed: *Crawford v. Atlantic Coast Lumber Co.*, 79 S. C. 166, 60 S. E. 445. A deed of timber above a certain size in diameter requires a measurement from outside to outside, bark included, in the absence of any general or local custom giving those words a different meaning; and if a time is set in the conveyance in which to cut and re-

move the trees, the purchaser is entitled to cut only such trees as attain the size mentioned within the term: *Hardison v. Dennis Simmons Lumber Co.*, 136 N. C. 173, 48 S. E. 588. In some cases the word "logs" might be held to include masts or spars, but where the deed calls for a sale of certain logs, it being based on the scale of "B" and his scale bill being incorporated in the contract, it was decided that a mast not included in such scale bill did not pass: *Haynes v. Hayward*, 40 Me. 145. A sale of all the timber on the vendor's land, to be cut on a particular part of the farm suitable to make staves does not pass the title until the trees suitable for that purpose are marked and designated so as to identify them: *Moss v. Meshew*, 8 Bush, 187. A contract for the sale of standing timber which recites that the owner of the land has "this day sold and does hereby convey to" the purchaser "all the white oak timber suitable for the manufacture of staves now growing on" the land described, conveys to the purchaser only such timber as is then suitable for the manufacture of staves: *Evans v. Dobbs*, 33 Ky. Law Rep. 1053, 112 S. W. 667. A conveyance of timber suitable for certain purposes, naming them, gives to the grantee the right to such timber only as was suitable for such purposes at the time of the grant: *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831; *Gray Lumber Co. v. Gastin*, 122 Ga. 342, 50 S. E. 164. But under a grant of timber suitable for certain purposes named, the grantee cannot, after removing the trees suitable for such purpose, afterward return and remove those which by growth subsequently came within the description of the original grant: *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831. A deed to a "certain lot of timber situated on" certain tract, the kinds and dimensions being specified, is a sale only of all the timber of the specified kinds and dimensions then on the tract: *Bradford v. Huffman*, 28 Ky. Law Rep. 18, 88 S. W. 1057. In a deed of growing timber for sawmill purposes, the words "one certain lot of yellow pine timber for sawmill purposes" means timber suitable only for sawmill purposes: *Martin v. Peddy*, 120 Ga. 1079, 48 S. E. 420. A deed of timber suitable for sawmill purposes generally means a sale of such timber only as is suitable for such purposes: *Tuttle v. D. W. Pingree Co.* (N. H.), 73 Atl. 407. A sale of all the "merchantable timber" on a specified tract of land may be valid and operative and transfer the title to such timber, notwithstanding the question, What timber on the land is merchantable? remains open: *Haskell v. Ayres*, 35 Mich. 89. A deed to all the merchantable pine timber on a certain described tract of land is a sale of all such timber as is merchantable: *Smith v. Huie-Hodge Lumber Co.*, 123 La. 959, 49 South. 655. A deed to all the pine timber on a certain tract of a certain size should be construed as a conveyance of all the pine timber on the tract that will measure such specified size or more at the stump when reached in the process of cutting during the continuance of the term of the deed: *Dennis Simmons Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300. A deed to timber of a certain size means timber of that size in diameter at the point where severed from the stump: *Gulf Yellow Pine Lumber*

Co. v. Monk (Ala.), 49 South. 248. Under a deed to all pine and poplar timber measuring ten inches and above on the stump when cut, then growing on the land, the vendee may cut all timber of the required size, and may put it to any purpose he sees fit after he has cut it: Herring v. Hardison, 126 N. C. 75, 35 S. E. 184. And generally, where a land owner conveys standing timber of a certain size without limitation as to the use to which it is to be appropriated, the grantee may use timber of that size cut for any ordinary purpose: Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

#### IV. Conveyance of Timber is Conveyance of Interest in the Land.

There can be no doubt that a conveyance of standing timber is a transmission or a conveyance of an interest in the land supporting it: Goodson v. Stewart (Ala.), 46 South. 239; Butterfield Lumber Co. v. Guy, 92 Miss. 361, 46 South. 78, 15 L. R. A., N. S., 1123. Standing timber is realty, and a contract for the sale thereof affects realty: Midyette v. Grubbs, 145 N. C. 85, 58 S. C. 795, 13 L. R. A., N. S., 278. Standing timber is real estate within the rule that there can be no warranty to real estate by parol, consequently there is no implied warranty of title in a sale of standing timber: Van Doren v. Fenton, 125 Wis. 147, 103 N. W. 228. While a deed to standing timber carries an interest in the land, it does not carry a warranty of the quality of such timber: Hege v. Newson, 96 Ind. 426; nor a warranty of the quantity of the timber on the land: Switzer v. Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762. But a vendee of standing timber acquires an interest in the real estate: McCoy v. Fraley (Ky.), 113 S. W. 444. And a purchaser of standing timber for a valuable consideration from the owner of the land acquires a vested interest in such land when the transfer is evidenced by a duly executed instrument transferring the timber and authorizing the purchaser to cut and remove it, even within a fixed time: Neils Lumber Co. v. Hines, 93 Minn. 505, 101 N. W. 959. As growing trees are part of the realty, the same formalities are required in a deed conveying the trees as in a deed conveying the land: Smythe Lumber Co. v. Austin (Ala.), 49 South. 875. Standing timber being part of the realty, the owner of the soil who has conveyed the timber by deed is not revested with the title thereto by a mere verbal declaration of the owner of the timber that he has surrendered it to the owner of the soil: Warren v. Ash, 129 Ga. 329, 58 S. E. 858. Standing timber is part of the realty, and the owner of the soil, who has by deed conveyed the timber, is not revested with the title by a mere verbal declaration of the owner of the timber that he surrendered it to the owner of the soil: Warren v. Ash, 129 Ga. 329, 58 S. E. 858. But a sale of standing timber attached to the soil, but which is to be severed therefrom and converted into personalty before the title is to pass to the purchaser, is an executory sale of personalty and not of an interest in the land: Clarke Brothers v. McNott (Ga.), 64 S. E. 795.

## V. Statute of Frauds.

Unsevered timber being a part of the realty, a valid conveyance of it can be made only by contract in writing. To this effect the cases are uniform: *White v. King*, 87 Mich. 107, 49 N. W. 518; *Morgan v. Pott*, 124 Mo. App. 371; *Andrews v. Costigan*, 30 Mo. App. 29; *Alt v. Groschlose*, 61 Mo. App. 409; *Warren v. Leland*, 2 Barb. 613; *McIntyre v. Barnard*, 1 Sand. Ch. 52; *Tremaine v. Williams*, 144 N. C. 114, 56 S. E. 694; *Childers v. Coleman Co. (Tenn.)*, 118 S. W. 1018.

Growing trees standing on land are part of the realty, and must so remain until severed therefrom, and the title to them while so standing can be passed and acquired only by a statutory deed, and an intention on the part of the licensor and licensee, evidenced by contract, that the latter shall, within a reasonable time, enter, sever and remove such growing trees, does not have the effect to convert them into personal property until the license is exercised, and this though the license within certain limits is irrevocable: *Potter v. Everett*, 40 Mo. App. 152.

A conveyance to remove standing timber, even if considered as a lease because not under seal, is within the statute of frauds, and so to be good for more than a year must be in writing: *Childers v. Coleman Co. (Tenn.)*, 118 S. W. 1018. Growing trees, being a parcel of the land, are within the statute of frauds, and cannot be sold or conveyed except by deed or conveyance in writing: *Warren v. Leland*, 2 Barb. 613. A sale of growing timber on land to be cut and removed therefrom is a contract concerning the land, and is within the statute of frauds and inoperative unless evidenced by a writing: *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. Rep. 641, 33 N. E. 90, 19 L. R. A. 721. Growing trees are such a part of the realty that the title to or an interest in them can be conveyed or transferred, as a general rule, only by a written instrument. A parol conveyance of them is void as being within the statute of frauds: *Magnetic Oil Co. v. Markbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73, 16 South. 632, 28 L. R. A. 434. A parol sale of growing trees must be regarded as a sale of an interest in the realty, and within the statute of frauds: *Garner v. Mahoney*, 115 Iowa, 356, 88 N. W. 828. It has been decided, however, contrary to this well-established rule, that a sale of standing timber to be immediately removed does not affect an interest in the land, and, therefore, though by parol, is neither within the statute of frauds nor a revocable license: *Robbins v. Farwell*, 193 Pa. 37, 44 Atl. 260; and that a parol sale of standing trees, though void as a sale of an interest in the land, operates as a license to enter and cut and carry away the trees, until revocation, but is revoked by a sale and conveyance of the land to a third person: *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19. An unsealed and unacknowledged contract for the sale of trees standing on land is within the statute of frauds, and cannot amount to more than a mere license to the vendee to enter, cut and remove the timber, and cannot operate to convert it into personal property and entitle the vendee to claim it as against creditor of the vendor: *Potter v. Everett*, 40 Mo. App. 152.



**VI. When Void for Indefiniteness.**

A deed conveying "a portion of the cypress timber" in a certain swamp and providing that the grantor "may retain from the timber enough for his farm and building purposes," is void for indefiniteness: *Mizell v. Ruffin*, 113 N. C. 21, 18 S. E. 72. A clause permitting the vendees to cut and remove "portions of the timber now standing on said premises," is too uncertain for enforcement in a court of law, and is binding on the parties only in so far as they mutually act under it: *Watson v. Gross*, 112 Mo. App. 615, 87 S. W. 104.

**VII. What Timber Conveyed.**

A deed to all the timber on a tract of land without reservation conveys all the timber on the designated tract of land: *Jacobs v. Roach* (Ala.), 49 South. 576; and such a contract is entire and not separable when the price to be paid is not apportioned: *Alcott v. Hugus*, 105 Pa. 350. A deed of all the timber which is located on certain designated lots of land, which deed recites that it is understood that the sale of this timber is strictly by the acre and not by the tract, is a conveyance of all the timber on the designated lots of land: *Perkins Co. v. Wilcox* (Ga.), 63 S. E. 831. A deed of "all the timber on our lands" includes all of the timber on all of the lands of the vendors: *Hughes v. Adams* (Tex. Civ. App.), 119 S. W. 134. A deed of the timber situated on a certain tract is a definite sale of the timber on that tract: *Bradford v. Huffman*, 28 Ky. Law Rep. 18, 88 S. W. 1057; *Haskell v. Ayres*, 35 Mich. 89. A deed conveying to a purchaser standing timber as described and branded is an absolute conveyance of the trees branded as described; and the grantor has no right to an injunction restraining the purchaser from entering and removing the branded trees before the expiration of the time within which he may do so: *Woody v. Intermont Iron & Timber Co.*, 141 N. C. 471, 53 S. E. 953. A deed to a lumber company conveying all the standing trees on a certain tract of land does not authorize the purchaser to cut other timber on the land to be used in the construction of roads and buildings on other land: *Ward Lumber Co. v. Coleman* (Ky.), 116 S. W. 266. If a person purchases all the timber on certain land, and the title to the lands fails, the grantee may recover the portion of the purchase price paid: *Fitzpatrick v. Hoffman*, 104 Mich. 228, 62 N. W. 349. On the other hand, if a deed to all the growing timber on a tract of land contains a provision that it shall be removed within a certain time, what remains uncut at the expiration of such time belongs to the grantor or to his grantee: *Kemble v. Dresser*, 1 Met. (42 Mass.) 271, 35 Am. Dec. 364; *Strasson v. Montgomery*, 32 Wis. 52. But a vendor who guarantees a certain amount of timber on the land sold cannot charge his vendee, for the purpose of the guaranty, with timber in swamps which it is not possible to remove: *Anderson v. Northern Nat. Bank*, 98 Mich. 543, 57 N. W. 808.

CRAIG v. UNITED STATES HEALTH AND ACCIDENT  
INSURANCE COMPANY.

[80 S. C. 151, 61 S. E. 423.]

**INSURANCE, LIFE**—Notice of Claim of Illness.—A provision in a policy of insurance that written notice of illness must be given at a certain place within ten days from the beginning of such illness is not void because unreasonable. (p. 878.)

**INSURANCE, LIFE**—Notice of Claim of Illness.—Mailing notice within the time limited for service of notice of the illness of the insured required by the policy is sufficient service of such notice. (p. 880.)

**NOTICE**—Time—Sunday.—If an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded from the computation, but if the number of days is less than seven, Sunday is not counted. (p. 880.)

**INSURANCE, LIFE**—Notice of Illness and Claim Therefor.—If an insurance policy requires notice by the insured within ten days from the beginning of the illness for which claim can be made, and that the illness must last for more than one week, and the insured must be continuously confined to bed and regularly attended by a physician, notice given within ten days from the day a physician begins to visit the insured is within the terms of the policy. (pp. 880, 881.)

E. Moore, for the appellants.

W. P. Robinson, for the appellee.

<sup>152</sup> WOODS, J. The plaintiff obtained from the defendant company a policy of insurance against accident and sickness, dated February 21, 1906, which contained these provisions: "Or, at the rate of fifty dollars per month for the number of consecutive days, after the first week, that *the assured is necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician by reason of illness . . .* ; or if during convalescence immediately following said confinement, or by reason of any nonconfining illness, the assured shall be wholly and continuously disabled from performing every duty pertaining to any business or occupation, and require the regular attendance of such physician, the company will pay him indemnity at one-fifth the above for a period not exceeding two consecutive months. . . . Written notice of any injury, fatal or not fatal, or of any illness for which claim can be made, must be given to the company at Saginaw, Michigan, *within ten days from date of accident or beginning of illness.* Failure on the part of the assured or the beneficiary to comply strictly with such notice requirement shall limit the liability of the company to one-fifth the amount which would otherwise be payable under this policy.

153 "An agent has no authority to change this policy nor to waive any of its conditions. Notice to or from any agent or knowledge acquired by him shall not be held to affect a change or waiver of this policy or any condition thereof. No assignment or change in this policy or waiver of any of its conditions shall be valid unless agreed to in writing by the president, vice-president or secretary of the company and indorsed hereon."

We have italicized the words most important to the decision of the case.

In an action in a magistrate's court judgment in favor of the plaintiff was recovered for an illness. The plaintiff testified he became sick August 16, 1906, and after being in bed thirty-one days, resumed work October 10, 1906. The attendance of a physician did not begin until the 21st of August. The plaintiff made no personal report of his illness to the insurance company until September, 28, 1906, but on August 27th he notified defendant's local collector, who, on the same day, mailed a letter to the company giving notice of the sickness.

We first consider the case on the theory adopted by the magistrate and the circuit court that the beginning of the illness contemplated by the policy was August 16th, the first day of plaintiff's sickness. The circuit court, in affirming the judgment of the magistrate, held the provision of the policy above quoted, as to time in which notice of sickness should be given, to be without effect and void, because unreasonable.

We think this conclusion of the circuit judge was clearly erroneous. It concerns not only the constitutional rights, but in the highest degree the business prosperity, of the people that freedom of contract should be preserved inviolate. It is true, freedom to contract is not unlimited, for the law-making branch of the government may impose such limitations as can be reasonably considered to be for the public health, safety or morals: *Rose v. Harlee*, 69 S. C. 523, 48 S. E. 541; *Johnson v. Spartan Mills*, 68 S. C. 339, 154 47 S. E. 7, 695; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. So, also, the judicial department of the government may refuse to enforce contracts recognized by the people at large as vicious in themselves, and, therefore, opposed to public policy. But the General Assembly has not undertaken to forbid such a contract as the parties here made, and it is certainly not possible to

point out any feature which could warrant the court in declaring it vicious, and tending to the public detriment.

If the provision of the contract under consideration were improvident or foolish, that would be no ground for the courts to refuse to enforce it. Attempts by courts to relieve parties from onerous contracts merely because they have entered into them heedlessly and improvidently are not only without warrant of law, but against the public interest; for such attempts tend to impair that general confidence in the certainty of contractual relations upon which material prosperity depends. In addition to that, nothing so encourages and increases heedlessness and improvidence as the expectation of being relieved from their consequences.

But even if the court could relieve against a contract merely because it contained clauses which, in the view of the court, should be considered unequal or unreasonable, such judicial power could not be invoked in this case. The provision on which the defendant relies is not unreasonable, but, on the contrary, it is evident some such stipulation is necessary to the protection of the defendant, as an insurer against sickness, to enable it to investigate alleged illness, and thus protect itself against imposition. Of course the insured would be excused from giving the notice if, from sudden and extreme illness or other cause, it became impossible for him to comply with the contract: *Stickley v. Mobile Ins. Co.*, 37 S. C. 56, 15 S. E. 280, 838; *Johnson v. Maryland Cas. Co.*, 73 N. H. 259, 111 Am. St. Rep. 609, 60 Atl. 1009; *Whalen v. Equitable Acc. Co.*, 99 Me. 231, 58 Atl. 1057; *Travelers' Ins. Co. v. Thornton*, 119 Ga. 455, 46 S. E. 678.

<sup>155</sup> The respondent relies on the case *Woodmen Acc. Assn. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777, 87 N. W. 909, 55 L. R. A., 291, as authority for the proposition that where the contract provides for notice within a specified time, notice within a reasonable time is sufficient. That decision is rested almost entirely on the authority of cases like *Edgefield Mfg. Co. v. Maryland Cas. Co.*, 78 S. C. 73, 58 S. E. 969, holding a requirement for immediate notice does not mean literally without the lapse of any time, but with all reasonable promptness under the circumstances. But none of these cases support the proposition that where the parties choose to fix the limit within which notice must be given the court can annul their agreement, and substitute its own notion of what would have been a proper provision on the subject.



The plaintiff endeavors to sustain the judgment on the further ground that the notice, mailed on August 27th, was, in fact, within ten days from August 16, 1906, the first day of any illness. The contract required written notice to be given "to the company at Saginaw, Michigan," but the deposit of the notice within the mail, properly addressed, within the required time, is in such case a sufficient compliance with the contract. The court of appeals of New York, the judges being divided, held it necessary to mail the notice in time for the company to receive it within the time limited: *Peabody v. Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956. But this court has decided mailing within ten days to be within time and to give rise to the presumption that the notice reached the company: *Sullivan v. Speights*, 12 S. C. 561; *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1. To the same effect in *Manufacturers' etc. Ins. Co. v. Zeitinger*, 168 Ill. 286, 61 Am. St. Rep. 105, 48 N. E. 179.

But notice was not received by the collector and by him given to the company until the 27th of August, the eleventh day, excluding the 16th of August, the day the sickness began.

<sup>156</sup> The respondent contends, as the 26th was Sunday, it should not be counted. No authority has been cited to sustain this position, and we can find none. On the contrary, the rule is, as stated in *Salley v. Seaboard Air Line Ry. Co.*, 76 S. C. 173, 56 S. E. 782: "Where an act is to be required to be done in a certain number of days exceeding a week, Sunday is not excluded from the computation; but if the number of days is less than seven, Sunday is not counted: *State v. Michel*, 78 Am. St. Rep. 379, note; 28 Am. & Eng. Ency. of Law, 223." If the contract is to be construed as requiring the notice to be given within ten days after the beginning of any illness at all, then it would necessarily follow from the view we have taken of the law that the plaintiff's recovery would be limited to one-fifth of the full amount mentioned in the policy. But the notice required is "of any illness for which claim can be made." The contract expressly provides claim for the full amount can be made only for an illness having all these incidents: 1. It must have lasted longer than a week, the liability beginning with the second week; 2. The assured must be regularly and continuously confined within the house by reason of the illness; 3. The assured must, during the illness, be regularly and continuously visited by a legally qualified physi-

cian by reason of such illness. The regular attendance of a physician is requisite even for the one-fifth of the insurance payable for a nonconfining illness. The visits of the physician did not commence until the 21st of August, 1906, and, therefore, the illness for which the assured could make claim did not begin until that day. It follows that a notice given August 27, 1906, was within the ten days' limit prescribed by the contract. This construction not only accords with the express language of the contract, but it affords to the defendant the means of protection from imposition, without subjecting it to the annoyance of receiving and the assured to the hardship of sending notice of every indisposition <sup>157</sup> of a week's duration on the mere chance that it may develop into a sickness falling within the terms of the policy.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*A Condition in a Policy insuring against injury by accident requiring a notice of the injury to be given within ten days of such accident is reasonable: Hatch v. United States Casualty Co., 197 Mass. 101, 125 Am. St. Rep. 332; Johnson v. Maryland Casualty Co., 73 N. H. 259, 111 Am. St. Rep. 609.*

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## STATE v. HAMILTON.

[80 S. C. 435, 61 S. E. 965.]

**CRIMINAL LAW—Former Jeopardy.**—If one is indicted for burglary and larceny and convicted for larceny after the prosecution has announced that he will not ask for a conviction for burglary because of the insufficiency of the evidence, and the court has stated that it will not direct a verdict of not guilty as to the burglary, and the defendant has obtained a new trial, he may be tried under a new indictment charging both larceny and burglary, and such trial is not putting the accused twice in jeopardy. (p. 883.)

**CRIMINAL LAW—Former Jeopardy.**—If one is indicted in separate counts for burglary and larceny, and being convicted of the latter obtains a new trial, the court has no right to consider the effect of the conviction for larceny in the first instance. (pp. 884, 885.)

E. M. Blythe and Morgan & Mauldin, for the appellant.

J. F. Lyon, attorney general, and J. E. Boogs, for the appellee.

439 POPE, C. J. At the September term of the court of general sessions for Pickens county, 1906, the defendant was indicted under two counts, burglary and larceny.

At the trial of the defendant the solicitor announced that he would not ask a conviction on the first count for the alleged burglary, upon the ground that there was no testimony offered in support thereof; and thereupon the court stated that it would direct a verdict of not guilty as to the first count.

The judge, thereupon, charged the jury generally, and the jury returned a verdict of guilty on the second count.

440 From the sentence on said verdict the defendant appealed to the supreme court. This court granted a new trial: *State v. Hamilton*, 77 S. C. 383, 57 S. E. 1098.

At the fall term, 1907, of the court of general sessions for Pickens county the solicitor handed out a new indictment, which contains substantially the two counts contained in the first indictment.

Upon the defendant's arraignment he interposed the plea of former jeopardy, giving proof of the first indictment and the fact that the two indictments are one and the same, and that the defendant is the same person described in each indictment; that the felony and burglary in said former indictment and the felony and burglary in the second indictment are one and the same felony and burglary. Wherefore, he claims he has been placed in jeopardy under the charge contained in the first count in said indictment, and that under article 1, section 17 of the constitution of the state of South Carolina, he cannot again be placed in jeopardy on said charge. Wherefore, he prays that he may be dismissed for the charge of burglary contained in the said first count in the said first indictment.

There was no difference of view between the parties so far as the testimony in support of said plea of jeopardy is contained, but the same, after reflection and argument, was overruled by the circuit judge, and the trial proceeded under both first and second counts.

After the charge of his honor, the jury returned a verdict of guilty, with recommendation to mercy; the judge then sentenced the defendant to five years' imprisonment. From this sentence the defendant now appeals to this court upon four grounds. Let the indictments and proceedings of the circuit court affecting the plea of jeopardy be reported.

We will now notice these exceptions. Nos. 1, 2 and 4 will be considered together, and are as follows:

1. "Because the circuit judge erred in overruling the defendant's plea of former jeopardy as to the first count in said indictment, made upon the ground that, having been <sup>441</sup> placed upon trial upon the identical charge contained in first count of said indictment, a jury having been impaneled for the trial of said charge, and said charge having been withdrawn from the consideration of the jury by the solicitor, he has been placed in jeopardy on said charge and could not be again tried thereon."

2. "Because the circuit judge erred in holding that the defendant had not been placed in jeopardy on the charge of burglary, contained in the first count of said indictment; whereas, he should have held: (a) that the statement of the solicitor that he would not ask for a verdict on that count, but would enter a nol. pros. on that count, was a withdrawal of that count from the consideration of the jury, and, further, was tantamount to a nol. pros. on that count; (b) that the statement of the circuit judge, made in his charge to the jury, was a withdrawal of the charge contained in said first count from their consideration."

4. "Because the circuit judge erred in refusing defendant's motion for a new trial and in arrest of judgment; whereas, he should have held that the defendant had been placed in jeopardy on the first count of said indictment and was entitled to his discharge as to the charge contained in said first count of said indictment."

As we have before remarked, it was upon motion of the defendant that a new trial was granted in this case, 77 S. C. 383, 57 S. E. 1098.

Thus the defendant is responsible for all the consequences which will flow to him from the new trial. If he had remained quiet, unquestionably his plea of former jeopardy would have been sustained. The effect, however, of the order for a new trial has removed every vestige of his plea of former acquittal.

This court has considered the effect of a new trial in a case where there were three counts in an indictment under which the jury found a verdict of guilty as to the first and third, and used the words, "We disagree as to the second count." The case referred to is *State v. McGee*, 55 S. C. <sup>442</sup> 247, 74 Am. St. Rep. 741, 33 S. E. 353. In this case the circuit judge held: "A verdict finding the defendant guilty under the first and third counts would necessarily have presupposed one of two things, to wit, either that the jury had found him not guilty under the second count, or that they



had disagreed as to that count, but were willing to render a verdict of guilty as to two counts, the practical effect of which, in law, would be to acquit him on the second count. When a verdict is entered which is not afterward set aside at the instance of the defendant, and the jury discharged from the further consideration of the case, its effect is to acquit the defendant of all the counts in the indictment, although the jury may have found him guilty on a less number than the whole of the counts; otherwise he would be subject for the same offense to be put in jeopardy of life and liberty a second time. Jurors who are unwilling to acquit a defendant on any of the counts in an indictment should refuse to agree except upon a general verdict of guilty.' As the verdict in this case must be set aside, and in order that the court may not be misunderstood, we take occasion to say that the defendant cannot claim an acquittal under the second count: *State v. Commissioners*, 3 Hill, 239."

The same principle of law underlies the decision of this court in the case of *State v. Gillis*, 73 S. C. 318, 114 Am. St. Rep. 95, 53 S. E. 487, 5 L. R. A., N. S., 571. Mr. Justice Jones, in delivering the opinion of the court, says: "It is true this rule was applied to offenses not capital, but the constitutional provision applies equally to offenses involving liberty as well as to offenses involving life as a penalty. The defendant must be held to have made his application for a new trial in view of the rule of law above declared, and must be deemed to have understood as plainly as if a statute had so declared that a new trial meant a rehearing upon the whole indictment as if no trial had taken place thereon."

It seems to us, therefore, that the points raised by these three exceptions are decided against the appellant; and that it is unnecessary, in view of the decisions we have quoted <sup>443</sup> from our own court, to linger longer in their consideration. These exceptions are overruled.

3. "Because the circuit judge erred in not holding that the finding by the jury of guilty on the second count of the indictment was an acquittal of the defendant on the separate and distinct charge contained in the first count of the indictment."

So far as the third exception is concerned, we hold that the defendant by interposing his appeal in 77 S. C. 383, 57 S. E. 1098, and having the same to obtain for him a new trial by the order of this court, has precluded himself from

having us to consider what is the true effect of the verdict of guilty on the second count of the indictment in the first instance. This exception must be overruled.

It is the judgment of this court that the judgment of the circuit court be, and the same is, affirmed.

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*The Accused Waives the Constitutional Safeguard* against being twice put in jeopardy, and may be tried again for murder, when he procures a new trial on his own motion, on a conviction of manslaughter under an indictment for murder: *State v. Gillis*, 73 S. C. 318, 114 Am. St. Rep. 95. See, also, *Commonwealth v. Murphy*, 174 Mass. 369, 75 Am. St. Rep. 353; *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911; *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617; *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294.

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## McMEEKIN v. CENTRAL CAROLINA POWER COMPANY.

[80 S. C. 512, 61 S. E. 1020.]

**NUISANCE—Abatement—Obstruction of Stream—Indictment.** The obstruction of a navigable stream cannot be declared a public nuisance and abated at the instance of a private party in a civil action without showing special damages. In such case indictment is the proper remedy. (p. 889.)

**EMINENT DOMAIN—Condemnation—Public Use.**—An act incorporating a corporation and providing "that the said power company shall, on demand, sell and furnish power to any person or corporation for manufacturing or lighting purposes, upon such persons or corporations paying the usual rates or charges for same," makes it a public corporation, which may be empowered to condemn land of private persons to be flooded by a dam erected across a navigable stream. (p. 891.)

The petition was as follows:

"1. That the respondent is, and at the times herein mentioned was, a corporation created and existing under the laws of the state of South Carolina; that said respondent under and by virtue of an act of the General Assembly of South Carolina, entitled 'An act to ratify and confirm the charter of the Central Carolina Power Company, granted by the Secretary of State on the seventeenth day of February, 1906, and to confer additional powers on said company,' approved twenty-fourth day of February, 1906, was invested and is still invested with the power, among other powers granted, to construct and maintain a dam or dams in and across Broad river, at a point between Frost's Mill and Alston, together with the right, power and privilege to acquire by purchase, or by

condemnation proceedings, all lands which may be overflowed by the construction and maintenance of such dam or dams as may be constructed and maintained under the power and authority conferred by said act.

"2. That your petitioner is the owner, in fee simple, and is now, and was possessed at the times herein mentioned, of the following described real estate, to wit: 'All that tract or parcel of land situate in the county of Fairfield, state of South Carolina, on Broad river, containing 33.79 acres, bounded on the north by track of Southern Railway, on the east by lands of Metz, on the south by Broad river, and on the west by lands of Yarborough.'

"3. That heretofore, to wit, on the — day of —, 1908, your petitioner was served with notice by said respondent that the above-described tract or parcel of land, the property of your petitioner, was required by it for the purpose of overflowing and sobbing the same by and with backwater created by the erection of a dam across Broad river, to which notice your petitioner replied in writing on the — day of —, 1908, signifying his refusal to consent to an entry thereon by said respondent.

"4. That your petitioner now learns that notwithstanding said refusal said respondent is prosecuting condemnation proceedings and is preparing to have a jury impaneled for the purpose of ascertaining the compensation to be paid your petitioner for the use of said lands.

"5. That your petitioner, upon information and belief, alleges that said act of the legislature ratifying and confirming the charter granted by the Secretary of State on the seventeenth day of February, 1906, and conferring additional powers, of and on the Central Carolina Power Company, respondent herein, is illegal and void, and of no effect in that (a) it provides for the erection of a dam across a navigable stream, contravening section 28, of article 1, of the constitution of the state of South Carolina, which provides: 'All navigable waters shall forever remain public highways free to the citizens of the state and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly'; also contravening section 1, article 14, which provides: 'The state shall have concurrent

jurisdiction on all rivers bordering on this and any other state bounded by the same, and they, together with all navigable waters within the limits of the state, shall be common highways and forever free, as well to the inhabitants of this state as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the General Assembly. (b) Said act is special legislation, in contravention of section 34, of article 3, of the constitution of South Carolina, and is not permissible under the proviso of section 2, article 9, of the constitution of South Carolina. (c) Said act permits the acquiring by condemnation of private property for private purposes without the consent of the owner in contravention of so much of section 17, article 1, of the said constitution as provides, 'Private property shall not be taken for private use without the consent of the owner.'

"6. That your petitioner is informed and believes that the said Central Carolina Power Company, respondent herein, will condemn the property of your petitioner herein described and deprive him of the free use and enjoyment thereof, unless restrained by the order of this court.

"Wherefore, your petitioner prays that the respondent be enjoined and restrained from further prosecuting proceedings for the assessment of compensation for use of said property, and for such other and further relief as may be just; and your petitioner will ever pray," etc.

The Central Carolina Power Company made a return to the rule, in which it averred that it was a corporation duly created and organized under the laws of South Carolina for the purpose of developing, transmitting and selling electric power, buying and selling land, building and erecting cotton and other mills, constructing and operating electric and other railways, lighting towns and cities, and doing such other things as electric power entered into as a motor; that, considering Broad river might be a navigable stream, the navigable portions of which were wholly within the state, and that it would be necessary to have special authority by the act of the legislature, the corporation made application to its General Assembly and caused to be introduced and duly passed by a two-thirds vote of each house a concurrent resolution for leave to introduce a bill to ratify and confirm the charter of the Central Carolina Power Company, granted by the Secretary of State in 1906, and to confer additional power on such company; all of which would appear by House



Journal, Session of 1906, at page 73, and in Senate Journal of the same session, at page 63. That such concurrent resolution having been so passed, the General Assembly passed an act to ratify and confirm the charter of the corporation granted by the Secretary of State on the 17th of January, 1906, and to confer additional power on such company. The statute so relied upon was set forth in full in this answer, which further alleged that the corporation proceeding under the act of Congress of March 3, 1889 (30 Stats., pp. 1151-1154, secs. 9-20, and chapter 425, United States Comp. Stats. of 1901, pp. 3540-3547), applied to the Secretary of War of the United States for his approval and the approval of the chief engineer of the plans prepared by the corporation for the erection of a dam across Broad river, and that the corporation expected to get such approval. It admitted the allegations contained in the second, third, fourth and sixth paragraphs of the petition, but denied the allegations and conclusions set out in the fifth paragraph of the petition, and, on the contrary, alleged that the act of the legislature of the state of South Carolina, hereinbefore referred to, was valid and binding under the proviso of section 1 of article 2 of the constitution of South Carolina, and that the legislature had full power and authority to confer upon the respondent the right to erect the proposed dam on Broad river, notwithstanding the provisions of section 28 of article 1 of the constitution of South Carolina, and of section 1 of article 14 thereof; and the corporation pleaded generally that it had full power and authority to acquire by condemnation the right of flowage of the petitioner's property, its purpose in so doing being a private use.

D. W. Robinson, for the petitioner.

W. H. Lyles, for the respondent.

**515** GARY, J. This is an application to the court, in the exercise of its original jurisdiction, for an order enjoining the defendant from taking the land of the petitioner under condemnation proceedings to the extent of backing water upon it on the completion of the dam across Broad river, which the defendant contemplates building as the basis for constructing an electrical plant.

The facts will fully appear by reference to the petition and the return to the rule to show cause, which will be set out in the report of the case.

The first ground upon which the petitioner relies for an injunction is, that the dam will obstruct a navigable stream, in contravention of section 28, article 1, and section 1, article 14, of the constitution of this state.

The obstruction of a navigable stream is a public nuisance, and the remedy is by indictment, unless the person instituting proceedings on the civil side of the court can show special or peculiar damages, differing in kind from those to which all others in common with him are exposed: *Carey v. Brooks*, 1 Hill, 365; *State v. Rankin*, 3 S. <sup>516</sup> C. 438, 16 S. C. 737; *Hellams v. Switzer*, 24 S. C. 39; *South Carolina Steamboat Co. v. South Carolina R. R. Co.*, 30 S. C. 539, 14 Am. St. Rep. 923, 9 S. E. 650, 4 L. R. A. 209; *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 46 S. C. 327, 57 Am. St. Rep. 688, 24 S. E. 337, 33 L. R. A. 541; *Baltzeger v. Carolina M. R. R.*, 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358. Thus showing that the obstruction of a navigable stream cannot be declared a public nuisance, and abated at the instance of a private party in a civil action merely on the ground that it is a public nuisance, as contended by this petitioner; but that in such case indictment is the appropriate remedy.

The aid of the court in the exercise of its chancery powers cannot, therefore, be invoked to restrain the defendant from doing an act which, if allowed to be completed, the petitioner would not have the right to demand should be declared to be illegal in a civil action.

The second ground set forth in the petition is that the said act is special legislation, in contravention of section 34, article 3, of the constitution, and is not permissible under the proviso of section 2, article 9, of the constitution, which is as follows: "Provided, that the General Assembly may by a two-thirds vote of each house, on a concurrent resolution, allow a bill for a special charter to be introduced, and when so introduced, may pass the same as other bills."

The petitioner's attorneys have not discussed this ground, and we deem it only necessary to refer to the proviso to show that this ground cannot be sustained.

The third ground upon which the appellant relies is, that the act permits the taking of private property, for private purposes, without the consent of the owner under condemnation proceedings, in contravention of so much of section 17, article 1, of the constitution, as provides that private property shall not be taken for private use without the consent of the owner.

Section 5 of the act incorporating the defendant provides "that the said power company shall, on demand, sell and furnish power to any person or corporation for manufacture or lighting purposes, upon such persons or corporations paying the usual rates or charges for same."

<sup>517</sup> In *Talbot v. Hudson*, 16 Gray (Mass.), 417, the court announced the following doctrine: "It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise in order to constitute a public use within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community. It is on this principle that many of the statutes of this commonwealth by which private property has heretofore been taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents coeval with the origin and adoption of the constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence."

This language is quoted with approval in the case of *Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10.

The petitioner's attorney contends "that the real purpose of the corporation was to generate and sell power for manufacturing purposes, or to use such power to operate its own manufacturing enterprise." They also say: "In the case at bar it will not do to say that the corporation is one for public uses, because of the provision in section 5 of its charter—that is, 'shall on demand sell and furnish power to any person or corporation for manufacture or lighting purposes upon such person or corporation paying the usual rates or charges for <sup>518</sup> same.' This provision was doubtless inserted for the purpose of giving color to the argument in behalf of

its public purpose. But, as shown above, it is impossible with this kind of company to serve the public generally, or an indefinite number of persons, as the ability to serve is used and exhausted in serving a small limited number of individuals or enterprises."

The language of section 5 of the act plainly imposes upon the defendant a public duty, and the petitioner assumes that the defendant will not comply with the requirements of the statute. It would be prejudging the case to decide that question at this time.

It must also be borne in mind that it does not appear from the allegations of the petition that more land will be required if the electric power generated by the petitioner should be devoted exclusively to the use of the public than will be necessary in case it also supplies electric power to private persons.

Having reached the conclusion that the petitioner was incorporated for a public purpose, it is only necessary to cite the case of *Ingleside Mfg. Co. v. Charleston Light and Water Co.*, 76 S. C. 95, 56 S. E. 664, to show that the land can be taken under condemnation proceedings.

An order dismissing the petition has already been filed.

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*The Uses for Which the Power of Eminent Domain cannot be exercised* are considered in the note to *Zircle v. Southern Ry. Co.*, 102 Am. St. Rep. 809. As to whether the application of water power to the generation of electricity for lighting, manufacturing and other purposes is a public use, see *Brown v. Gerald*, 100 Me. 351, 109 Am. St. Rep. 526; *Fallsburg Power etc. Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855; *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818. That riparian rights are property within the rule that private property cannot be condemned for public use without compensation, see *State v. Superior Court*, 48 Wash. 277, 125 Am. St. Rep. 927; *Kalama Electric Light etc. Co. v. Kalama Driving Co.*, 48 Wash. 612, 125 Am. St. Rep. 948.

*As to Whether an Injunction Will Lie* against the taking or injuring of private property for a public use, before compensation has been made, see *Harman v. Caretta Ry. Co.*, 41 W. Va. 356, 123 Am. St. Rep. 985; *Town of New Decatur v. Scharfenberg*, 147 Ala. 367, 119 Am. St. Rep. 81; *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326; *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526.



## McLEAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

[81 S. C. 100, 61 S. E. 900, 1071.]

**CARRIERS—Passenger Assuming Dangerous Position.**—If a passenger, without an emergency excusing it, rides in a place of obvious danger, which he knows, or ought to know, is not provided for passengers, he is guilty of contributory negligence and cannot recover for an injury to which his act contributes as a proximate cause. (p. 898.)

**CARRIERS—Relative Duty of Passenger and Carrier.**—The duty of a carrier demands that he exercise the highest degree of care for the safety of passengers, but there is a corresponding duty on the part of a passenger to exercise at least ordinary care for his own safety. (p. 900.)

**CARRIERS—Passenger Riding on Top of Car.**—A passenger who, without excuse or necessity, leaves his seat in a passenger-car attached to a freight train and takes a position upon the top of the caboose, is chargeable with negligence contributing as a proximate cause to his injury when the caboose is derailed while the passenger coach remains intact on the track. He cannot recover against the carrier. He assumes the risk of the dangerous position, and neither the suggestion of a brakeman to go there, nor the failure of the conductor to warn him while the train is standing at a station, can excuse his negligence. (pp. 900, 901.)

Willcox & Willcox, Henry E. Davis, J. T. Barron, E. O. Woods and W. F. Dargan, for the appellant.

Edward McIver, W. P. Pollock and Spears & Dennis, contra.

<sup>103</sup> JONES, J. The plaintiff, as administratrix, brought this action to recover damages for the death of William McLean, caused by the derailling of a caboose car, on top of which he was riding, alleged to have been the result of defendant's negligent and willful conduct. The trial resulted in a verdict and judgment for ten thousand dollars in favor of the plaintiff. The defendant has appealed to this court upon forty-two exceptions, with numerous subdivisions. We deem it unnecessary to consider the exceptions in detail, but will direct attention to the pivotal and controlling questions:

1. Was there any evidence tending to show that McLean's death was the result of any wanton or willful act or omission on the part of the defendant?

It appeared that on August 11, 1904, William G. McLean, with nine or ten other young men, boarded the defendant's train at Darlington, South Carolina, with a block ticket for the party from that point to McCall, South Carolina, where they were going to play baseball. The train was a freight

train, but there was also a passenger coach attached and at the rear end of the train there was a four-wheeled caboose. There were twenty-five passengers, including three infants, and the seating capacity of the coach was sufficient for twenty-four grown persons.

Just after the train left Darlington, Conductor York began taking up the tickets, beginning in the passenger <sup>104</sup> coach. On entering the caboose car, he found several passengers in there, among them D. T. McKeithan, J. W. Moore and four or five of the baseball men, including William G. McLean. The conductor testified that he told the men in the caboose that said car was not for passengers, and requested them to go into the passenger coach. This was corroborated by the testimony of McKeithan, Moore and Scarborough, one of the train hands. Fred Stem testified that he went into the caboose with the conductor, pointed out the men in there entitled to ride on the block ticket, and returned to the passenger coach, and that he did not hear the conductor make such statement. J. W. Wilcox testified that he was in the caboose car and did not hear the statement. Later McKeithan and Moore and some of the young men went into the passenger coach. There can be no reasonable doubt that such a statement was made by the conductor, and at the same time it may be conceded that Stem and Wilcox did not hear it. Whether the unfortunate McLean heard it will never be known with certainty. There can be no reasonable doubt that the conductor intended that all present should hear the statement, and the fact that said statement was made and was acted on by some present, must be kept in mind, in judging whether the after conduct of the conductor indicated any wanton or willful disregard of duty. The conductor returned to the front end of the passenger coach, where he kept his bill box and papers.

At Mont Clair, a station about seven miles from Darlington, McLean and Smith climbed up on top of the caboose by means of a ladder at the rear end. After the train passed Mont Clair, and before reaching Lumber, which is about ten miles from Mont Clair, J. W. Wilcox climbed upon the cab and found McLean and Smith up there, and he sat with them upon the cupola of the cab. Mr. Wilcox stated that he went up there because it was sultry and hot in the caboose; that before going he asked a brakeman of the caboose to open the window of the cupola; that he was informed that the window was nailed or tight and could not be raised, and

<sup>105</sup> that the brakeman suggested that it was cooler on top, and that he got up there. This is all the evidence to support the allegation that McLean was invited by defendant's agent to ride on top of the caboose, and the testimony as to the suggestion of the brakeman was taken subject to the objection that a mere brakeman has no authority whatever, real or apparent, to invite a passenger to ride on top of the caboose. There was not a particle of evidence that the conductor was aware that these young men were riding on top of the caboose from Darlington to Lumber. The train stopped for about one-half hour at Lumber, shifting, etc. During this stop these young men ate some watermelon on top of the cab and engaged in sport with others on the ground, throwing the rinds at each other. After this, according to Wilcox's testimony, Smith went down and Fred Stem went on top of the caboose. Stem said he went up after the train had stopped at Lumber about thirty minutes, and found Wilcox and McLean there. Wilcox could not state positively whether McLean went down from the cab during the stay at Lumber, but the uncontradicted testimony of J. W. Moore makes it certain that he did. Moore testified that while at Lumber, McLean came down into the passenger coach and sat with him a few minutes on the seat vacated by McKeithan, who got off at Lumber, his destination; that he had some watermelon rind in his hair and brushed it out, seemed warm and fanned himself awhile, got up and disappeared; that he did not see him any more until after the wreck. McLean, therefore, having a seat in the passenger coach, voluntarily left it and went on top of the caboose.

The complaint alleged that "plaintiff's intestate and others were seen by the conductor and other agents of the defendant company to be riding on top of the caboose, and were not warned of any danger thereon." The only evidence offered to establish this is fairly represented by the following from the testimony of J. W. Wilcox:

"Q. When you got to Lumber did the train stop any considerable length of time? A. It stopped about half an hour, <sup>106</sup> and did some shifting in the yard.

"Q. Did you at any time see the conductor? A. Yes; he was walking around there.

"Q. Did he see you? A. He should have seen me.

"Q. Could he see whether there was anybody on the caboose or not? A. He could see.

"Q. Did he see? A. He should have seen; we were in a conspicuous place.

"Q. Was there any remark made to him by anyone up there while you were at Lumber? A. We bought some water-melons and we were eating watermelon, and I think some of the boys, in a guying way, asked the captain if he would have a piece.

"Q. Did he, when that remark was made to him, look up there? A. He looked in that direction.

"Q. Did he answer? A. I couldn't say; he was a good distance off."

The conductor testified that he was busy with duties at the station, and was not aware that any of these young men were on the caboose until at the time of the wreck. But conceding that the conductor actually saw these young men on top of the caboose, while it was at rest at Lumber and detached from the engine, that fact would not tend to show that he had reason to believe they would remain and ride on top of the caboose. He had already informed passengers, in the presence of McLean, that it was against the rules for passengers to ride inside the caboose. While the caboose was at rest and detached from the engine, there was no real danger in going on top and eating watermelon there. For that matter they could have chased each other over the bumpers or under the cars without danger if the shifting engine was not about to connect. The hazard was not in being on top of the caboose while it was detached and at rest, but in daring to ride upon it, and there was no evidence that the conductor knew that they had ridden or intended to ride there. On the contrary, the only reasonable inference to be drawn from the testimony is that the conductor, in view of the notice he had already given that the caboose was not to be occupied by passengers, had reason to believe that no one would be so reckless as to remain and ride on its top. Further <sup>107</sup> with respect to the question whether the defendant, through its agents, willfully failed to warn the plaintiff's intestate not to ride on the caboose, there was testimony by J. W. Moore, without direct contradiction, to the effect that while the train was at Lumber, a few minutes before its departure, he heard some of the train crew say to some one on top of the train, "You better come inside; the white folks don't allow you to ride up there." Wilcox and Stem testified, however, that they heard no such warning.

When the train left Lumber it was some thirty minutes late. The track between Lumber and Robbins Neck was straight and slightly down grade. McLean, Wilcox and Stem



were sitting on the cupola of the caboose. There is nothing in the testimony from which it could be reasonably inferred that the speed of the train was reckless, or that it exceeded the schedule speed of thirty miles an hour allowed by the rules of the company, and there was no attempt made to show that such rule was unreasonable. In these days a high rate of speed may be perfectly consistent with due care in the management of a freight train. For the purpose of the point under consideration, it may be conceded that there was a scintilla of evidence tending to show a high and rapid rate of speed. It may have so appeared to some passengers, and especially to those riding on top of the caboose, who were necessarily subjected to the jerky motions of a freight train. Conceding even that there was evidence tending to show a negligent rate of speed, still there was failure to show such a speed as indicated a wanton and willful disregard of duty, for negligence and willfulness indicate opposite states of the mind. When the accident happened the engineer had blown the signal for Robbins Neck, a flag station about three miles from Lumber. Suddenly the cab was derailed, broke loose from the passenger coach, and turned over down a slight embankment, precipitating McLean, Wilcox and Stem to the ground, and so injuring McLean that he died two days thereafter.

<sup>108</sup> The acts of wantonness alleged to have caused the injury and death are thus summarized in the seventh paragraph of the complaint:

"7. That said car was derailed and wrecked as aforesaid by the negligence, carelessness, recklessness and wantonness of the defendant company and its agents, servants and employes, acting in the scope of their agency and duties: (a) in providing unsafe, unsuitable and unfit cars on their said train on said occasion; (b) in attaching to the rear of its said train the light, short and small car or caboose, which was unfit and unsafe for such use; (c) in attaching to the rear of its train a car not provided with sufficient trucks or wheels, and which was too light and short for such use, and which was unfit and unsafe for passengers to ride in; (d) in running said train, as constructed, at a high and excessive rate of speed; (e) in allowing, permitting, encouraging and inviting passengers to ride in said unsafe, unfit and improper car or caboose, and in unsafe and dangerous places on their said train of cars, and in failing to warn them of danger; (f) in failing to have heavy, strong rails, properly and securely fastened together; (g) in failing to have

sufficient, sound and secure crossties to give necessary support to the track; (h) in that the flanges of the wheels of the cars were defective, worn out and unsafe on said occasion."

There was no attempt to prove specifications "f," "g" and "h." We have already considered specifications "d" and "e." It remains to consider whether there was evidence tending to show willfulness in the respects charged in specifications "a," "b" and "c."

The fact that the cab was derailed would, at most, be only presumptive evidence of some negligent act or omission, with respect to the track, the car or the management. The evidence makes it manifest that there was no willful disregard of a passenger's right to use the cab in question. It had been inspected just before its use on the occasion in question and found to be in good condition. Four-wheeled cabooses<sup>109</sup> cars had been in use for years by the defendant company. Two of plaintiff's witnesses thought it was an unsafe model for a high rate of speed, but, on the other hand, there was testimony from experts that the car was especially fitted for freight service, and that it was a standard on twelve or fourteen railroads in the country, including the Pennsylvania system. The cab was not intended for the use of passengers, and, as shown, the conductor impressed that fact upon passengers when he first became aware that they desired to ride therein. There was no evidence showing such frequent derailment of four-wheeled cabooses as distinguished from other patterns as to warrant defendant in being charged with recklessness in their continued use.

After a painstaking review of the record, we fail to find the slightest evidence tending to show any willful misconduct of defendant causing the death of plaintiff's intestate, and it is our duty to set the judgment aside for error in submitting such issue to the jury and in permitting a verdict to stand based upon such a conclusion.

2. We next consider the question of contributory negligence.

The court refused to give the jury the following instructions as requested by defendant's counsel:

"It is negligence per se for a passenger to ride on top of a caboose car, except in an emergency requiring it, and if his act in so doing cause his injury or contributes thereto as a proximate cause, he cannot recover."

"It is negligence per se for a passenger to ride on top of a caboose car when there is a regular passenger car provided

for passengers, and if the passenger's riding on top of the caboose car causes his injury or contributes thereto as a proximate cause, he cannot recover."

"If a passenger goes into a car provided for passengers and afterward leaves such car and goes in and upon the top of a caboose car, a place of obvious danger to any man in his senses, and not intended for passengers, and he is injured by <sup>110</sup> reason of his being on top of said car, which injury would not have occurred had he been in the car provided for passengers, he is guilty of negligence or contributory negligence, as a matter of law, and cannot recover."

These requests do not assume as a fact any matter in issue, and left to the jury to determine whether McLean's riding on top of the caboose contributed to his death as a proximate and concurring cause, and the principle of law contended for by them was not placed before the jury in the instructions given. We think it was error to refuse the requests.

The authorities generally hold that if a passenger, without an emergency excusing it, rides in a place of obvious danger, which he knows, or by the exercise of ordinary care ought to know, is not provided for passengers, and such act contributes as a proximate cause to his injury, he is guilty of contributory negligence and cannot recover: *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Houston etc. R. R. v. Clemmons*, 55 Tex. 88, 40 Am. Rep. 799; *Bon v. Railway Pass. N. Co.*, 56 Iowa, 664, 41 Am. Rep. 127; *Kentucky etc. R. R. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Little Rock etc. R. R. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Florida etc. Ry. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 1. 11 South. 506, 16 L. R. A. 631; *Paterson v. Central R. R. & B. Co.*, 85 Ga. 653, 11 S. E. 872; *Asbury v. Charlotte E. Ry. & P. Co.*, 125 N. C. 568, 34 S. E. 674; *Baltimore & P. R. R. v. Jones*, 95 U. S. 439, 24 L. ed. 506; note to *Illinois C. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 90; 4 *Elliot* on Railroads. 1632; 6 *Cyc.* 652; 5 *Ency. of Law*, 2d ed., 674.

This view does not at all conflict with *Zemp v. Wilmington & M. R. R. Co.*, 9 Rich. 84, 64 Am. Dec. 763, which held that under the circumstances of that case the question of contributory negligence was for the jury. *Zemp*, when injured, was standing on the platform of the passenger coach without knowledge that it was a prohibited place. The train had stopped at a point where the stages had been in the habit of taking up passengers; the conductor left the cars to inquire whether they should stop there as heretofore or proceed far-

ther; the passengers, seeing one stage-coach and persons and horses in the woods at this point, supposed that they had gone as far as they <sup>111</sup> could on the railway; many arose from their seats and several got on the platforms, amongst the rest the plaintiff, who got on the rear platform of the forward car. The halt was but for a few minutes, and as the conductor ordered the train to proceed, the plaintiff stepped on the forward platform of the hindmost car. In a few moments the engine, tender and baggage-car were derailed, due to negligent construction of the track, the passenger-cars were jammed together, and the body of Zemp was caught in the wreck of the two platforms.

It will be observed that Zemp went upon the platform while the car was at rest, for the purpose of disembarking at the usual stopping place. His standing there for a few moments after the car suddenly moved forward, having no knowledge that it was a prohibited place, could not be held contributory negligence as matter of law.

In connection with the foregoing, we will consider the question whether there was error in refusing to direct a verdict on the ground that the only conclusion of which the evidence is susceptible is that plaintiff was guilty of contributory negligence.

All questions or issues of fact are for the jury, but when the facts upon which the case must turn are undisputed, or conclusively established, and they admit of but one inference, the question is one of law, since there is no issue of fact, and the court not only may, but when requested must, direct the jury as to the proper conclusion: *Jarrell v. Charleston & W. C. R. R. Co.*, 58 S. C. 491, 36 S. E. 910; *Lyon v. Charleston & W. C. Ry. Co.*, 77 S. C. 328, 58 S. E. 12.

The plaintiff's intestate was a graduate of a college and a very intelligent and energetic young man. Having a seat in the passenger coach, he left the same, without excuse or necessity, and went on top of a freight cab and rode there until precipitated therefrom to his death. If it be conceded that he went upon the cab at the suggestion of a mere brakeman, of which there is no evidence, and it be conceded that the conductor saw him while eating watermelon on top of the detached caboose during the long stop at Lumber, a fact <sup>112</sup> positively denied by the conductor, and sought to be established by showing that he could have seen him had his attention been directed to that end, still the plaintiff's intestate was guilty of gross negligence in remaining on top of the car



and riding thereon. To ride thus on a freight cab is a danger so obvious that a prudent man should not take the hazard unless some reasonable necessity compels. There was no emergency in this case and he took the risk from motives of pleasure. Neither the suggestion of a mere brakeman to go there nor the failure of the conductor to warn, if he saw him there, engaged in sport while the car was at rest and detached, can excuse the negligence of the passenger in remaining and riding in a place not provided for passengers and of such obvious danger.

The cases cited above show that such is and ought to be the law. The duty of a carrier of passengers demands that he exercise the highest degree of care for the safety of passengers, but there is a corresponding duty on the part of the passenger to exercise at least ordinary care for his own safety. Without this co-operation on the part of the passenger, the carrier can never carry out efficiently the rules provided for safety. The rules of the defendant company forbade a passenger riding even inside the cab, and the conductor made a reasonable effort to notify passengers of it and to enforce it.

If the unfortunate McLean, though present, failed to hear the warning, of which there is no evidence, still it was so manifestly hazardous for him to ride on top of the cab, where no reasonable man contemplates that a passenger will ride, except in a great emergency, that his act must be held negligent.

In this state, where the doctrine of comparative negligence is not recognized and where it is only necessary, in order to defeat a recovery, to show some negligence of plaintiff directly contributing as a proximate cause to the injury, and without which it would not have happened, we are bound to hold, upon the most favorable view of the testimony <sup>113</sup> in behalf of plaintiff, that her intestate's negligence contributed as a proximate cause to his injury. The undisputed testimony is that no one in the passenger coach received the slightest injury, as that car was in no wise affected by the derailment of the cab. So far as the evidence shows, no one was injured except those riding on top of the caboose. Hence, it is manifest that if plaintiff's intestate had occupied the passenger coach, where he should have been, he would not have been injured.

It is contended that to make the negligence of a person a proximate cause, he must do something, and that just passively, though negligently, being where the stroke fell, cannot be a proximate cause, as, by way of illustration, in *Hunter v. Atlantic Coast Line R. R.*, 72 S. C. 336, 110 Am. St. Rep. 605, 51 S. E. 860, the passenger walked off the moving train; in *Jarrell v. Charleston & W. C. R. R. Co.*, 58 S. C. 491, 36 S. E. 910, the passenger stepped off a train standing over a trestle; in *Lyon v. Charleston & W. C. R. R. Co.*, 77 S. C. 328, 58 S. E. 12, the employé was uncoupling a car in a negligent and dangerous manner. This contention cannot be sustained. In *Sanders v. Aiken Mfg. Co.*, 71 S. C. 58, 50 S. E. 697, the court declared: "An attempt to make a line of separation between positive and negative negligence—between active negligence and lack of vigilance—would involve the courts in distinctions not only difficult and intricate, but highly artificial and unsound."

An examination of the cases which hold a passenger guilty of contributory negligence, by riding in an exposed and prohibited place, will show that the passenger's negligence placed him in a position in which the negligence of the carrier, operating in connection with the negligent position of the passenger, produced the injury.

This is not a case in which the negligence of the passenger was a remote cause in the chain of causation, or a mere condition upon which the carrier's negligence operated as an efficient cause, but is a case in which the negligence of the passenger, riding in an exposed and prohibited place, operated directly and concurrently with the negligence of the <sup>114</sup> carrier, and without which the injury would not have happened.

These views render it unnecessary to further consider the exceptions.

The judgment of the circuit court is reversed.

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*A Passenger Who Takes a Dangerous Position* on a car, when there is no excuse or necessity therefor, will generally be held to assume the risk thereof: *Freeman v. Pere Marquette R. R. Co.*, 131 Mich. 544, 100 Am. St. Rep. 621; *Rice v. Philadelphia Rapid Transit Co.*, 214 Pa. 147, 112 Am. St. Rep. 738. As to how far this rule is modified where the passenger takes such a position because of the crowded condition of the car, see *Verrone v. Rhode Island Suburban Ry. Co.*, 27 R. I. 370, 114 Am. St. Rep. 41; *Indianapolis Street Ry. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. Rep. 163; *Jackson v. Natchez etc. Ry.*

Co., 114 La. 981, 108 Am. St. Rep. 366. Although a passenger on a freight train is negligent in putting himself in a perilous position, yet if the direct cause of the injury to him is the omission of the railroad employes, after becoming aware of his peril, to use a proper degree of care to protect him, the railroad company becomes liable: *Rodgers v. Choctaw etc. R. R. Co.*, 76 Ark. 520, 113 Am. St. Rep. 102. If a street railway company consents to a passenger's taking a dangerous position on its car and knowingly assumes to carry him in that position, it must exercise that high degree of care which the law requires a carrier to observe for the safety of his passengers: *Parks v. St. Louis etc. Ry. Co.*, 178 Mo. 108, 101 Am. St. Rep. 425.

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### STATE v. JAMES.

[81 S. C. 197, 62 S. E. 214.]

**SUNDAY LAW—Several Acts as One Offense.**—A butcher and ice dealer making several sales and deliveries on the same Sunday commits but one offense. (p. 903.)

**SUNDAY LAW—Works of Necessity Defined.**—"Necessity," as used in Sunday laws, is an elastic term; it does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. There is a tendency, which ought not to be sanctioned, to claim accustomed luxuries as necessities. (pp. 903, 904.)

**SUNDAY LAW.—Ordinary Sales or Deliveries of Ice or Fresh Meat** are not works of necessity within the exception of Sunday laws. (p. 904.)

S. Oliver O'Bryan, for the appellant.

J. H. Lesesne, contra.

<sup>198</sup> **WOODS, J.** The defendant, William James, was convicted before a magistrate of the offense of violating the Sunday law, contained in Criminal Code, section 500. The circuit court, on appeal, affirmed the judgment of the magistrate.

The defendant is a butcher and ice dealer in the town of Manning. He was arrested on three warrants, charging three separate offenses of selling ice and meat, and delivering ice and meat, to three different persons, and carrying on his ordinary business, by such sales and deliveries, on Sunday, August 4, 1907.

Contrary to the contention of the counsel for the prosecution, the magistrate ordered the three charges to be consolidated <sup>199</sup> into one, holding whatever might be the number of sales and deliveries, as all were on the same day, they constituted but one doing or exercising worldly labor, business or work of the defendant's ordinary calling, within the terms

of the statute. Our statute is the same as the English statute (29 Charles II, c. 7). In deciding under that statute the precise point here involved, in *Crepps v. Durden*, Cowp. 640, Lord Mansfield said: "On the construction of the act of parliament the offense is 'exercising his ordinary trade on the Lord's day,' and that without any fraction of a day, hours or minutes. It is but one entire offense, whether longer or shorter in point of duration. So, whether it consists of one or of a number of particular acts, the penalty incurred for this offense is five shillings. There is no idea conveyed by the act itself that if a tailor sews on the Lord's day, every stitch he takes is a separate offense; or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day." This case was cited and the principle applied in holding a number of acts of adultery to constitute but one offense in *Re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556, 30 L. ed. 658. The argument against this construction of the statute, on the ground of the inadequacy of the fine of one dollar to prevent the violation of the law, loses its force in view of the fact that the General Assembly has not seen fit to change the penalty, though the judgment of Lord Mansfield was rendered in 1777 and that of the supreme court of the United States in 1887.

The main question is whether the sale or delivery of ice or fresh meats to the residents of the town of Manning on Sunday is a work of necessity. A work of necessity, within the meaning of the statute, may be that labor necessary to save the worker himself from unforeseen and irreparable loss, or it may be that necessary to the community. There is no evidence that the sales or deliveries <sup>200</sup> here under consideration were made to persons who had any unusual or sudden necessity for these articles, so the question here is whether such sales or deliveries on Sunday are ordinarily necessary to the people constituting the municipal community of the town of Manning. It is impossible to state, in the form of a legal proposition, the degree of need or inconvenience which would amount to necessity: *Lawton v. Rivers*, 2 McCord, 445, 13 Am. Dec. 741. Necessity is an elastic term. It does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. No doubt a thing which is merely needful or desirable to the residents of a town might be a necessity to the residents of a great city.



So, also, that which was a luxury a century ago may have become now a necessity. There is always, however, a tendency, which ought not to be sanctioned, to claim accustomed luxuries as necessities falling within the exception of the law.

The obvious intention of the statute is to set apart one day for rest from ordinary labor, so as to give opportunity to all for leisure and the contemplation of the higher things of life. This purpose would be defeated if the courts should hold every work a necessity, the interruption of which would break into the ordinary habits of the community, or produce a degree of public inconvenience or discomfort. Assuming that supplies could not be laid in on Saturday, there is still no ground to say it is a grievous deprivation not to have ice and fresh meat every day in the week. Discussion of the numerous authorities is unnecessary. Various kinds of labor alleged to fall within the exception of works of necessity in Sunday laws are considered in the following cases: *Commonwealth v. White*, 190 Mass. 578, 77 N. E. 636, 5 L. R. A., N. S., 320; *McGatrik v. Wason*, 4 Ohio St. 566; *Yonoski v. State*, 79 Ind. 393, 41 Am. Rep. 614; *Topeka v. Hempstead*, 58 Kan. 328, 49 Pac. 87; *Arnheiter v. State*, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392; *Hennessdorf v. State*, 25 Tex. 597, 8 Am. St. Rep. 448, 8 S. W. 926; *Murray v. Commonwealth*, 24 Pa. 270; *Commonwealth v. Louisville etc. R. R. Co.*, 80 Ky. 291, 44 Am. <sup>201</sup> Rep. 475; *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *State v. McBee*, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638; *Burns v. Moore*, 76 Ala. 329, 52 Am. Rep. 332; *McGrath v. Mervin*, 112 Mass. 467, 17 Am. Rep. 119; *Hamilton v. Austin*, 62 N. H. 575; *State v. Knight*, 29 W. Va. 340, 1 S. E. 569.

So far as we can find, there is no precedent for holding the continuance on Sunday of ordinary sales or deliveries of ice or fresh meat to be a work of necessity in a town, and there is no sound argument in favor of such a conclusion.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*Labor on Sunday* is not prohibited by the common law: *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365. It has been held that labor in operating an ice factory may become a "work of necessity" within the meaning of Sunday laws: *Hennessdorf v. State*, 25 Tex. App. 597, 8 Am. St. Rep. 448. But the delivery of flour on board a steamer in order to avoid liability of delay in getting it to market from the closing of navigation has been held not a work of necessity: *Pate v. Wright*, 30 Ind. 476, 95 Am. Dec. 705; and the clearing out of a wheel-pit to prevent stoppage on a week day of mills employing many men has also been held not a work of necessity: *McGrath v. Merwin*, 112

Mass. 467, 17 Am. Rep. 119. That the keeping open of a barber-shop and the shaving of customers are not acts of necessity, see *State v. Sopher*, 25 Utah, 318, 95 Am. St. Rep. 845; *Ungericht v. State*, 119 Ind. 379, 12 Am. St. Rep. 419.

*There can be but One Violation*, by the same person on the same day, of a statute prohibiting business on Sunday, and but one penalty can be inflicted: *Friedeborn v. Commonwealth*, 113 Pa. 242, 57 Am. Rep. 464.

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## JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

[81 S. C. 235, 62 S. E. 244.]

**DAMAGES.**—**Mental Suffering Means** distress or serious pain as distinguished from annoyance, regret or vexation; mental anguish is intense mental suffering. (pp. 906, 907.)

**TELEGRAPH COMPANY—Mental Suffering.**—There is no presumption of mental anguish arising from delay in a telegram depriving one of an opportunity to attend his cousin's funeral. (pp. 907, 908.)

George H. Fearons, J. H. Marion and Evans & Finley, for the appellant.

A. L. Gaston, contra,

<sup>236</sup> **WOODS, J.** The following telegram, intended for the plaintiff, was delivered to the defendant's agent on August 3, 1906, at Hudson, North Carolina:

"Miss Mary Johnson, near Sou. Dept., Chester, S. C.:

"Alie dead. Bring here tomorrow. Answer whether you can come. S. J. SMITH."

Alie was the wife of the sender and the first cousin of the plaintiff. The telegram was not delivered till August 6th, and negligence on the part of the agent at Chester in not <sup>237</sup> making proper efforts to find the addressee was admitted. The plaintiff recovered judgment for one hundred and fifty dollars for mental anguish and suffering, in being deprived of the privilege of attending the funeral of which the telegram was intended to give notice.

The single question made by the appeal arises from the refusal of the circuit judge to charge the following request: "The court charges that where a party is deprived of attending a funeral by reason of delay in the delivery of the telegram, and the relationship between such party and the deceased, to whom the telegram relates, is that of first cousin,

proof of such relationship is not of itself sufficient to raise a presumption of mental anguish, and in order to enable such party to recover damages for mental anguish on account of such deprivation, it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the plaintiff and the deceased, and that at the time the message was accepted by the telegraph company for transmission and delivery, adequate notice was given the company of such special relations."

In *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757, the question being as to the presumption of mental anguish or suffering of one who, upon the occasion of the death of his wife, was deprived of the presence of his brother in law in his hours of sorrow, the court laid down these propositions: "1. That a plaintiff can only recover such damages as are the direct and proximate result of a wrongful act on the part of the defendant; 2. That mental anguish by a brother in law may be the result naturally and reasonably to be anticipated from the failure to deliver a telegram, but there is no presumption that such injury has been sustained; 3. That if, in the particular case, one related merely by affinity sustains damages, they are special, and the defendant must have notice of the facts from which it may be reasonably expected they would arise, at the time the message is delivered for transmission." We are now called on to decide whether the same rule applies to first cousins.

<sup>238</sup> If the reasoning of the court in that case is to be regarded, it is perfectly clear there must be some line drawn in degrees of consanguinity where the presumption of suffering and anguish for such disappointments cannot be indulged. For it is within the knowledge of all that the relationship of father in law, mother in law, brother in law or sister in law is usually closer by intercourse and affection than that of the remoter blood relations. The reasoning and conclusion in *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757, are thoroughly sound, but the principle of that case would lead to absurdity unless the court fixes some degree of blood relationship beyond which suffering and anguish will not be presumed as the results of delay in the transmission and delivery of telegrams.

Our statute provides for damages for "mental anguish or suffering." It will not be doubted these words were intended to have their usual strong meaning. They do not give the slightest ground to impute to the General Assembly an inten-

tion to encumber the administration of justice, and open the flood-gates of speculative litigation by allowing suits to be brought for any unpleasant feeling or sensation, however slight. Mental suffering means distress or serious pain as distinguished from annoyance, regret or vexation. Mental anguish is intense mental suffering.

Being deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent and grandchild in the great sorrows of life, and being deprived of attending their funeral rites, produces in every normal man and woman with normal affections for these near kindred distress and serious pain—that is, mental suffering or anguish within the meaning of the statute. When we leave these close family ties and reach the relation of uncle and aunt, niece and nephew, and that still further removed relation of cousin, the deprivation ordinarily produces annoyance, regret or vexation, but not a state of mind attending to distress or mental suffering. This, we think, is the common-sense interpretation of the statute, viewed in <sup>239</sup> the light of the general experience of men; and it is in accord with authority.

The following authorities support the case of *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757, holding there is no presumption of mental anguish, arising from delay in telegrams affecting the feelings of those related by affinity: *Western Union Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 30 S. W. 298; *Western Union Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. 649; *Davidson v. Western Union Tel. Co.* (Ky.), 54 S. W. 830; *Western Union Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 39 S. W. 198. In *Denham v. Western Union Tel. Co.* (Ky.), 87 S. W. 788, recovery was denied to an aunt in a suit for damages for delay in a telegram announcing the death of a nephew. In *Western Union Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482, it was likewise held there was no presumption that an uncle will suffer mental anguish from failure to attend his niece's funeral.

In North Carolina, the view is taken that any telegram announcing sickness or death is sufficient notice to the company to warrant a recovery in any case where mental anguish is shown to have resulted, without respect to the relationship of the parties; but, on the trial, where the relationship does not raise the presumption of mental anguish, the damages



must be affirmatively proved. The rule established in this state by Butler's case (77 S. C. 148, 57 S. E. 757) is, that there is no presumption that telegrams announcing sickness or death involve mental anguish or suffering, but rather annoyance, regret or vexation, unless they are sent by or intended for near relations. The defendant, therefore, had a right to the instruction asked for.

The judgment of this court is, that the judgment of the circuit court be reversed and the cause remanded to that court for a new trial.

Mr. Chief Justice Pope concurs with hesitation.

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*The Elements of Damages Recoverable from Telegraph Companies* for negligence in the transmission or delivery of messages are considered in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 286. Damages may be recovered, as a general rule, for mental suffering resulting in the delay of a telegram: *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 127 Am. St. Rep. 991.

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## IN RE UNION MANUFACTURING AND POWER COMPANY.

[81 S. C. 265, 62 S. E. 259.]

**PARTITION—Grantee of Easement as Party.**—The grantee of one cotenant of an easement to overflow a part of the common property is a necessary party to partition. (p. 911.)

**PARTITION—Relief for One not Made a Party.**—The grantee of one cotenant of an easement to overflow a part of the common property, who has been given no notice of partition, is entitled, on intervention, to have the decree opened and his interest protected, if practicable, by allotting to his grantor the portion of property burdened with the easement. (p. 911.)

Elliott & Elliott and J. Ashby Sawyer, for the appellant.

Wallace & Barron and J. Gordon Hughes, contra.

**266 JONES, J.** This is an appeal from an order of judge Watts refusing to allow the Union Manufacturing and Power Company to intervene in the suit of Sue R. Jeter and Mary A. Jeter against Sara Ida Knight.

It appears that Sue R. Jeter, Mary A. Jeter and Sara Ida Knight were owners, as tenants in common, of a tract of land on Broad river, in Union county. On January 15, 1903, Sue R. Jeter and Mary A. Jeter executed to the Union Manu-

facturing and Power Company a release or grant of an easement to overflow a portion of said tract by the erection of a dam across Broad river. After the dam was erected, and on March 1, 1906, Sara Ida Knight, who had not granted easement to overflow, brought an action against the Union Manufacturing and Power Company for damages to her undivided one-fourth interest by reason of said overflowing. Among other defenses the Union Manufacturing and Power Company alleged its equity to have the tract so partitioned among the said tenants in common as to have <sup>267</sup> allotted to granting tenants that portion of the tract affected by the alleged easement, in so far as it may be practicable and equitable to do so without injury to the nongranting tenant.

While this action was so pending, on August 26, 1907, Sue R. Jeter and Mary A. Jeter commenced an action against Sara Ida Knight for partition of said land. The petition for intervention alleges that service of summons in said action was accepted by Wallace & Barron, attorneys for Miss Knight, dated August 26, 1907; that on the back of the summons there is an indorsement, dated September 5, 1907, consenting to the docketing of the case, and the said case was docketed September 6, 1907; that the writ in partition being dated September 3, 1907, was filed September 6, 1907; that commissioners were appointed and sworn September 3d and made return, which was filed on September 6, 1907; and that decree and partition was made by Judge Watts at chambers on September 6, 1907. In this partition tract No. 1, alleged by petitioner to be most affected by the backwater, was allotted to Sara Ida Knight. The petition alleged that the partition was greatly injurious and prejudicial to the rights of petitioner, and was so intended. The facts stated in the petition were not denied, and the petition was dismissed in a formal order without stating the reasons therefor.

After careful consideration, this court is of the opinion that it was error not to allow petitioner to intervene, with a view to have partition made so as to secure petitioner's rights in the premises, provided the same may be done without prejudice to rights of the nongranting tenant, Sara Ida Knight.

Section 195 of the Code provides that "the court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable <sup>268</sup> neglect." This section should have a liberal construction

in furtherance of justice. According to the allegations of the petition, the proceedings were had without any notice to petitioner, and no opportunity whatever was given to protect petitioner's rights in the premises. Petitioner was not only taken by surprise, but, according to the untraversed allegations, the proceedings were conducted with a design to render the easements granted by some of the cotenants ineffective. A court of equity should be slow to admit its impotency to correct such glaring injustice.

In *Charleston C. & C. R. R. Co. v. Leech*, 35 S. C. 146, 14 S. E. 730, the court held that the grantees of a right of way from one cotenant is not such a party to partition proceedings as would authorize the grantee to participate in the appointment of the commissioners, and there was some expression to the effect that such a grantee was not a necessary or proper party to the partition proceedings; but notwithstanding these expressions, as matter of fact, partition was ordered in said action at the instance of the railroad company, and its rights were carefully guarded by explicit directions in the writ, enjoining the commissioners who were sworn to carry out such directions, if practicable, to partition the land so that the railroad bed and right of way shall lie upon the part, if any, assigned to Mrs. Leech, the granting tenant. The case of *Charleston C. & C. R. R. Co. v. Leech* was three times in this court (33 S. C. 175, 26 Am. St. Rep. 667, 11 S. E. 631; 35 S. C. 146, 14 S. E. 730; 39 S. C. 446, 17 S. E. 994), and the case throughout was controlled by the principle that where a tenant in common had placed a burden on the common property, justice and equity demanded that partition should be, if practicable, so made as to allot to such tenant in common the portion upon which the burden has been placed; and on the last-mentioned appeal that principle was so far enforced as to hold that the heirs at law of Mrs. Leech taking her interest, which exceeded the damage done by the construction of the railroad, were estopped to claim compensation, <sup>269</sup> although actual partition was rendered impracticable because the children of Mrs. Leech became owners of the whole upon her death. It was considered by the court that, under such circumstances, the children took Mrs. Leech's share burdened with the easement.

It is hard to reconcile such a strenuous enforcement of the rights of the easement holder against the interest of the burdening cotenant, with the view that the easement holder has

no such interest in the partition as would make him a proper or necessary party to such partition.

We think the better view is that the petitioner, in the circumstances stated in this case, is a necessary party to the partition proceedings, as it is delusive to recognize a right while denying opportunity and remedy for its protection.

In Freeman on Cotenancy and Partition, 465, the learned author says: "In those states where such a conveyance is regarded as void against the cotenants of the grantor, the grantee is not usually considered as a necessary party defendant to a suit for partition, and such suit may be prosecuted to a final decree without taking any notice to him whatsoever. But there can be no doubt that the grantee of a specified parcel will become seised thereof in severalty if, upon partition, it should be assigned to him or to his grantor; and if not so assigned, he will lose his entire interest. He is more deeply interested in partition than any of the tenants in common of the entire tract. It little matters to them where their respective proportion may be located. But with the grantee of a special location, it is all-important that such division will be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected, as far as possible, without doing injustice to the cotenants of the whole tract. He has, therefore, been regarded as a proper party defendant, even in states where his conveyance has been spoken of as void against the cotenant or his grantor. In such states, the making <sup>270</sup> of such a grantee a party defendant may, perhaps, be required by the courts rather by reason of their desire to do complete justice than as a matter of absolute right; but in states where his conveyance is regarded as valid, and as investing him with all the rights and interests which his grantor had in the tract conveyed, his right to be a party defendant is as absolute as that of a cotenant of the whole tract: *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 175, 22 L. R. A. 641."

In the case of encumbrances, such as judgments or mortgages against the interest of a cotenant, it may not be necessary, as a rule, to make such lienholders parties, because, after partition in kind, the lien will merely be transferred to the tenant's share in severalty, or, in case of sale, the tenant's share in the fund, and thus complete justice be effected, but in *Kennedy v. Boykin*, 35 S. C. 61, 28 Am. St. Rep. 838, 14



S. E. 809, where a tenant in common gave a mortgage on a specific part of the common property, the mortgagee was held to have an equity to require partition, if practicable, without prejudice to other cotenants, so as to allot the specific portion covered by the mortgage as the share of the mortgagor, and thereby save the lien of the mortgage. In this case the right of the easement holder cannot be protected at all, unless it is done in the partition proceedings, and under the allegations this right was wantonly disregarded in the partition proceedings.

The judgment of the circuit court is reversed and the case remanded, with instructions to open the judgment, allow the intervention of petitioner, and proceed to make partition under specific directions to commissioners to make partition, so far as practicable, without injury to the interest of the non-granting cotenant, Sara Ida Knight, so as to allot to the granting tenants, Sue R. Jeter and Mary A. Jeter, the portion of the tract burdened by them with the alleged easement.

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*In a Partition Suit* all persons interested are necessary parties: *Batterton v. Chiles*, 12 B. Mon. 348, 54 Am. Dec. 539; *Portis v. Hill*, 14 Tex. 69, 65 Am. Dec. 99; *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81. See, also, *Robertson v. Brown*, 187 Mo. 452, 106 Am. St. Rep. 485; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *Ferris v. Montgomery L. & I. Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Boone v. Knox*, 80 Tex. 642, 26 Am. St. Rep. 767. The rights of parties cannot be adjudicated in the proceedings when they are not properly before the court: *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 111 Am. St. Rep. 77. It has been decided that one who holds a vendor's lien on land held in common is not a necessary party to a suit to partition the land: *Moore v. Willey*, 77 Ark. 317, 113 Am. St. Rep. 151. See, also, *Wetterlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449.

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### VAUGHAN v. LANGFORD.

[81 S. C. 282, 62 S. E. 316.]

**POSSIBILITY OF REVERTER**—Whether an Estate.—The possibility of reverter after the termination of a fee conditional, being a mere possibility, is not an estate. (p. 914.)

**POSSIBILITY OF REVERTER**—Grant or Devise.—The possibility of a reverter, after the termination of a fee conditional, is not the subject of devise, inheritance or grant. (p. 915.)

**POSSIBILITY OF REVERTER**—Release by Will.—It seems that a possibility of reverter cannot be released by will to the tenant in fee conditional. (p. 915.)

**WILLS**—Possibility of Reverter.—Words in a will signifying an intention to exclude certain devisees from participation in any

other property than that devised to them cannot have the effect of excluding them, as heirs, from participating in other property, such as a possibility of reverter, not disposed of. (p. 915.)

**COTENANCY—Recovery for Betterments.**—A cotenant cannot recover the value of betterments put upon the land without having credited thereon against him the value of the use of the land. (p. 915.)

**COTENANCY—Accounting and Betterments.**—In an accounting between cotenants, betterments, are to be regarded as paid pro tanto by the rents as they accrue, and the statute of limitations is subject to this rule. (p. 916.)

**COTENANCY—Adjusting Equities in Partition.**—In decreeing partition, a court of equity should adjust and settle the equities of the cotenants with respect to betterments, waste and rents from the common property. (p. 918.)

**COTENANCY—Lien in Favor of Co-owner for Rents.**—There is no fixed lien on the common property for rents, in favor of one cotenant against another, and the court in partition will not provide for the payment of such rents from the common property to the prejudice of persons holding conveyances or liens on the interest of the cotenant owing the rent. But, as among the parties themselves, the court in decreeing partition has the power, in doing full justice in the premises, to adjust all demands for rent, and require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the cotenant owing the rent. (p. 918.)

Simpson & Bomar and S. M. Pilgrim, for the appellants.

Haynsworth & Patterson and Stanyarne Wilson, contra.

283 **WOODS, J.** The action is for partition. The land described in the complaint was owned by William Jones, who, on August 21, 1868, conveyed it to his daughter, Eliza Jones, "and the lawful heirs of her body." Eliza Jones, on December 21, 1882, executed to E. L. Langford a deed of conveyance, containing a full warranty clause, and afterward, on March 28, 1895, died without having had heirs of her body. The plaintiffs allege that Eliza Jones held a fee conditional in the land, and that, when she died without having had heirs of her body, there was a reverter to the heirs of William Jones, living at the time of her death. The known heirs of William Jones were the plaintiffs, a daughter, Frances, who died July 31, 1895, unmarried and childless. William Jones had another daughter, Mary, who predeceased her father, leaving four children, Frances, John, Judith A., and William Long, who left the state about 1848. William returned to the state about twenty years ago and said his brothers and sisters had all died childless. A year or two later a report came back that he also had died childless, and nothing has been heard of him since.

The plaintiffs admit that the defendants own one-third of the land in fee by reason of the fact that Frances Jones,

<sup>284</sup> one of the heirs of William Jones, living at the time of the death of Eliza, who was entitled to one-third of the reversion, had joined Eliza in the conveyance made to E. L. Langford, with a general warranty of title, thus estopping herself and her heirs from setting up claim to her interest in the land.

The plaintiffs claimed an accounting for rents and profits at the rate of one hundred and fifty dollars a year.

The defendants alleged (1) that they were the owners of the land, and that the plaintiffs had no title or interest therein; (2) that the purchase money paid by E. L. Langford to Eliza Jones had been invested in other lands, which the plaintiffs had taken as her heirs; (3) that they were protected by adverse possession; and (4) that they were entitled, in any event, to betterments to the amount of fifteen hundred dollars. The second and third defenses are not involved in the appeal.

We do not understand any question to be made that under the deed from her father Eliza Jones took a fee conditional. The defendants contend, however, that William Jones, the grantor, by his will, made after the conveyance to Eliza, devised to her the reversion as a part of his residuary estate, or, if not that, the will shows that he had previously released the reversion to her, or, at least, that he did not intend the plaintiffs should have the reversion or any other interest in his estate. It is clear from the will that the testator meant to dispose of all the property then in his possession, each item of which he mentions; but it is equally clear, from the fact that he makes mention of the several items, and saying they constituted all the property he possessed, and making no reference to the reverter, that he did not have in mind and did not intend to attempt to devise the possibility of reverter created by his deed to Eliza. The possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate. It is thus described in *Blount v. Walker*, 31 S. C. 13, <sup>285</sup> 9 S. E. 804: "It is neither a present nor a future right, but a mere possibility that a right may arise upon the happening of a contingency, which is not the subject of either devise or inheritance. This is because the grant or devise of a fee conditional passes the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which can be the subject of devise or inheritance; and hence it is settled that, upon the termination of such an estate, it goes to those who can bring themselves into the class of heirs of the person creating the estate at the time when the estate terminates,

and not to those who were heirs at the time of the death of such person": *Adams v. Chaplin*, 1 Hill's Ch. 265; *Deas v. Horry*, 2 Hill's Ch. 244; *Pearse v. Killian*, McMull. Eq. 231. In the case last cited the court, through Chancellor Harper, holds that he who would be entitled to an estate, if the fee conditional should presently determine, cannot devise or convey it; yet he may release it to the tenant in fee conditional, so as to make his estate an absolute fee simple. We are inclined, however, to the opinion that such a release could not be made effective by will, for the reason that a will could have no legal effect until the death of the testator; and at the moment of death the possibility of reverter passes from the testator and beyond his control to his heir.

But it is not necessary to decide that point, because the will of William Jones shows on its face that it had no reference whatever to the possibility of reverter. Certain it is that there are no words in the will which could possibly be construed as an attempt to release the possibility of reverter to Eliza, and though there are words signifying an intention to exclude the plaintiffs from participation in other property than that devised to them, that cannot have the effect of excluding them, as heirs, from participating in any property not disposed of: *Blackman v. Gordon*, 2 Rich. Eq. 43, 44 Am. Dec. 241.

With respect to their fourth defense the defendants claim <sup>286</sup> that the circuit court, in allowing them credit for betterments put upon the land by E. L. Langford, decreed that the rent of the land for the time that E. L. Langford had it should be deducted. The objections urged against this method of adjustment are that the defendants should not be charged with the debt of E. L. Langford for rents; that the rents and profits chargeable against E. L. Langford are barred by the statute of limitations; and that there is no claim made in the complaint for rents and profits for the time the land was held by E. L. Langford. None of these objections have any substantial foundation. Assuming that the defendants are entitled to receive compensation for the betterments made by E. L. Langford, they cannot claim more than Langford himself would have been entitled to had he remained in possession, and it is obvious he could not have recovered the value of the betterments put upon the land without having credited thereon against him the value of the use of the land. This is the equitable rule by which the case is governed: *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19; *Tribble v. Poore*, 28 S. C.



565, 6 S. E. 577; *McGee v. Hall*, 28 S. C. 562, 6 S. E. 566; *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278. The statute of limitations has no application, for the reason that, in accounting between cotenants, betterments are to be regarded paid for pro tanto by the rents as they accrue. There is no proof here that the rents accrued more than six years before the betterments were made, and, therefore, in no possible view is the statute of limitations available to the defendants. As to the third point, it is true the plaintiffs do not seek in the complaint to recover judgment against the defendants for the rents which accrued while E. L. Langford was in possession; but when the defendants claim the benefit of betterments made by E. L. Langford, it is manifest they cannot have more than the net amount due for betterments; that is, the difference between the value of the betterments to all the owners of the land and the value of the use of the land to him.

<sup>287</sup> We do not think the circuit decree contemplates making defendants liable for the debt of E. L. Langford by charging them with any balance of rents which accrued against E. L. Langford, beyond the value of betterments. But that is not a practical matter, because, under the evidence, it is not possible that his liability for rents can exceed his betterments, which are credited to defendants.

The decree provides that any rents due by defendants, over and above the betterments credited to them, shall be paid from the defendants' share of the proceeds of the sale of the land. By their seventh exception the defendants submit this was error, contending that the plaintiffs have no right to any other means of collection of the rents than an ordinary money judgment. The point is important, and there is no express decision of it in this state. We do not think it ought to be held on principle that any lien or encumbrance arises in favor of one cotenant against the share or interest of another in the land for rents due. Such liens would be indefinite in amount, and undisclosed by public records, upon which third parties in dealing with the owners of property ordinarily have a right to rely. They would greatly injure tenants in common by impairing the market value of their shares and interests, because of the apprehension on the part of those contemplating purchasing such interests, or otherwise dealing with them, that claims for rents might be established as superior liens. There are many authorities holding that no such liens exist: *Burns v. Dreyfus*, 69 Miss. 211, 30 Am. St. Rep. 539, 11

South. 107; Bird v. Bird, 15 Fla. 434, 21 Am. Rep. 296; Flack v. Gosnell, 76 Md. 88, 35 Am. St. Rep. 413, 24 Atl. 414, 16 L. R. A. 547; Burch v. Burch, 82 Ky. 622; Clark v. Hershy, 52 Ark. 473, 12 S. W. 1077; 17 Am. & Eng. Ency. of Law, 697; 3 Jones on Liens, sec. 1165. In New York and Missouri the contrary is held: Hannan v. Osborn, 4 Paige, 336; Beck v. Kallmeyer, 42 Mo. App. 563. We think reason and the weight of authority is against holding rents, due to one cotenant by another, to <sup>288</sup> constitute an outstanding lien or encumbrance on the latter's moiety.

But the absence of a lien does not render a court of equity powerless to require cotenants to do full justice to each other with respect to all their dealings with the common property, when the rights of third parties are not involved. Accounting for waste, for betterments, and for rents among cotenants, is now recognized as an incident to the right of partition, and the universal practice of the court of equity is to adjust all these matters in the suit for partition. Value added to the land by a cotenant, in the form of betterments, will be allowed and paid to him from the proceeds of the sale made for partition: Johnson v. Pelot, 24 S. C. 255, 58 Am. Rep. 253; Buck v. Martin, 21 S. C. 590, 53 Am. Rep. 702; Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19. On the same principle, when the rights of third parties are not involved, a cotenant ought not to be allowed to have his share of the proceeds of sale, without first accounting for waste committed by him on the common property, and the rents and profits derived by him therefrom. In Hancock v. Day, McMull. Eq. 69, 36 Am. Dec. 293, the power and discretion of the court to make such provision in the order of sale is fully recognized, though it was held in that case that the defendant's share of the proceeds of the sale should not be held to await the result of further litigation as to his liability for rent, when there was no showing that the defendant was not able to respond to any claim that might be established against him. The court says, in Backler v. Farrow, 2 Hill's Ch. 111: "The exception to the commissioner's report seems to have been sustained on the ground that damages for waste cannot be recovered in this court, the remedy being at law. This, no doubt, is in general true; but having proper jurisdiction of the case, there is hardly any question in relation to property which this court may not determine incidentally for the purpose of doing complete justice and preventing multiplicity of litigation."

<sup>289</sup> The rule that the court of equity, in decreeing partition, should adjust and settle the equities of cotenants with respect to betterments, waste and rents from the common property while under its control is thus stated by Judge Story: "Cases of a different nature, involving equitable compensation, to which a court of law is utterly inadequate, may easily be put; such, for instance, as cases where one party has laid out large sums in improvements on the estate. For, although, under such circumstances, the money so laid out does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and compelling the party applying for partition to make due compensation. So, when a tenant in common has been in the exclusive reception of the rents and profits, on a bill for partition and account, the latter will also be decreed. So, where one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or, if that cannot be done, he will be entitled to compensation for those improvements": Story's Equity Jurisprudence, sec. 655.

We think the true rule may be thus stated: There is no fixed lien on the common property for rents, in favor of one cotenant against another, and the court will not provide for the payment of such rents from the common property, to the prejudice of persons holding conveyances or liens on the interest of the cotenant owing the rent. But, as among the parties themselves, the court in decreeing partition has the power, in doing full justice in the premises, to adjust all demands for rent, and require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the cotenant owing the rent. This rule is just and in accord with the principle that, when all the parties and the property are before the court of equity, it will do full justice to all before releasing its hold. It is not <sup>290</sup> objectionable, as creating a secret, indefinite lien, to the prejudice of those parties dealing with the owners of the property, and, therefore, it is not opposed to the authorities above cited, holding that no such lien exists.

We do not see how there can be room for serious contention that the report of the death of all the children of Mary Long, together with their complete disappearance for more than twenty years, was not sufficient *prima facie* evidence of the

death of these persons. There is no ground for the exception on that point.

The judgment of this court is that the judgment of the circuit court be affirmed.

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*A Possibility of Reverter*, while it cannot be alienated or devised by the grantor, may descend to his heirs: *North v. Graham*, 235 Ill. 178, 126 Am. St. Rep. 189.

*In a Proceeding for Partition* one cotenant who has received the rents and profits from the common property may be compelled to account therefor: *Barnett v. Thomas*, 36 Ind. App. 441, 114 Am. St. Rep. 385. See, also, *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449. As to whether they constitute a lien on the property, see *Burns v. Dreyfus*, 69 Miss. 211, 30 Am. St. Rep. 539; *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339; *Flack v. Gosnell*, 76 Md. 88, 35 Am. St. Rep. 413, and note. The liability of one cotenant to another for rents and profits received is further discussed in the notes to *Ward v. Ward*, 52 Am. St. Rep. 924; *Early & Wife v. Friend*, 78 Am. Dec. 665.

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## MAULDIN v. MATTHEWS.

[81 S. C. 414, 62 S. E. 695.]

**MANDAMUS—Control of Official Discretion.**—Courts have authority to control the action of officers or official boards, vested with discretionary power, when they refuse to act in consequence of a conclusion they have reached, which is without any foundation in the facts before them and is, in the view of the court, capricious or arbitrary. (p. 921.)

**MANDAMUS—Interference with Official Discretion.**—Courts should interpose by mandamus, in the case of officers vested with discretionary power, only where it clearly appears that they refuse to perform official duty, or so misconceive official power or duty that the purpose of the law will be defeated. (p. 921.)

**MANDAMUS Against Pharmaceutical Examiners to Issue License.**—When the statute provides that a graduate of a reputable college of pharmacy is entitled to a license, the board of pharmaceutical examiners may be compelled by mandamus to license a graduate of a college held in high esteem by physicians, pharmacists and the public, notwithstanding the instruction at such college does not come up to what the examiners themselves conceive to be the proper standard. (pp. 922, 923.)

Oscar C. Mauldin and W. Christie Benet, for the petitioner.

W. M. Dunlap, contra.

<sup>414</sup> **WOODS, J.** The statute law of the state provides that the board of pharmaceutical examiners, consisting <sup>415</sup> of six pharmacists, elected by the pharmaceutical association of the state of South Carolina, "shall alone possess and exercise



the powers of granting, withholding or vacating the license of pharmacists, apothecaries and druggists." The statute requires the board to subject every applicant to examination before issuing a license, making, however, an exception in these words: "No examination shall be required in case the applicant is a regular graduate in pharmacy from any reputable college; but such applicant shall be entitled to a license upon furnishing evidence of his graduation satisfactory to the said board and upon payment of the fee of five dollars."

At a regular examination appointed by the board, the petitioner, John M. Mauldin, appeared, presented a diploma showing his graduation from the University of Maryland, Department of Pharmacy, otherwise called Maryland College of Pharmacy, and, without claiming the benefit of the exception as to college graduates, offered to take the examination. The board excluded him from the examination on the ground that he had not complied with the board's requirements as to conditions of granting a license, that the applicant "had served not less than four years with a druggist or apothecary." Thereafter, the petitioner presented his diploma, tendered the fee of five dollars and demanded a license without examination as a regular graduate in pharmacy from a reputable college. His demand having been refused, the petitioner now applies to this court for a writ of mandamus, requiring the board to issue to him a license. The board, by its return, alleges that it cannot be compelled by mandamus to issue the license, because it acted in a judicial capacity in refusing it, on the grounds that the applicant is without sufficient experience, and that he does not hold a diploma from a reputable college. The board further alleges that it does not wish to reflect upon the University of Maryland, but it holds it not to be a reputable college, because:

416 "1. That it does not require, as a prerequisite to receiving its diploma, that the candidate shall have had such practice and experience in drugs, etc., as to make it safe to the public for him to practice pharmacy in the state of South Carolina; and,

"2. That said college only requires two terms of six months each for said candidate to study and receive his diploma, which period and course of study are too short and inadequate to properly fit any person to practice pharmacy."

In *State v. Matthews*, 77 S. C. 357, 57 S. E. 1099, it was held the statute confers on the board of examiners the

power to determine whether the college from which the applicant graduated is reputable, that the power involves the exercise of discretion not subject to control or review by mandamus, except where it clearly appears the board has failed to exercise reasonable discretion and has arbitrarily refused a license. The general rule is everywhere recognized that the writ of mandamus will not issue to control the judgment or discretion of a public officer, but only to require the performance of a plain, ministerial duty: *State v. Verner*, 30 S. C. 277, 9 S. E. 113; *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *State v. Burnside*, 33 S. C. 276, 11 S. E. 787; *State v. McMillan*, 52 S. C. 60, 29 S. E. 540.

Whether the courts can control the action of officers or official boards, vested with discretionary power, when they refuse to act in consequence of a conclusion they have reached, which is without any foundation in the facts before them, and, therefore, in the view of the court, capricious or arbitrary, is a question of some difficulty. But it must be answered in the affirmative, on principle as well as authority. This was the view indicated, not only in *Smith v. Matthews*, 77 S. C. 357, 57 S. E. 1099, and *Lynah v. Commissioners*, 2 McCord, 170, but by Lord Mansfield in *Rex v. Askew*, 4 Burr, 2186, 16 Eng. R. Cas. 760, where the application was to compel the admission of a physician to practice; and it is in accord with the <sup>417</sup> weight of authority: *Ex parte Burr*, 9 Wheat, 529, 6 L. ed. 152; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Ex parte Bradley*, 74 U. S. 364, 19 L. ed. 214; *Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994; *St. Louis v. Meyrose L. Mfg. Co.*, 139 Mo. 560, 61 Am. St. Rep. 474, 41 S. W. 244; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *Illinois State Board Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201.

The courts should exercise, however, the utmost circumspection not to substitute their own discretion for that of the officer or board whose refusal to act is under consideration; and to interfere by mandamus only when the facts so clearly show the duty of the officer or board to act that there is really no room for the exercise of reasonable discretion against the doing of the act which the court is asked to require performed. In other words, the court should interpose only where it clearly appears that the officer or board refuses to perform official duty, or so misconceives official power or duty that the purpose of the law will be defeated. The practice of pharmacy being a legitimate and useful business, it was

clearly not within the legislative intent that any citizen should be excluded from it by the arbitrary will of the board of examiners. The board subjects itself to being held within its duties by mandamus when it so misconceives its duties and power that its exactions amount to imposition on the applicant of terms and conditions not contemplated by the statute.

The statute provides that a regular graduate in pharmacy from any reputable college shall be entitled to a license. The evidence is full and conclusive that the Maryland College of Pharmacy is held in high esteem by physicians and pharmacists. Indeed, we do not understand the respondents seriously to question that this is a fact. But their position is that they believe it unsafe for the public for one to compound drugs who has not had at least four years of such practical experience as service for that period under a druggist or pharmacist would give; that they should not <sup>418</sup> recognize as reputable a college which does not require practical experience in its laboratories or under a pharmacist, either or both together, for a period of four years; that the Maryland College of Pharmacy does not require that period of service under a druggist or in their laboratory, but only two terms of study and laboratory work of eight months each; and, therefore, they cannot recognize that college as reputable. Clearly, the respondents, in taking this position, have misconceived their duty and power. It was shown at the hearing that there is ground for the difference in opinion among pharmacists and colleges of pharmacy as to the value of four years' service in a drug store before graduating in pharmacy. The undisputed evidence was that the University of Michigan, Vanderbilt University, Northwestern Chicago, Cleveland School of Pharmacy, Albany College of Pharmacy, New York College of Pharmacy (Department of Columbia University), and National College of Pharmacy at Washington, D. C., do not require the four years' service insisted on by the respondents, their reason being that the time is better spent in acquiring general knowledge in school or college. Some other colleges of high reputation, like the University of Virginia, still require the four years' practical work.

The question is not whether Maryland College of Pharmacy ought to have all the requirements that the respondents think essential to make capable pharmacists. The statute does not confer on the board of pharmaceutical examiners the power to exact of a college compliance with its own stand-

ards. On that point the General Assembly has assumed the responsibility of danger to the public, and has directed that licenses be issued to graduates of reputable colleges—that is, colleges of whose character those of the public, having general acquaintance with the subject, entertain a good opinion. Maryland College of Pharmacy, being a college of which such good opinion is entertained, is a reputable college; the board of examiners had, therefore, no discretion to refuse <sup>419</sup> to issue the license to the petitioner, who is one of its graduates.

It is, therefore, ordered that the writ of mandamus do issue requiring the respondents, constituting the board of pharmaceutical examiners, to issue to the petitioner a license as a pharmacist, upon payment by him of a fee of five dollars.

Mr. Justice Gary did not sit in this case.

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*Mandamus Against Medical Boards and Boards of Pharmaceutical Examiners* to compel the issuance of licenses to applicants therefor is discussed in the note to *Ward v. Commissioners of Beaufort Co.*, 125 Am. St. Rep. 516.

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## POOLE v. PARIS MOUNTAIN WATER COMPANY.

[81 S. C. 438, 63 S. E. 874.]

**WATER COMPANIES.**—*Mandamus is a Proper Remedy* to compel a public service water company to supply its customers with water, upon compliance with its reasonable rules and regulations. (p. 924.)

**WATER COMPANIES—Shutting Off Supply to Delinquent.**—It is reasonable to allow a water company to protect itself by cutting off the supply from a customer until he has paid delinquent water rents due by him, but it is unreasonable to cut off the supply to a tenant because he refuses to pay delinquent water rents due by the landlord or by a former occupant. (p. 924.)

**WATER COMPANIES—Shutting Off Supply to Delinquent.**—While a water company has the right to cut off a customer's supply for nonpayment of reasonable and just bills for water rents, and to refuse to engage to furnish further supply until those bills are paid, the right cannot be exercised so as to coerce the customer into paying a bill which is unjust, or which he in good faith and with show of reason disputes, when he offers to comply with the reasonable rules of the company as to the supply for the current term. (p. 928.)

James H. Price and J. J. McSwain, for the appellant.

Cothran, Dean & Cothran, contra.



442 JONES, J. The Paris Mountain Water Company, respondent, is a corporation under the laws of this state, and is engaged in the business of supplying water to the city of Greenville and its inhabitants. The petitioner, Poole, is a citizen and resident of the city of Greenville, and the dwelling occupied by him, No. 487 Coxe street, was connected by the service pipe and meter with defendant's water mains. William A. Hamby was the owner of the dwelling, and water was supplied under a contract made between respondent and Hamby before petitioner became tenant. The petitioner became tenant of the house on January 24, 1907, and finding the water turned on used so much of it as he desired during the year 1907. About January 1, 1908, respondent presented petitioner with a bill for sixty-five dollars, based upon the quantity of water as registered by the meter at forty cents per one thousand gallons. The petitioner, claiming that the amount demanded was exorbitant, refused to pay the same, but offered to pay five dollars, the flat rate provided in the schedule for "residences occupied by one family, five rooms," which was refused by respondent. Within ten days after presenting the bill respondent cut off the water supply from the premises. Respondent offered to adjust the account for twelve dollars, but petitioner refused to pay that amount. Petitioner demanded that respondent supply his premises with water, and offered to sign a contract for the year 1908, on a reasonable basis, and to pay the first quarter in advance, but respondent refused to supply him further with water unless he pay the amount demanded, reduced to twelve dollars.

This proceeding was begun in the circuit court to compel respondent to supply petitioner with water, and to execute a contract for the year 1908, at the rate of five dollars per annum, the minimum rate fixed by the city ordinance, upon compliance by petitioner with the reasonable rules of respondent company.

443 Judge Klugh dismissed the petition, in a decree herewith reported, and the petitioner appeals.

Mandamus is an appropriate remedy to compel a public service water company to supply its customers with water, upon compliance with its reasonable rules and regulations. The right of the company to adopt reasonable rules for the conduct of its business, and the duty of the customer to comply with such rules, is not, and cannot be, disputed. The rule adopted by respondent involved in this case is as follows:

"All water rents shall be payable to the treasurer or other authorized person, at the office of the company, on the first day of January, April, July and October of each year. Should the water rent remain unpaid thirty (30) days from the date of bill, the supply of water may be cut off without notice, and the company shall have the right to sue for and recover the amount due for the time that water was furnished prior to cutting off supply."

In the absence of a statute making water rents a lien or encumbrance upon the premises, this regulation is not reasonable, so far as it may be construed to authorize cutting off water supply should a tenant refuse to pay delinquent water rents due by the landlord or former occupant, as this would coerce a person to pay the debt of another: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 50 N. E. 634, 40 L. R. A. 657; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468, 40 South. 820; *Linne v. Bredes*, 43 Wash. 540, 117 Am. St. Rep. 1068, 86 Pac. 858, 6 L. R. A., N. S., 707. But with respect to a consumer, who is under an express or implied contract to pay water rents, it is reasonable to allow the company to protect itself by cutting off the supply from such consumer until he has paid delinquent water rents due by him: *People v. Manhattan Gas Light Co.*, 45 Barb. 136; *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439; *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516, 14 L. R. A. 669; 30 Ency. of Law, 2d ed., 419, 420.

444 The petitioner used the water supplied, and he alleges that he was informed, on February 15, 1907, that he would have to pay the water rent, but that he did not know the conditions upon which respondent supplied said place with water; that he went to the offices of respondent to sign a contract therefor, and stood ready and willing at any time to sign a reasonable contract and to pay reasonable charges for what he used. The respondent alleged that it was not aware that petitioner occupied the premises until several months after January 1, 1907; that no application was made to it by petitioner for a contract for water service; that the water was supplied to the premises under a contract with the owner, Hamby; and that quarterly statements, or water bills, were mailed to said Hamby; and on information alleged that Hamby delivered these bills to petitioner. The petitioner, however, denied, under oath, that any such bills had ever been presented to him, either by Hamby or respondent. These

circumstances, we think, justified the circuit court in holding that there was an implied contract by petitioner to pay reasonable charges for the amount of water consumed. We further agree with the circuit court that petitioner was bound to pay at meter rates. Section 7 of the franchise ordinance provided: "That the said water company should not charge to the consumers, during the existence of this franchise, exceeding the following maximum rates, but they shall have the right, at their option, at any time to insert a water meter into the service pipe of any consumer, and supply him at meter rates. No water shall be supplied to any consumer per year for less than \$5." Then follows a schedule containing the flat rates, among other items: "Residence, occupied by one family, five rooms, \$5." Then the schedule of meter rates, and among other items: "100 to 1,000 gallons per day, at rate of 1,000 gallons, 40 cents." Under this authority respondent had the right to subject petitioner to reasonable meter rates: *Charleston Light etc. Co.* <sup>445</sup> *v. Lloyd Laundry etc. Mfg. Co.*, 81 S. C. 475, 62 S. E. 873. The contention of petitioner that he is only liable on the basis of the flat rate, and that he is entitled to a contract for the year 1908 at the flat rate, cannot be sustained.

The circuit court was also correct in holding that the reasonableness of the meter rates, as specified in the ordinance, was not questioned; and, in the absence of any adverse evidence, the rates fixed in the ordinance are presumptively reasonable.

We think, however, that the circuit court was in error in holding that the reliability of the meter was not questioned. It is alleged that the house occupied by petitioner contained only four rooms; that his family consisted of himself, wife and three small children, aged seven, four and two years, respectively; that he owned no cow or stock of any kind to consume water; and that the consumption of water did not exceed thirty gallons per day. He further alleged, upon information received from a clerk of respondent, that the average water consumed by customers, in residences less than five rooms, is about eighty cents per quarter; and that the water rents of W. A. Hamby, who lived in an adjoining house of similar size to one occupied by petitioner, and kept a horse, does not exceed one dollar per quarter; that petitioner is informed and believes that respondent has a great deal of difficulty with water meters, some reading fast and some reading slow, and that many complaints are made to

respondent about exorbitant water charges. The respondent, in its return, admitted that the water meter "showed a large consumption, larger than respondent would have thought should exist," and respondent was willing to accept twelve dollars in settlement of a claim of sixty-five dollars, based upon the meter reading. It is true, respondent alleged, with supporting affidavits, that the meter had been tested and was accurate, and no leaks were discovered. On the other hand, there was no evidence of any wasteful use <sup>446</sup> of the water by petitioner's family. It is as easy to believe that there was some inaccuracy of the water meter, or some leak for which petitioner is not responsible, as to believe that petitioner, in the circumstances stated, consumed over four hundred and fifty gallons of water per day after entering the premises. But this is not a suit upon the claim for water rents, and it was not incumbent on petitioner in this proceeding to establish the inaccuracy of the water meter. It is sufficient in this proceeding for petitioner to establish that at the time his water supply was cut off there was a bona fide dispute as to the correctness of the bill rendered for water rents, and this, we think, has been shown.

The court realizes that caution must be observed here, and that heed be not given to trivial, captious, whimsical, unreasonable disputes as to meter registration, for, in the absence of a contrary showing, the meter is presumptively correct; but in this case we feel that the dispute is not only bona fide, but substantial and serious.

It appears that respondent made no demand on petitioner for water rent until January 1, 1908, when the bill for the year 1907 was first presented. This is the first act of respondent showing recognition of petitioner as liable for water rents. Petitioner then had the right to rely upon compliance by respondent with its own rule authorizing the cutting off of the water supply should the water rent remain unpaid thirty days from the date of the bill. The date of the bill in this case was January 1, 1908, and yet respondent cut off the water before the expiration of the time fixed by its rule. Hence, at the time of the commencement of these proceedings, and at the time of the judgment of dismissal, the respondent was acting in breach of its own rules in cutting off the water supply. Here, then, is the status. The respondent cut off petitioner's water supply, contrary to its rules, for nonpayment of a bill which appeared to be exorbitant, and which petitioner in good faith and with show of reason



disputed, and thereafter respondent refused to enter <sup>447</sup> into a contract to supply petitioner for the current year, except upon payment of the disputed bill.

While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term: *State v. Citizens' Tel. Co.*, 61 S. C. 83, 85 Am. St. Rep. 870, 39 S. E. 257, 55 L. R. A. 139; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *Wood v. City of Auburn*, 87 Me. 287, 22 Atl. 906, 29 L. R. A. 376.

The inconvenience arising from subjecting the water company to the necessity of resorting to the regular courts to collect disputed claims is not to be compared to the hardship to the consumer, as a member of the public, involved in permitting the water company to be judge in its own cause, and to coerce the disputant into submission by denying him water.

The judgment of the circuit court is reversed and the cause is remanded, with instructions to issue a writ of mandamus compelling respondent to supply petitioner with water upon his complying with respondent's regulations, but without exacting payment of the disputed claim as a condition precedent.

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*A Public Service Corporation has the Right to Prescribe Such Rules* for its convenience and security as are just and reasonable, and refuse to accommodate patrons who decline to comply therewith. Hence, the rule of a water company that it may deprive a delinquent customer of water by shutting off his supply until he pays the amount due may be enforced: *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 3 Wash. 316, 28 Am. St. Rep. 35; *State v. Board of Water & Light Commrs.*, 105 Minn. 472, 127 Am. St. Rep. 581. But a rule requiring the payment of one dollar by every person from whose premises water has been turned off for nonpayment of water rates, as a charge for turning the water off and then turning it on again, has been held unreasonable: *American Water Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610. And a rule of a water company that water may be shut off from customers in all cases of nonpayment of water rents is unreasonable and void, if construed so as to permit the water to be shut off because a former occupant has not paid his bill: *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432; *Burke v. City of Water Valley*, 87 Miss. 732, 112 Am. St. Rep. 468. See, also, *Linne v. Bredes*, 43 Wash. 540, 117 Am. St. Rep. 1068.

GREENWOOD DRUG COMPANY v. BROMONIA COMPANY.

[81 S. C. 516, 62 S. E. 840.]

**RES JUDICATA.**—A Judgment in an Action on Contract is an estoppel to an action in tort brought by the defendant in the former action against the plaintiff therein, and based upon the same facts, with an additional allegation of fraud inducing the contract, of which fraud the plaintiff in the latter action was cognizant when he filed his answer in the former suit. (pp. 931, 932.)

Ellis G. Graydon and Nicholson Bros., for the appellant.

Giles & Outs, contra.

**517 JONES, J.** This appeal involves the application of the law of estoppel by judgment.

In a former action the Bromonia Company recovered judgment against Greenwood Drug Company for the value of a quantity of certain medicine called Bromonia, amounting to one hundred and forty dollars, and for expenses of advertising said medicine, amounting to fifty-seven dollars and fifty cents, pursuant to a contract entered into between the parties, which judgment on appeal to this court was affirmed: *Bromonia Co. v. Greenwood Drug Co.*, 78 S. C. 482, 59 S. E. 363. Thereafter, Greenwood Drug Company paid the judgment, and brought this action against the Bromonia Company, and attached the funds paid in settlement of said judgment. The complaint in this action seeks to recover damages for alleged fraudulent misrepresentation by the Bromonia Company, which induced Greenwood Drug Company to enter into the contract sued on in a former action, and for the worthlessness of the medicine for which recovery was had, alleging as elements of the damages the one hundred and forty dollars paid as the price of the goods; fifty-seven dollars and fifty cents, the amount paid for advertising; thirty dollars and thirty-six cents, interest on these amounts; seventy-one dollars and seventy cents, the costs of that suit; and ninety dollars and ninety-four cents, the attorneys' fees and expenses incurred by Greenwood Drug Company in defending that suit.

Judge Gage dissolved the attachment and dismissed the complaint, holding that the plaintiff, Greenwood Drug Company, was estopped by the judgment in the former action, from which order appeal is taken by the defendant.

The reasons given by Judge Gage are as follows: "The complaint in the second case is practically the same as the

<sup>518</sup> answer in the first case, except that it alleges a scienter on the part of the Bromonia Company when it made the alleged false statements. The Greenwood company contends that the issue of fraud which it now makes has never been heretofore made and adjudicated; that it is entitled to a day in court, and now demands it. It contends that, inasmuch as that issue was not made in the first action, it was not then adjudicated.

"The parties to the action are the same; the court is the same; the subject matter, Bromonia, and the advertisement of it, is the same. The exact issue in the first case was: Did the Greenwood Drug Company owe the Bromonia Company for a lot of medicine, and for money paid out in the advertisement of the medicine? That, too, is the issue in the second case. It was decided in the first case, and that ends the controversy: *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

"If Smith should sue Brown on a note, and Brown should plead payment, and the jury should find for Smith, Brown could not thereafter renew the controversy by pleading that Smith had seduced him into signing the note by fraudulent misrepresentations."

We think the judgment should be affirmed. The general rule is that a judgment giving effect to a contract is conclusive evidence that it is free from fraud or illegality, although such issue was not raised in the action, except where the party objecting was ignorant of the fraud or illegality before judgment, or was prevented from pleading it: 23 Cyc. 1294. The case of *Hart v. Bates*, 17 S. C. 35, falls within the exception stated, as, in that case, the fraud was not discovered until after the former judgment. Estoppel by judgment on the merits covers not only what was actually decided, but also what was necessarily implied in the final result: 23 Cyc. 1306. Our decisions are in accord with this general rule. In *Willis v. Tozier*, 44 S. C. 1, 21 S. E. 617, the court said: "A judgment is conclusive between the parties <sup>519</sup> to it, not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition: *Trimmier v. Thomson*, 19 S. C. 247; *Caldwell v. Mischeau*, 1 Spear, 276." Hence, a judgment on a note is conclusive that the maker's name was not forged: *Fraser v. Charleston*, 19 S. C. 384. And allegations of fraud in the execution of a mortgage and prior payments are *res judicata* after judgment of foreclosure and sale, and will not support

an action to set aside the sale and vacate the mortgage where the defendant appeared in the former action and had opportunity to litigate such question: *Ruff v. Doty*, 26 S. C. 173, 4 Am. St. Rep. 709, 1 S. E. 707. In this last-mentioned case the court, referring to *Hart v. Bates*, 17 S. C. 35, and *Fraser v. Charleston*, 19 S. C. 384, said: "These two cases, considered together, decide briefly that a matter not necessarily involved, and not raised in a previous case, is not *res judicata*; but if necessarily involved, and (whether) raised or not, it is concluded, and especially so if the party denying the adjudication knew of the matter and could have interposed it at a previous trial, either in support of a claim or as a defense." In *Ryan v. Southern B. & L. Assn.*, 50 S. C. 185, 62 Am. St. Rep. 831, 27 S. E. 618, the court held a judgment debtor estopped from bringing a separate action under section 1891, for usurious interest collected of him in a foreclosure judgment, as the judgment negatived usury.

In this case the Greenwood Drug Company knew of the alleged fraud, if any existed, as the answer in the former action set up the said fraud but failed to allege the scienter; and in the second action the complaint alleged that "Soon after entering into said contract the plaintiff had reason to believe that it had been deceived and defrauded, etc." Hence, this case cannot fall within the exception to the general rule. The plaintiff was not prevented from pleading fraud in the former action, but because of its defective plea certain evidence which it sought to introduce on that subject was properly rejected. Such result followed from <sup>520</sup> the failure or neglect of the Greenwood Drug Company to make proper plea, and not from any denial of the right to make such issue. The judgment upon the contract necessarily involved an adjudication that the Bromonia Company had delivered to Greenwood Drug Company goods of value as alleged, and had incurred expense of advertising, according to contract, and necessarily implied that there was no want or failure or illegality of consideration in the contract enforced. To support the second action would necessarily assail and annul the correctness of the result in first action and give back to Greenwood Drug Company the money it was adjudged to pay therein, on the ground that the goods adjudged to be of value were really worthless, and on the ground that the contract adjudged to be a valid obligation was void for fraud, known at the time of the former judgment. It is apparent that the second action substantially involves the issues ac-



tually and impliedly involved in the first action, and it is of no consequence that the form of the second action was in tort, while the first action was in contract.

The appellant cites *Kirven v. Virginia-Carolina Chemical Co.*, 77 S. C. 493, 58 S. E. 424, as sustaining its contention. In that case the judgment of the circuit court was affirmed by a divided court in effect holding that a judgment of the United States circuit court on a note for fertilizers is not res judicata of an action in the state court for damages for actual injuries to the crop of defendant, caused by the use of the fertilizer, alleged to have been negligently compounded and deleterious, when such question was withdrawn in the United States court by permission of the court.

If it is to be conceded that the action by Kirven in the state court was a distinct and independent suit for actual injury to his property, constituting a cross-action as distinguished from a suit based upon mere failure of consideration of the notes upon which judgment was rendered, there is much reason for holding that a withdrawal of such issue <sup>521</sup> by permission of the court in the first suit should prevent judgment therein from operating as an estoppel in a subsequent suit on the issue or cross-claim so withdrawn. The opinion of the two justices opposed to affirmance in that case was based upon the view that where a judgment goes against the defendant, and he afterward sues plaintiff on a cross-claim which he might have presented in the first suit, but did not, if the facts which he must establish to authorize his recovery are inconsistent with or opposed to the facts on which recovery was had in the first action, the former judgment operates as an estoppel. If Kirven in the second action had sued for damages arising from his payment of the judgment rendered against him, on the ground that the fertilizers were worthless, and that fact was known to him before the judgment, he would undoubtedly have been estopped by the judgment.

But in the case at bar no issue was withdrawn by permission of the court; and if evidence of fraud was excluded, it was only because such fraud was not properly pleaded. The case stands as if there had been no attempt to plead fraud in avoidance of the contract. Moreover, the present suit is not upon a distinct and independent cause of action for actual injury, arising from the sale or use of the medicine, but is nothing more in effect than an action to restore Greenwood Drug Company to the status it would have occupied

if it had made successful defense in the former action; in other words, to reopen and relitigate that case.

These views require that the order of Judge Gage be sustained.

It appears that on the thirteenth day of January, 1908, Judge Klugh issued an order enjoining the Bromonia Company from enforcing its said judgment against the property of Greenwood Drug Company during the pendency of this action; and from this order the Bromonia Company has <sup>522</sup> appealed. For the reasons already stated the order of Judge Klugh should not have been granted.

The judgment of this court is that the order of Judge Gage herein be affirmed, and the order of Judge Klugh herein be set aside.

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*A Judgment is Conclusive* between the parties, not only as to such matters as were in fact determined, but as to other matters which the parties might have litigated as incidental to the subject matter of the litigation: *Garden City v. Merchants' etc. Bank*, 65 Kan. 345, 93 Am. St. Rep. 284; *Alerding v. Allison*, 170 Ind. 252, 127 Am. St. Rep. 363; *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524; *Pereles v. Gross*, 126 Wis. 122, 110 Am. St. Rep. 901. As to whether matters of fraud are within this rule, see *Ruff v. Doty*, 26 S. C. 173, 4 Am. St. Rep. 709.

**CASES**  
**IN THE**  
**SUPREME COURT OF APPEALS**  
**OF**  
**VIRGINIA.**

**ROBINSON v. CITY OF NORFOLK.**

[108 Va. 14, 60 S. E. 762.]

**LICENSE TAX—Revenue or Police Regulation.**—A tax imposed under a general taxing ordinance is presumed to be for revenue alone, unless the contrary is made clearly to appear. To construe a general taxing ordinance as a police regulation, it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions. (p. 939.)

**LICENSE TAX—Territorial Limits of City.**—The legislature cannot authorize a city to levy a license tax upon a circus, exhibiting beyond its territorial limits, for the sole purpose of raising revenue to defray the general expenses of the city. (p. 939.)

Loyall & Taylor, for the plaintiff in error.

James F. Duncan, for the defendant in error.

**14 HARRISON, J.** This action of trespass on the case in assumpsit involves the right of the city of Norfolk to assess a circus with a license tax that is exhibiting beyond the territorial limits of the city, but within one mile of such limits.

**15** The facts agreed of record are as follows: "That John F. Robinson gave a circus performance on September 16, 1906, wholly within the county of Norfolk, within one mile of the corporate limits of the city of Norfolk, but the territorial limits of the city of Norfolk do not extend to the locality where said performance was given. That no parade in said city was given. That this suit is brought to collect a license tax imposed by the city of Norfolk under section 55 of an ordinance of the city of Norfolk, adopted by the select and common councils of said city on the 10th and 14th of April, 1906, and approved by the mayor, April 21, 1906. That such parts of the charter and ordinances of the city of Norfolk as are pertinent to the subject matter hereof shall be admissible. That the license tax authorized and collected

by section 55 above is not applied to the special object of defraying the expenses incident to the police or other protection furnished circus performances, but to the general expenses of the city.

"That the said John F. Robinson paid the license tax in the county of Norfolk imposed by the state of Virginia.

"That the decision in this suit shall determine the issue in the suit of the City of Norfolk v. Barnum & Bailey, Limited, pending in this court."

The whole matter of law and fact was heard and determined by the court, and judgment rendered in favor of the city for the tax assessed, with interest and costs.

This demand of the city is in pursuance of section 55 of its general tax ordinance, imposing taxes upon property, persons and licenses for all city purposes, and is as follows:

"55. Circuses or menageries, within the city or within one mile of the boundary thereof, for every twenty-four hours or part thereof, including one parade, \$350 each, and for each parade of a circus or menagerie, not included in the above, \$350. Sideshows, for each tent, within the city, or within one mile of the boundary thereof, \$25 for every twenty-four hours or part thereof."

<sup>16</sup> The city of Norfolk relies upon section 1032 of the Code as its authority for this ordinance and the assessment of the license tax therein provided for. That section is as follows: "The jurisdiction of the corporate authorities of each town or city, in criminal matters and for imposing and collecting a license tax on all shows, performances, and exhibitions, shall extend one mile beyond the corporate limits of such town or city."

The payment of this tax is resisted by the defendant as an unwarranted and invalid exercise of the taxing power by the city of Norfolk.

For the purposes of taxation, the constitution has divided the state into counties and magisterial districts, cities and towns. Each of these subdivisions has its territorial limits fixed, each being distinct and separate from the other. What is meant by the words "territorial limits," in section 168 of the constitution, is the actual boundaries of each of such subdivisions, as the same are fixed by law. It would seem to be fundamental that one of these communities cannot, for its own benefit, tax one of the others which has no share in the benefit to be derived from such taxation.

The circus in question was being exhibited in Norfolk county. The territorial limits of that county embraced the



whole county, and it cannot be seriously contended that the legislature can create a taxing district in a county from which a city shall raise revenue for the exclusive benefit of such city.

The principle that one territory cannot be taxed for the benefit of another is fundamental, and well recognized by the authorities on the subject. It does not rest alone upon the theory of taxation without representation, but upon the principle that private property cannot be taken for anything but a public use: *Cooley on Taxation*, 2d ed., c. 5, p. 140 et seq., and cases cited.

At pages 141, 142, this learned author says: "It can therefore be stated with emphasis that the burden of a tax must be made to rest upon the state at large, or upon any particular district <sup>17</sup> of the state, according as the purpose for which it is levied is of general concern to the whole state, or, on the other hand, pertains only to the particular district. A state purpose must be accomplished by state taxation; a county purpose by county taxation; or a public purpose for any inferior district by taxation of such district. This is not only just but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties." And again at page 161 it is said: "It is certainly difficult to understand how the taxation of a district can be defended where people have no voice in voting it, in selecting the purposes, or in expending it."

The only case in Virginia on the subject of extraterritorial taxation is *Langhorne v. Robinson*, 20 Gratt. 661. In this case an act which authorized the city of Lynchburg to tax property within its corporate limits and for one-half a mile beyond its boundaries, for the purpose of paying interest on bonds of the Va. & Ten R. Co., was held by a divided court to be constitutional. This has been termed by Judge Cooley a doubtful case: *Cooley on Taxation*, 160. That case arose under the constitution of 1830, which imposed no restriction upon the legislature with respect to its power of taxation; whereas, the existing constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." It was not until the adoption of the constitution of 1851 that it was required that taxation should be equal and uniform.

The case of Langhorne v. Robinson was criticised in *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440, which follows the case of *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627. In the latter case the legislature had undertaken to empower the city to tax lands adjoining the city to the extent of half a <sup>18</sup> mile for local purposes, and the city, under this authority, had imposed taxes which the plaintiff resisted. The court pronounced the law unconstitutional, giving as a reason that the proper construction of the constitution in regard to taking private property for public use is that it can be taken only for public use, and not for private use at all, and when taken for public use there must be a just compensation allowed and paid. To tax occupations outside of a city for the benefit of those living in a city is, in effect, taking the property of a citizen for private use; that is, for the use of a particular community, of which the outside citizen forms no part. Whether it be called a tax or the appropriation of property, the result is precisely the same. Power to violate those rights would seem to be quite beyond the lawful authority of any government, and certainly the legislative department of the government cannot arbitrarily take the property of one citizen to give it to another, and, of course, cannot authorize others to do so.

If it were permissible for a city to raise revenue from circuses outside of its territorial limits, it would be equally permissible for the legislature to authorize that city to levy a tax upon any class of property in a county contiguous thereto for the exclusive benefit of such city.

It is not necessary in this case to decide whether or not the city of Norfolk can assess a license tax against circuses either within or without its territorial limits, under its police power, for the purpose of police regulation; because it clearly appears from the record that the circus tax in question was levied for the purpose of raising revenue to defray the general expenses of the city government and not for the special purpose of meeting the expense incident to such police protection as might be afforded the circus. The agreed statement of facts shows: "That the license tax authorized and collected under section 55 of the ordinance is not applied to the special object of defraying the expenses incident to the police or other protection furnished circus performances, but to the general expenses of the city." <sup>19</sup> That the tax in question was intended for general revenue purposes and not specially for police regulation is shown by the ordinance itself, the preamble to which is as follows:

"1. Be it ordained by the common and select councils of the city of Norfolk, that no person shall engage in any business in the said city of Norfolk, for which a license is required by the laws of the commonwealth, or the ordinances of said city, without first having applied for and obtained such license, under the penalty or penalties hereinafter provided, as a part of this ordinance; and that for the year beginning on the first day of February, 1906, and for each year thereafter, while this ordinance is in force the taxes on lands and lots, persons, incomes and other property for the support of the city government, the payment of interest on the city debt, and for other municipal expenses, shall be as follows."

Then follows the general levy upon all subjects of taxation, including licenses. As to the latter, it is ordained as follows:

"14. Be it further ordained, that for the year beginning the first day of May, 1906, and for each year thereafter until further provision is made, the license taxes on persons, firms, companies, associations and corporations conducting business or engaged in professional employment, or doing anything for which a license is required in the city of Norfolk, shall be as follows." Here follows a long list of callings upon which a license tax is imposed, section 55 being the imposition of the tax upon circuses sought to be enforced in this case. It is given a place along with the numerous sections imposing license taxes on every trade, calling and occupation which the councils could reach, and no reason is perceived why the city intended section 55 to be construed as a police measure any more than it intended the sections imposing a license tax on the numerous other callings named to be construed as police measures. It is true that the expense of the police department is paid from the general revenues of the city, but this expense is merely a part of the whole general expense, and does not come from any special <sup>20</sup> source. This ordinance, in which section 55 is found, constitutes the regular annual revenue bill enacted by the councils of the city of Norfolk, and it cannot be successfully controverted that every subject embraced therein is taxed for raising revenue and for no other purpose.

The distinction between the police power and the taxing power is clearly drawn by the authorities.

In 22 American and English Encyclopedia of Law, 917, the difference is thus defined: "The police power must also be distinguished from the taxing power, and the distinction is this: That the taxing power is exercised for the raising of

revenue and is subject to certain limitations, while the police power is exercised only for the purpose of promoting the public welfare, and though this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions upon the taxing power do not apply."

In the case of North Hudson County Ry. Co. v. Hoboken, 41 N. J. L. 71, the court says: "The exaction of license fees for revenue purposes is the exercise of the power of taxation. The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue, the amount of the tax, if not limited by the charter, is in the discretion of the authorities; if given as a police power, it must be exercised as a means of regulation only, and cannot be used as a source of revenue."

"Only those cases where regulation is the primary purpose can be specially referred to the police power": Cooley on Taxation, 587.

Where any imposition is laid upon persons or property under a general taxing ordinance, the only conclusion that can be drawn is that such tax is laid for revenue purposes alone, unless the contrary is made clearly to appear. To construe a general taxing ordinance as a police ordinance, it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions. Otherwise, there would be nothing to distinguish a revenue ordinance from a police ordinance.

<sup>21</sup> The ordinance in question being, as shown, for the purpose of raising revenue to defray the general expenses of the city government, we are of opinion that section 55 thereof, imposing a license tax on circuses outside of the territorial limits of the city of Norfolk is unwarranted. And we are further of opinion that the legislature cannot authorize a city to levy a license tax upon a circus, exhibiting beyond its territorial limits, for the sole purpose of raising revenue to defray the general expenses of such city; and that, in so far as section 1032 of the Code authorizes such a tax, it is invalid.

For these reasons, the judgment complained of must be reversed, and this court proceeding to enter such judgment as the lower court ought to have entered, it is ordered that this suit be dismissed.

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*A City Authorized by Its Charter to Provide for "Licensing, taxing and regulating hacks, drays, wagons and other vehicles, used within*



the city for pay," has been held to be without authority to license and tax vehicles used in hauling into and out of the city: *City of St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440. But under a statute giving cities power to direct the location and regulate the management of pork packing-houses within their limits and one mile beyond, it has been held that a city may exercise such authority over a packing-house situated within one mile thereof: *Chicago Packing etc. Co. v. City of Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

### CITY OF NORFOLK v. PERRY CO.

[108 Va. 28, 61 S. E. 866.]

**TAXATION.**—A Perpetual Leaseholder, Rather than a Lessor, is responsible for the taxes on the property. (p. 942.)

**TAXATION.**—When a Municipal Corporation Makes a Perpetual Lease of land, and the lessee covenants to pay the public taxes which shall become due on the property, the term "public taxes" includes not only those levied by the state, but also those levied by the municipality, although at the time of the execution of the lease municipal taxes on land were unknown. (p. 943.)

**TAXATION.**—The Mere Nonuser by a Government of Its Power to Tax, however long continued, cannot be construed into a forfeiture of the power. (p. 943.)

**TAXATION.**—The Failure of a City in Times Past to Tax Certain Land, in disregard of the constitutional mandate to tax all property not exempt, is no reason for a continuation of the disobedience. (p. 944.)

**TAXATION.**—Perpetual Lease.—A City has Power, though it is the holder of the legal title to land of which it has made a perpetual lease, to levy taxes on the property to be paid by the lessee, since he and not the city is virtually the owner. (p. 944.)

**TAXATION.**—Perpetual Lease—Land and Buildings.—The failure to assess the buildings as well as the land to the lessor (the tax being charged to the lessee), where there has been a perpetual lease of the land, is at most harmless error; but if a joint assessment will be of advantage to the lessee, and he has a right to it, his remedy at law by motion is adequate to have the assessment corrected in that particular. (p. 944.)

James F. Duncan and Nathaniel T. Green, for the appellant.

W. L. Williams and Tazwell Taylor, for the appellees.

**29 HARRISON, J.** In the year 1792 the appellant, then the borough of Norfolk, was the owner of an area of land within the limits of the present city of Norfolk. In that year it laid off this land into lots and leased the same to various individuals for ninety-nine years, renewable forever. Among these leases was one executed in June, 1797, by which there was leased to one Richard Evers Lee, lot No. 10, at an annual

rental of six pounds and fifteen shillings, or twenty-two dollars and fifty cents in United States money, the lessee, as a further consideration, covenanting for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." This lease was for a term of ninety-nine years, renewable for a further term of ninety-nine years, and so on forever.

In May, 1895, before the expiration of the original lease, the city of Norfolk, in accordance with its terms, executed a renewal thereof to the executors of Caroline F. Hare, she having been in her lifetime the owner of all the rights of the original lessee. This renewal lease contained the same terms as the original lease.

<sup>30</sup> By successive assignments, the property covered by this lease has passed to and become vested in the appellees, J. W. Perry Co. and John F. Roper, who have improved the same by the erection of valuable buildings thereon.

This property has been assessed for taxation by the state and such taxes have been regularly paid without protest. In the year 1906 the land was assessed for taxation at twenty-one thousand dollars, and the buildings thereon at six thousand five hundred dollars. The land was assessed for that year in the name of the city of Norfolk, and the buildings thereon in the name of the appellee, J. W. Perry Co.

In the year 1906, the city of Norfolk imposed a tax of three hundred and forty-six dollars and fifty cents on the land, and a tax of one hundred and seven dollars and twenty-five cents on the buildings. Thereupon the appellees filed this bill for an injunction against the collection of these taxes by the city of Norfolk, upon the ground that they were illegal and in contravention of the contract, under which they claim. A temporary injunction was awarded, which was followed by the decree appealed from perpetually enjoining the city of Norfolk, its agents, etc., from the collection of the taxes complained of.

While technically the relation of landlord and tenant exists between the city of Norfolk and the appellees under the terms of the contract of June, 1797, to which we have adverted, it is manifest that the appellees are the substantial and real owners of the property upon which the tax in question is assessed. They have the right of possession, use and occupation forever, upon payment of the stipulated rent of twenty-two dollars and fifty cents per annum, and they can assign or devise the same, and their heirs will take in case there is no assignee

or devisee. In all essential respects, so far as liability for taxes is concerned, appellees are in the position, with respect to this property, that the ordinary fee simple owner would be. It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of <sup>31</sup> the property and entitled to its use forever. In such a case, certainly for the purposes of taxation, the mere legal title remaining in the landlord will be disregarded and the burden of taxation placed where it belongs, upon the lessee to whom the value and the benefit belongs.

As said by Mr. Justice Bleckley, in a similar case which is quoted with approval by the supreme court: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes": *Wells v. Savannah*, 181 U. S. 531, 21 Sup. Ct. Rep. 697, 45 L. ed. 986.

Looking to the official action of the governing body of the borough of Norfolk, in its ordinances or resolutions, providing for these perpetual leases, which are recited in the lease contract under consideration, and to the terms of the contract itself, we fail to find any reference to the matter of exempting this property from taxation. Instead of such a stipulation there is in the deed of lease made by the borough to the several lessees a clause directly negating the idea that it was intended to grant a perpetual exemption of this property from the burden of taxation, borne in common by all other property holders. This clause obligates the lessee, "his executors, administrators and assigns, to pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land."

The appellees insist that the term "public taxes," employed by the parties in this covenant, had reference only to state taxes, and was not intended to include the city taxes now sought to be collected, because at that time a municipal tax on land was unknown. It might be argued with equal force that it could not have been contemplated by the parties, at that early day, that the property, now worth thousands of dollars, in a large and <sup>32</sup> rapidly growing city, should bear no part of the common burden necessary to secure the in-

numerable advantages and benefits enjoyed by all the citizens of a well regulated, modern municipality. The word "public," as applied to taxes in this covenant, is broad enough to embrace the taxes then imposed or which might thereafter be lawfully imposed upon other land owners in that community. The word has no such fixed or settled meaning as necessarily to exclude city taxes from the term "public taxes." The word "public" is used variously, depending for its meaning upon the subjects to which it is applied.

In *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506, the court says: "We think that the current of the authorities in this state and in some of our sister states runs to this result: that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed for some public or general use or purpose, in which he has no direct, immediate or peculiar interest; being exactions from him toward the expenses of carrying on the government, either directly and in general that of the whole commonwealth, or more immediately and particularly through the intervention of municipal corporations."

We are of opinion that the covenant, in the case at bar, by the lessee, to pay all "public taxes" which shall become due on the land, not only covered taxes imposed at the time of the lease, but all taxes arising in the future that might be assessed by any lawful authority.

The appellees insist that the interpretation of the contract of lease suggested by them is evidenced by the conduct of the municipal authorities in failing to tax the property in the past. Mere nonuser by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power. Whatever the practice of the city hitherto may have been, the mandate of the constitution is, that all property shall be taxed save that exempt by constitutional authority; and that all taxes, whether state, local or <sup>33</sup> municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax: Const. 1902, secs. 168, 183. That this mandate may have been heretofore disregarded is no reason why it should be disobeyed now: *Wells v. Savannah*, 181 U. S. 531, 21 Sup. Ct. Rep. 697, 45 L. ed. 986.

Based upon the contention that the property here involved belongs to the city, as lessor, it is insisted by the appellees that the city of Norfolk has no power to tax its own property. Ordinarily the state does not tax its own property, but



it has the power to tax it if it sees fit to do so: Cooley on Taxation, 3d ed., p. 263. And this would be true also of a city having general powers of taxation, as the city of Norfolk has: *Norfolk v. Norfolk Landmark P. Co.*, 95 Va. 564, 28 S. E. 959.

The reason governments of a state or city do not tax their own property is that it would render necessary new taxes to meet the demands of such a tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy: Cooley on Taxation, 3d ed., p. 263.

If, however, it were true that a city could not tax its own property, the rule would not apply in this case, for the reason that here, as already seen, the city is practically the holder of the mere legal title, while the appellees are the substantial and beneficial owners. Here the collection of the taxes would not be a vain thing, because the city does not pay the taxes, but they are paid by the lessee of the perpetual leasehold estate, who is the virtual owner, and the city gets the benefit of such taxes in common with all other taxes collected by it.

It is further contended by the appellees that the buildings put upon the land by the lessees cannot be assessed separately in their names, but that the land and buildings should be assessed together in the name of the lessor.

If it were conceded that the mode of assessment adopted was wrong, and that suggested by the appellees proper, it would be harmless error. The city had, under the law, to tax the property <sup>34</sup> at the same rate that was imposed upon other real estate within its territorial jurisdiction, based upon its valuation in assessing for purposes of state taxation. It is not claimed that the taxes would be less if the mode of assessment suggested by the appellees was adopted, nor is it perceived that the mode of assessment objected to has in any way affected or prejudiced their rights. If having both the land and the buildings assessed in the name of the lessor be of advantage to the appellees, and they have the right to have them so assessed, their remedy at law, by motion, is adequate to have the assessment corrected in that particular.

For these reasons, we are of opinion that no right of the appellees, under their lease contract, has been violated by the tax imposed by the city of Norfolk, and, therefore, the decree appealed from, enjoining the collection of such tax, is erroneous and must be reversed. And this court proceeding to

enter such decree as the circuit court should have entered, it is ordered that the temporary injunction granted herein be dissolved and that the complainants' bill be dismissed.

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*The Respective Duties of Life Tenants and remaindermen or reversioners to pay taxes are discussed in the note to First Congregational Church v. Terry, 114 Am. St. Rep. 448.*

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## LAMBERT v. CITY OF NORFOLK.

[108 Va. 269, 61 S. E. 776.]

**CEMETERIES—Damages to Adjacent Property.**—One is not entitled by the common law to damages against a city on account of its establishing a cemetery adjacent to his property, merely because it offends his taste or feelings or affects the fastidious sentiments of prospective purchasers. (p. 948.)

**EMINENT DOMAIN.—The Word "Damage," as Used in the Law of eminent domain,** refers to physical damage to the corpus of the property, or to some right appurtenant thereto, and not damage to the feelings, tastes or sentiments of the owner. (p. 949.)

**CEMETERIES—Damages to Adjacent Owners.—A Statute Providing** that the owners shall have a right of action when "damage" is done to adjacent lands by the establishment of a cemetery has reference to injuries to the corpus of the property or some right connected therewith, and it does not give to adjacent proprietors a right of recovery because the cemetery is offensive to his tastes or sentiments and renders his property less desirable or salable. (p. 952.)

Thomas W. Shelton, for the plaintiff in error.

James F. Duncan and E. R. F. Wells, for the defendant in error.

**260 HARRISON, J.** This action was brought against the city of Norfolk to recover damages which the plaintiff alleges she had sustained in consequence of the city having established a cemetery adjacent to her lands.

It appears that on February 15, 1906, the city of Norfolk purchased, for cemetery purposes, a tract of land situated on Mason's creek, in the county of Norfolk, two and one-half miles north of the present city limits, containing one hundred and sixty-six and one-half acres, at the price of three hundred and twenty dollars per acre, and has paid for the same and received a deed therefor. This purchase was made under power conferred on the city by its charter and by virtue of section 1414 of the Code, as amended by an act approved February 9, 1906: Acts 1906, p. 10.

The amended section is as follows: "Sec. 1414. Location of cemeteries; limitation as to quantity of land.—Nothing contained in the four preceding sections shall be so construed as to authorize any cemetery to be hereafter established in the corporate limits of any city or town, or within one hundred yards of any residence, without the consent of the owner of such residence; or to authorize the conveyance of more than three hundred or the condemnation of more than two acres of land for use of a cemetery, but when damage is done to adjacent lands by the establishment of such cemetery, whether established by purchase of land or condemnation proceedings, the owners whose lands have been damaged shall have right of action against any person, firm, corporation or municipality establishing said cemetery, said action to be instituted within one year from the establishment of such cemetery": Acts 1906, p. 10.

Prior to this amendment the statute inhibited the establishment of a cemetery within the corporate limits of any city or town, or within four hundred yards of any residence without the consent of the owner of such residence; and further inhibited the conveyance of more than seventy-five acres, or the condemnation <sup>261</sup> of more than two acres of land for use as a cemetery: Acts 1902-3-4, p. 896.

The changes, reducing the distance from a residence at which a cemetery could be established from four hundred to one hundred yards, and increasing the area that could be bought for cemetery purposes from seventy-five to three hundred acres, were doubtless suggested by the greatly increased demand for burial space, especially within convenient reach of large cities. The right of action, given for the first time by this amendment, was manifestly in furtherance of the recent constitutional provision, that the legislature should not "enact any law whereby private property shall be taken or damaged for public uses, without just compensation": Const. 1902, sec. 58.

The statute, as amended, seeks to protect two objects, namely, residences and land. It protects residences by inhibiting the establishment of a cemetery within one hundred yards thereof. This denial of the right to establish a cemetery within one hundred yards of a residence, without the consent of the owner, was doubtless considered a sufficient and effective protection to such residence. The right of action is confined to a recovery for damage done to adjacent lands by the establishment of a cemetery. The limitation of one hundred yards is not measured from the land, but from

a residence. It affects residences alone and has nothing to do with the right of action given to an adjacent land owner.

The plaintiff owns and resides on one hundred and twenty-five acres of land, which is adjacent to the rear portion of the tract owned by the city. No part of the plaintiff's land has been taken, and no right appurtenant thereto has been invaded. The record shows that the establishment of this cemetery has in no way interfered with any of the plaintiff's rights of property, such as access, rights of way, water rights, light and air, easements, lateral support, etc.; or that the cemetery is being operated as a nuisance. On the contrary, it appears that she has suffered no such injuries. The plaintiff's declaration, her bill of particulars, and the evidence, all show that her case is <sup>262</sup> based solely upon the theory that the market value of her land has been diminished by reason of the purchase of the land by the city of Norfolk for cemetery purposes, and by its passage of an ordinance establishing the same as "Evergreen Cemetery." The plaintiff's land is only used for farming purposes. It has never been platted or laid out in streets, and no lots there have ever been offered for sale. In view, however, of the rapid growth of Norfolk, the plaintiff expects her land to have a future value for residential purposes, and she thinks that an adjacent cemetery will greatly impair its value for such purposes. It is clear that the claim of the plaintiff to damages rests entirely upon sentimental considerations, and the prejudice that some people have to living near a cemetery.

Such considerations as constitute the basis of the plaintiff's claim were not recognized at common law as ground for a recovery of damages. At common law, it was generally damage done to the corpus of the plaintiff's property, or to some right enjoyed by the plaintiff in connection therewith, and not to the feelings, for which a recovery was allowed. The inconvenience had to be something more than fancy or fastidiousness. The law did not recognize damage to the feelings or mind, commonly called sentimental damage, but applied the maxim, "*Damnum absque injuria*."

This doctrine of the common law is aptly illustrated by the case of *Monk v. Packard*, 71 Me. 309, 36 Am. Rep. 315. There the plaintiff sued an individual for damages suffered on account of a private burying ground, located wholly on the land of the defendant, the nearest grave being forty feet from, and opposite to, the plaintiff's sitting-room, and in plain view of his front windows and door. He claimed that it rendered his residence uncomfortable and the enjoyment



of his property disagreeable, and that it had lessened its market value. The jury allowed twenty-five dollars damages, and the defendant appealed. It was held that the verdict was against the law and should be set aside, the court saying: "Nor can the verdict be sustained upon <sup>263</sup> the sole ground of the cemetery's proximity to the plaintiff's premises, and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located it must *ex necessitate* be in the vicinity of the private property of someone, who might prove its market value injuriously affected thereby: *New Orleans v. Wardens etc.*, 11 La. Ann. 244. But assuming that the jury in respect to these matters found in behalf of the defendants, and concluded that there was no injury to the plaintiff's property or to his physical health or comfort, and based their verdict solely upon the ground that, on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting-room or steps from his door, and that thereby the comfortable enjoyment of his dwelling-house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action." This contention of the defendants was also sustained, the court, quoting from *Cooley on Torts*, saying: "The inconvenience must be 'something more than fancy, delicacy or fastidiousness.' . . . If this burial ground is, under the circumstances, a private nuisance, then is it also a public nuisance to every traveler who passes on that road, as well as every soldiers' monument in the country."

It is plain, therefore, that, under the common law, the plaintiff would not be entitled to damages against the city of Norfolk on account of the establishment of "Evergreen Cemetery," merely because it offended her taste or feelings, or might affect the fastidious sentiments of some of her prospective purchasers of lots.

This was the state of the law when the constitution of 1902 was adopted. This instrument, for the first time, provides that the legislature shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation. <sup>264</sup> In section 1414 of the Code, as amended, the word "damaged" is used in the same sense that it is in the constitution. The statute simply carries out the constitutional provision on the subject.

Before the adoption of the present constitution, private property could be damaged by a municipality, acting under legislative authority, and no compensation for such damage could be recovered: *Home Building etc. Co. v. Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; *Meyer v. City of Richmond*, 172 U. S. 82, 19 Sup. Ct. Rep. 106, 43 L. ed. 374. In each of these cases, and in others that might be cited, a municipal corporation, acting under legislative authority, had been the offender, and each of them was decided on the general principle that these cities, although they violated common-law rights of property, nevertheless did so under authority of the legislature; and that the legislature had the power, under the then existing constitution, to grant such authority, without requiring damages to be paid, inasmuch as the acts done did not constitute a "taking" of property, within the meaning of the constitutional provision then in force. In each of the cases to which we have adverted, the act done constituted a violation of a common-law right, and would have been actionable if it had been done by an individual. Relief was denied, not because no right had been invaded, but because there was legislative authority for the invasion.

This line of decisions was referred to and commented on in the debates on the subject of inserting the "damage clause" in the constitution of 1902: and their effort, in making the right of recovery for an admitted injury depend upon whether the wrong was inflicted in pursuance of legislative authority or otherwise, was repeatedly criticised. It is clear that the law, as illustrated by the decisions which we have just mentioned, was regarded by the convention as unsatisfactory, and that it was the desire to remedy that condition of things which led to the insertion in the constitution of the words "or damaged," <sup>265</sup> thereby inhibiting the legislature from enacting any law whereby private property might be taken "or damaged" without providing for compensation. The convention was not attempting to create any new right incident to land, but was providing a right of action, which, before the enactment of this provision, did not exist where the injury was inflicted under legislative authority. The meaning of the word "damaged" was neither enlarged nor restricted by the constitution. It must, therefore, have been used in the same sense and with the same meaning that it had at common law—not damage to the feelings, tastes or sentiments, but physical damage to the corpus or to some right of property appurtenant thereto.

This provision of the constitution of 1902 has been considered by this court in two cases—*Swift v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A., N. S., 404, and *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 59 S. E. 407, 17 L. R. A., N. S., 1053. In the *Swift* case, the injury complained of was the physical establishment of a new grade on a street on which the plaintiff's property abutted. The injuries which it was claimed the plaintiff had suffered were injuries to his right of access to his property. No question of sentimental damages, or depreciation in value, caused by sentimental considerations, was involved in the case; but the court, both in the *Swift* case and in the *Shartzter* case, cited with approval the leading case of *Rigney v. Chicago*, 102 Ill. 64, which case had also received the approval of the supreme court of the United States in the case of *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638.

The *Rigney* case (102 Ill. 64) appears to have been the first case decided under the constitutional provision embodying the "damage clause." In that case it was held that the damages contemplated were those resulting from the direct physical disturbance of a right, either public or private, which a land owner enjoyed in connection with his property, and which gave to it an additional value. The court does not say in this case that the land must be actually invaded or disturbed in order to give its <sup>266</sup> owner a right for damages under the constitutional provision, but that it was sufficient if some right connected with the land had been disturbed, basing the right of damages on the ground that a right had been disturbed.

The question was more fully discussed in the *Shartzter* case. That was a condemnation proceeding by the Tidewater Railway Company. Julia A. Shartzter owned land adjoining that which was condemned, and the question involved was in regard to the proper measure of her damage and the items which it was proper to consider.

The case at bar is stronger than the *Shartzter* case. Here the city of Norfolk has not sought to condemn the plaintiff's property, but has established a cemetery on its own property, and no property rights of the plaintiff have been in any way affected or disturbed thereby. She simply objects to the presence of a cemetery adjacent to her land.

In the *Shartzter* case (107 Va. 562, 59 S. E. 407), Judge Keith says: "A person who is asking nothing with respect to his property is limited in the use of his own property only by the maxim, that he must enjoy it in such a manner as not

to injure that of another; or, less literally but more accurately, perhaps, 'so use your own property as not to injure the rights of another.'"

In further discussion of the subject, it is said, quoting with approval the following language from the opinion of the court in the case of *Eachus v. Los Angeles Consol. El. R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750: "The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, <sup>267</sup> or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents of that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

The learned judge, further quoting with approval, says: "'A recovery has not been allowed,' says Lewis on Eminent Domain, 'in any case unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress'": Lewis on Eminent Domain, sec. 236.

Judge Dillon makes the following clear and forcible statement of the law applicable to the subject under consideration: "The words 'injured or damaged,' found as they are in the eminent domain clause relating to the taking or appropriation of property for public use, as well as the history of the origin and cause of this provision, and a consideration of the mischief intended to be remedied, show that it was not the in-



tention of the constitutional amendment to create a right and to give a remedy in all cases of consequential damage which may result from the exercise of legislative power in making public improvements, or even from the appropriation of private property, or for injuries to private property for public use. A city, for example, under legislative authority, might condemn land for the purpose of establishing a hospital thereon, or a prison, which, if established, would have the consequential effect to <sup>268</sup> injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the constitutional amendment. This amendment must, as it seems to us, be limited to cases where the corpus of the owner's property itself, or some appurtenant right or easement connected therewith, or by the law annexed thereto, is directly (that is, in general if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property. These elements 'concurring,' his property is damaged within the meaning of the constitutional amendment; and to the extent of such diminished value, beyond damages sustained by the public at large from the improvement, the property owner is, under the constitutional amendment, entitled to compensation. It may, perhaps, be premature to affirm that the meaning of the word 'damaged,' as used in the recent constitutional amendments, is absolutely confined to cases where the common law would have given a remedy for injuries to property or property rights, if the legislative authority to do the act which caused the damage had not, aside from such constitutional amendment, deprived, or been previously construed to deprive, the owner of his right to compensation therefor; and yet such is, in our judgment, its main, if not exclusive, purpose and effect": Dillon on Municipal Corporations, sec. 587d.

It follows from what has been said that the plaintiff is not entitled to recover, having suffered no injury because of the establishment of the cemetery that is recognized by the law as a wrong to be compensated in damages.

The instructions given by the circuit court were in harmony with the views herein expressed, and without prejudice to the rights of the plaintiff.

The judgment complained of must be affirmed.

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*The Right of Property Owners to Compensation for Damages for property injured where there is no physical invasion of the premises*

is discussed in the note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 904. Recent cases on this subject are *Stehr v. Mason City etc. Ry. Co.*, 77 Neb. 641, 124 Am. St. Rep. 872; *Taylor v. Seaboard Air Line Ry.*, 145 N. C. 400, 122 Am. St. Rep. 455; *King v. Vicksburg Ry. etc. Co.*, 88 Miss. 456, 117 Am. St. Rep. 749; *Atchison etc. Ry. Co. v. Armstrong*, 71 Kan. 366, 114 Am. St. Rep. 474.

## AMERICAN LOCOMOTIVE COMPANY v. HOFFMAN.

[108 Va. 363, 61 S. E. 759.]

### NUISANCE—Successive Actions, Whether Maintainable.—

When an act complained of as a nuisance is unlawful in itself, a right of action accrues immediately, and includes all subsequent damage flowing from it. But when the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery, and until the damage does occur there is no cause of action; and for repeated injuries resulting from the same cause repeated actions may be brought. (p. 955.)

### WATERS—Obstruction Causing Overflow—Successive Actions.

Where one erects culverts and a fence upon his land so that the act is not unlawful in itself and can occasion no cause of action until damage results to an upper proprietor, new actions can be brought for recurring injuries resulting in overflows from a continuance of the nuisance. (p. 956.)

### WATERS—Obstruction Causing Overflow—Damages.—

Where a riparian proprietor is liable to a succession of actions for subsequent injuries caused by a continuance of an obstruction to the stream which backs water upon the premises of an upper proprietor, the diminution of the market or fee-simple value of the premises is not a proper subject for consideration in ascertaining the damages in an action for several overflows that have already occurred. (p. 956.)

**WATERS.—The Fact that One Riparian Proprietor has Himself Partially Obstructed** the stream does not preclude him from recovering damages for injuries due to further obstructions by a lower proprietor. (p. 958.)

**WATERS—Care to Avoid Obstruction.—The Degree of Care Exacted** of a riparian proprietor in so constructing culverts and water-gates as not to injure an upper proprietor by causing the water to back upon his premises is that which an ordinarily prudent man would exercise under all the circumstances of the case. (p. 958.)

The instructions referred to in the opinion of the court were as follows:

“No. 2. The court instructs the jury that the degree of care and foresight which the defendants should have used in building their fence and water-gate and constructing their culverts was in proportion to the nature and magnitude of the injury which would likely have resulted from the water being backed upon the plaintiff's property, and it should have been that care and prudence which a discreet and cautious

individual would or ought to have used for the purpose of protecting himself from injury.

"No. 3. The court instructs the jury that if they believe from the evidence that the defendants failed to use such skill and engineering knowledge in the construction of the fence, water-gate and culverts in question as is ordinarily practiced in the construction of such work, and as a consequence said fence and water-gate were improperly built, or said culverts improperly constructed, and would not carry off the flow of water which the defendants had reasonable cause to believe would occasionally flow down Cannon's branch, and as a consequence thereof the plaintiff's property was damaged, then the defendants were guilty of negligence in so constructing said fence, water-gate or culverts. But the court instructs the jury that the burden of proving that the defendant was so negligent in discharging this duty, and that such negligence caused the injury, is upon the plaintiff.

"No. 4. The court instructs the jury that although they may believe from the evidence that the lot owned by Hoffman was subject to overflows during high waters, yet this would not prevent Hoffman from building on said lot, provided said lot was raised to a sufficient height, or a wall high and strong enough was placed around or on said property to prevent the water which might be reasonably expected to flow down Cannon's branch at periodically recurring freshets from flowing on said property, and said wall did not directly interfere with the flow of such high water in said creek."

McGuire, Reily & Bryan and Wyndham R. Meredith, for the plaintiff in error.

John A. Lamb and Conway R. Sands, for the defendant in error.

**365** BUCHANAN, J. This is the second time this case has been in this court. The case upon the former writ of error is reported under the same style in 105 Va. 343, 54 S. E. 25, 6 L. R. A., N. S., 252. No further statement of the case is necessary beyond what is there found, except as to the proceedings had since then.

After the cause was remanded for a new trial, the plaintiff amended his declaration by adding eight counts, and by striking out the second and sixth counts of the declaration as it was upon the former trial. The object of the new counts was to recover damages for injuries alleged to have been suffered by the plaintiff from flooding, arising from the same causes,

between the time of bringing the action and the filing of the last amended declaration. Upon the trial on this amended declaration, there was a verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court in admitting evidence as to the difference in the fee simple or <sup>366</sup> market value of the plaintiff's premises immediately before it was first overflowed, in December, 1902, and after the last overflow in July, 1906. The same question is raised by instruction numbered 5, given at the request of the plaintiff, which told the jury that if they found for the plaintiff, in assessing his damages they should take into consideration the actual loss sustained by him, as shown by the evidence, and in arriving at such damages the jury might consider the market value of the property as shown by the evidence before it was first flooded and after it was last flooded, any encumbrance or annoyance to which the plaintiff was subjected, and any amount which the evidence showed had been expended by the plaintiff in cleaning and repairing the premises.

Whether or not that evidence was admissible, and the giving of that instruction proper, depends upon the character of the obstruction or nuisance complained of, and the object of the action: See *Southside R. Co. v. Daniel*, 20 Gratt. 344; 2 *Farnham on Waters*, secs. 589, 589a.

In the case of *Southside R. Co. v. Daniel*, 20 Gratt. 344, at page 337, it was said by Judge Staples, in delivering the opinion of the court, that where the act complained of "is unlawful in itself, a right of action accrues immediately, and is held to include all subsequent damage flowing from it. And in such cases there can be but one recovery between the parties, as the injury is not the cause of the action.

"Where, however, the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery," and until such damage does occur there is no cause of action; and for repeated injuries resulting from the same cause repeated actions may be brought."

The principles announced in that case are recognized and approved in the recent case of *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A., N. S., 465.

The erection of the culverts and the fence and water-gate in <sup>367</sup> this case, being upon the defendant's own land, was not an unlawful act in itself, and no cause of action could arise until damage resulted to the plaintiff therefrom; and new actions could be brought for recurring injuries resulting



from a continuance of the nuisance: *Southside R. Co. v. Daniel*, 20 Gratt. 344.

This action was not brought to recover entire damages, even if the facts of the case would have authorized it. This is clear from the declaration itself. It claims damages for overflows caused by seven different freshets. After the case was remanded for a new trial, the manifest object in amending the declaration by adding the eight new counts was to recover damages for overflows caused by freshets subsequent to the institution of the action, and to avoid the necessity of bringing another action therefor. This being an action to recover damages for injuries done to the plaintiff's premises by reason of the overflows which had occurred prior to the filing of the plaintiff's last amended declaration, and the defendant being liable to a succession of actions for subsequent injuries caused by a continuance of the nuisance, if it was one, the diminution in the fee simple or market value of the premises was not a proper subject to be considered by the jury in ascertaining the damages; for it would be manifestly unjust to permit the plaintiff to recover as damages a sum equal to the diminution of the market or fee simple value of his premises, and still have the right to successive actions against the defendants for a continuance of the nuisance: See *Battishill v. Reed*, 18 Com. B. 696; reported also in *Sedgwick's Leading Cases on the Measure of Damages*.

We are of opinion that the court erred in admitting the evidence and in giving the instruction.

Evidence was admitted as to the unsanitary condition of the plaintiff's premises, alleged to have been caused by the overflows complained of. This action of the court was objected to, upon the ground that there was no claim for such damages alleged in the declaration.

<sup>368</sup> In counts 1 and 9 of the declaration there were allegations as to the unhealthy condition of the property after the floods, respectively, of December, 1902, and of June, 1905. Under these counts, evidence of the facts alleged was admissible; and if it be true, as stated, that the witnesses who testified as to the unsanitary condition of the premises knew nothing of their condition after those floods, then the defendants should have asked the court not to admit any evidence on that subject, except as to those floods, instead of objecting on the ground they did; for a party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence

except those which he pointed out specifically: *Warren v. Warren*, 93 Va. 73, 24 S. E. 913.

The action of the court in giving the other four instructions asked for by the plaintiff is assigned as error.

Instruction No. 1 is as follows: "The court instructs the jury that it was the duty of the defendants in building their fence and water-gate across, and constructing their culverts in Cannon's branch, to so build said fence and water-gate and construct said culverts as not to obstruct such flow of water as the defendants might reasonably have expected would occasionally flow down Cannon's branch, including the ordinary rise of said branch at periodically recurring freshets. And if the jury believe from the evidence that the flows of water in Cannon's branch, upon the occasions complained of in the declaration, were not greater than that which the defendants might reasonably have expected would flow down said Cannon's branch on such occasions, then it was the duty of the defendants to have anticipated such flows of water, and to have so built said fence and water-gate and constructed said culverts that neither said fence and water-gate nor said culverts would, under such circumstances, have caused the water to back upon the plaintiff's property. And if the jury believe from the evidence that <sup>369</sup> the defendants failed to so build said fence and water-gate or construct said culverts, and failed to provide other ways sufficient for the passage of the water down Cannon's branch on such occasions, and as a consequence thereof the plaintiff was injured, then the defendants are liable to the plaintiff."

The objection is made to this instruction that "it violates the settled rule of this court that where an instruction concludes with a direction that the jury shall find for the plaintiff, such direction can only be based upon the absence of negligence on the part of the plaintiff contributing to the injury where there is any proof in the record of such contributory negligence and the instruction should so state." The contention of the defendants is that as there was evidence tending to show that the damages done to the plaintiff's property were due, in part at least, to his having erected his house on a part of the lot which at high water was covered wholly or partly by the waters of Cannon's branch, and that the erection of the wall around the house to keep the water off the lot narrowed the channel in places, filled it in, deflected the stream, and caused it to flow into the rear gateway or entrance to his lot, the plaintiff was guilty of contributory negligence, and if so, he could not recover.

The fact, if it was a fact, that the plaintiff had, prior to the time the defendants built the fence, water-gate and culverts, partially obstructed the stream by the house and wall which he had placed upon his lot did not, as the defendants insist, prevent him from maintaining an action against them to recover damages for injuries resulting from, or caused by, further obstructions on their part. They would not, of course, be liable for the damages caused by the plaintiff's obstructions, but they would be for damages caused by their own. Any other rule would work the greatest injustice. It would be a license to the lower riparian proprietor to obstruct the stream in any manner he saw proper, even to the destruction of the premises above him, where its owner had obstructed the stream in any <sup>370</sup> manner, however slight: See *Brown v. Dean*, 123 Mass. 254; *Riddle v. Delaware County*, 156 Pa. 643, 27 Atl. 569; 2 *Farnham on Waters*, sec. 595, and cases cited in notes to the section.

It is not altogether clear whether it was intended by the instruction in question to tell the jury that if they found for the plaintiff, the defendants were liable for all the damages suffered by the plaintiff, or that they were liable for only such damages as resulted from or were caused by the obstructions which they had placed in the stream. On the next trial, if a like instruction is asked for, it should be unambiguous on this point.

The objection made to instruction No. 2 is, that the court erred in defining the degree of care it was the duty of the defendants to exercise in building their fence and water-gate and in constructing their culverts, in this: That it told the jury that the care and prudence required was that which a discreet and cautious individual would or ought to have used for the purpose of protecting himself from injury, when it should have told them that the care required was that which an ordinarily prudent man would have exercised under all the circumstances of the case.

The degree of care required in such cases is that contended for by the defendants; but, as we construe the instruction, it does in effect what the defendants say it ought to have done. Upon the next trial, however, if an instruction on this point is asked for, it can be made entirely plain.

The objections to instructions 3 and 4 are without merit. There was evidence in the case tending to prove the facts upon which they are based, and there was nothing in the form or language of No. 3 to mislead the jury.

For the errors pointed out, the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

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This Case was Before the Supreme Court of Virginia in 105 Va. 343, 54 S. E. 25, 6 L. R. A., N. S., 252. From the opinion then rendered it appears that the American Locomotive Company, by placing culverts in a small stream known as Cannon's branch, and by running a fence with a water-gate across the stream, so obstructed the water as to cause it at different times to back upon the premises of Hoffman above. Hoffman had recovered a judgment in the lower court, but the supreme court reversed the judgment and remanded the case for a new trial.

## **WHEN A NUISANCE WILL SUPPORT BUT ONE RECOVERY AND WHEN IT MAY SUPPORT SEVERAL.**

- I. Explanations and References to Former Notes, 959.**
- II. General Principles Controlling, and Exceptions, 959.**
- III. Illustrations Showing how the General Principles have been Applied.**
  - a. When Nuisance will Support but One Recovery, 962.**
  - b. When Nuisance will Support Repeated Recoveries, 966.**

### **I. Explanations and References to Former Notes.**

The question of the operation of the statute of limitations has been discussed in former notes of this series, and whenever in these notes the operation of the statute with references to actions for nuisances was considered, the cases then cited necessarily bear upon our present topic.

In the note appended to *St. Louis etc. Ry. Co. v. Biggs*, 20 Am. St. Rep. 176, the operation of the statute of limitations with references to nuisances was considered at some length. Also on page 953 of the note appended to *In re Hamlin*, 126 Am. St. Rep. 944, and on page 630 of the note to *Cooke v. England*, 92 Am. Dec. 627, a brief discussion of the effect of the statute in actions for nuisances will be found. It is well, therefore, to refer to these three notes in connection with this one.

### **II. General Principles Controlling and Exceptions.**

The general principles of law which are stated in the principal case (ante, p. 953), as to when a nuisance will support but one recovery and when it will support several, are sustained by the great preponderance of authority, and have been thus stated in other jurisdictions: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. . . . But when such structure is permanent in its character, and its construction and maintenance are not necessarily injurious, but may be so, the injury to be compensated in a suit is only the damage which has happened; and



there may be as many successive recoveries as there are successive injuries": *St. Louis etc. Ry. v. Biggs*, 52 Ark. 240, 20 Am. St. Rep. 174, 12 S. W. 331, 6 L. R. A. 804. "If, by reason of a trespass upon realty, it has been so injured as to render it permanently useless and valueless to the owner, he should recover the damages thus occasioned in a single action. . . . But if the nuisance was of such a character as could be abated and terminate the injury, the plaintiff would not be limited to a single action resulting from its creation, but might sue for injuries resulting from its maintenance. In that event, if he so desired, he might bring successive suits for damages resulting up to the time of bringing each suit, provided they were not covered by a former action, and were within the statute of limitations": *City Council of Augusta v. Marks*, 124 Ga. 365, 52 S. E. 539.

"Where an injury is permanent, it is such as is spoken of in the books as original—that is, as accruing wholly when the wrongful acts were done; and is distinguished from an injury which is to be regarded as continuing—that is, an injury that could and should be terminated, and is to be compensated strictly with reference to the past, and upon the theory that it will be terminated. Where the injury is permanent, but one action can be maintained, and the recovery allowed is for all damages, past and prospective": *Bizier v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145, 30 N. W. 172. "When the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had for the entire damages in one action; but where the extent of a wrong may be apportioned from time to time and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but must, be brought to recover the damages sustained": *Scott v. City of Nevada*, 56 Mo. App. 189; and to same effect are *Highland Ave. & B. R. Co. v. Matthews*, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462; *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 825; *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334, 17 Am. Rep. 106.

"Where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit, but where it is not permanent, but depends on accidents and contingencies so that it is of a transient character, successive actions may be brought for injury as it occurs": *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 434.

The rule announced by the foregoing cases that a permanent nuisance, and one which necessarily produces injury, will support but one action, is supported by the great weight of authority, as we shall presently see, and is clearly based upon the theory that as the entire damages in such cases can be estimated and recovered in one action, a multiplicity of suits will not be allowed.

But in New York and Wisconsin this rule does not seem to prevail; for it has been held in those states that, even though the nuisance is permanent and continuing, it will support separate actions for its continuance.

The leading New York case on this subject is that of *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536, where

the suit was by an abutting owner to recover damages sustained from the construction of a railway in the street fronting his premises, and it was held that he could recover only such damages as had been sustained up to the commencement of the action, the court saying: "Whatever difference there may be in other states as to the rule of damages under consideration, in this state there is none whatever. Here the authorities are entirely uniform, that in such an action as this damages can be recovered only up to the commencement of the action, and that the remedy of the plaintiff is by successive actions for his damages until the nuisance shall be abated"; citing *Green v. New York etc. R. R. Co.*, 65 How. Pr. 154; *Taylor v. Metropolitan Elevated Ry. Co.*, 50 N. Y. Super. Ct. 312; *Duryen v. Mayor etc.*, 33 N. Y. Super. Ct. 120. All of these New York cases are based upon the theory that the court will not presume that a nuisance will be permanent; but inasmuch as nothing is absolutely permanent, it is difficult to see what tests the court would require the plaintiff to apply in order to determine whether to all practical purposes a nuisance was permanent or not. Whatever inconveniences, however, may have developed by adhering to the rule established in New York by the forgoing cases, the rule has been followed in later cases, but evidently the later decisions follow the *Uline* case more upon the doctrine of *stare decisis* than upon a conviction of its soundness, for in *Pond v. Metropolitan Elevated R. Co.*, 112 N. Y. 186, 8 Am. St. Rep. 734, 19 N. E. 487, the court, though sustaining the rulings in the former New York cases, said: "It might be productive of less inconvenience on the whole if an opposite rule prevailed."

In *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625, 1 N. W. 295, the action, like in *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536, was to recover damages against a railroad company for a nuisance to plaintiff's land, caused by building and maintaining its railroad track in a public street in front of plaintiff's premises. It was held that the only damages for which a recovery could be had were those which plaintiff had sustained at the time the suit was brought, and therefore evidence of any permanent depreciation in the value of the land was not admissible. The court said: "The recovery in the present action will be a bar only as to damages sustained previous to the commencement of the same, and the plaintiff and her grantees can recover in another action, for any injury caused to the lot by the maintenance of such railroad subsequent to the commencement of this action." Another reason given by the court in support of its ruling was that: "In the action to recover damages for nuisance, the plaintiff may have judgment to abate the nuisance, and it would be clearly unjust that the plaintiff should recover damages for a continuance of the nuisance and at the same time have judgment to abate and remove the same." And to the same effect is *Cobb v. Smith*, 38 Wis. 21.

These cases refer to the New York cases for support, and it must be noted that neither the courts of New York or Wisconsin hold that

prospective damages may not be recovered, and therefore only one action maintainable, if the nuisance is permanent, but they seem to hold that no nuisance can be presumed to be of that character, and therefore, while not technically disputing the rule that a permanent nuisance, and one which is necessarily injurious, will support but one action, the holdings of these courts result in practically opposing the rule.

The definition of what is to be regarded as a permanent nuisance within the rules above given which has been most frequently referred to and adopted by the courts was thus stated by the supreme court of New Hampshire: "Whenever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means": *Troy v. Cheshire R. R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

But notwithstanding this apparently satisfactory definition of what constitutes a permanent nuisance, the dividing line between the cases when the damages have been regarded as new damages—i. e., those arising from a continuance of the nuisance and for which separate actions may be brought for each successive injury—and those which have been regarded as original damages—i. e., where the nuisance was considered as permanent and all the damages to have accrued at once—so that but one action would lie, is not always clearly distinguishable. The most satisfactory method of determining how the general principles applicable to our topic are to be applied is by a review of the particular cases.

### III. Illustrations Showing How the General Principles have been Applied.

**a. When Nuisance will Support but One Recovery.**—In *Hyland Ave. & B. R. Co. v. Mathews*, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462, the action was to recover damages to plaintiff's lot, resulting from a nuisance caused by the construction of an embankment for the track of defendant's railroad in a street on which the lot abutted. The principal contention was whether plaintiff could recover damages beyond those sustained prior to the commencement of the suit; and this depended upon the question whether the injury was to be regarded as permanent or transient in its character, so that its continuance constituted but one wrong, for which only one action would lie, or whether it would support successive actions for subsequent injuries.

It was held that the nuisance was of a permanent character for which only one action would lie. "To allow successive suits for the recovery of such damages in parts would amount to giving several causes of action for a single tort. This would be in violation of the

principle that fresh damage, without a fresh injury, does not authorize a second or subsequent action."

In *Hyde Park etc. Electric Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206, plaintiff recovered damages for the depreciation in the value of his lot adjoining the electric light plant of defendant. It was contended by defendant that the only damages recoverable were for the temporary injuries to plaintiff's property resulting from the operation of the plant. It was held that the injury was permanent, and as plaintiff was confined to a single action he was entitled to recover whatever damages he sustained by the operation of the plant, both present and future damages.

In *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, the action was to recover damages for grading a street, so as to throw water on a lot of the plaintiff, and it was held that all damages must be recovered in one action. Judge Elliott, delivering the opinion, said: "The improvement of the street was a complete and permanent fact, and where the parties must presume that it was permanent in its character, and that it was intended that the thing done should remain unchanged. It cannot be presumed that municipal officers, having built a street or road, intended it to be temporary. A presumption that the wrong was not of a permanent character might, perhaps, obtain where a natural watercourse is temporarily obstructed, or where, in the course of improving a street, water was thrown upon a lot; but it cannot prevail where the improvement of the street is complete and the street permanently constructed." The learned judge then draws the same distinction that was made in the principal case (*American L. Co. v. Hoffman*, 108 Va. 363, ante, p. 953, 61 S. E. 759), viz., that the improvement of the street was not in itself unlawful, or a nuisance, but plaintiff's cause of action was based on the wrongful manner in which it was done. But he then deduces from this a very different rule from the one upheld in the principal case, and held that plaintiff could not maintain an action upon the ground of the continuance of the nuisance, while in the principal case it was held that, though the construction itself was originally lawful and not a nuisance, and therefore no action would lie on account of the construction itself, if its continuance caused damage, successive actions would lie for each recurring injury as for the continuance of a nuisance.

In *Powers v. Council Bluffs*, 45 Iowa, 632, 24 Am. Rep. 792, the nuisance arose from the defendant city changing the course of a living stream of water, which meandered a street, by cutting a ditch on the side of the street, and diverting the stream in the front of lots owned by plaintiff. Owing to the improper construction of the ditch, excavations were caused in plaintiff's lots. This action was not brought within five years after the damage to plaintiff's premises first began, and it was held that the statute of limitations began to run at the date of the diversion of the stream by the city, and therefore the action was barred.



In reaching this conclusion the court said: "The only question in this case is as to the character of the damage. Was it, as it accrued from day to day, new damage? If so, plaintiff was entitled, under the evidence, to recover some damages, although his right of action as to a part of the damages which he had sustained might be barred. We have to distinguish, then, between what must be regarded as original damages and what may be regarded as new damages." The opinion then recites the language we have previously quoted from *Troy v. Cheshire Ry. Co.*, 23 N. H. 83, 55 Am. Dec. 177, and said that if that principle be applied to the case at bar, "we must hold that the damages were original. The plaintiff's ground of complaint is that the ditch was improperly constructed. As constructed it resulted in the excavation of the plaintiff's lots. The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation. The result, too, was a necessary one, the ditch remaining as constructed. The cause of the difficulty was a permanent one, in that it would not grow less unless remedied by human labor."

Likewise in *Bizier v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145, 30 N. W. 172, plaintiff sought to recover damages sustained by the back flowage of water caused by the erection of a dam. The dam was not constructed by the defendant, but it had succeeded by purchase in the ownership of the dam, water power, and improvements connected therewith. Plaintiff obtained a verdict for one thousand dollars for permanent damages, and the jury also found specially that the dam was of a permanent character, and became so prior to its purchase by defendant.

The verdict for damages was reversed on appeal, when it was held that the defendant could be liable for the damage sustained only upon the theory that the nuisance was one which could and should be abated, and that defendant was in fault for not abating it, but that this theory was precluded by the special verdict finding the nuisance was of a permanent character.

So, too, in *Elizabeth etc. R. R. Co. v. Combs*, 73 Ky. (10 Bush) 382, 19 Am. Rep. 67, it was held that the whole damage to adjacent property from smoke, soot, or fire, resulting from the use of a street by a railroad company, may be recovered in one action, as such an injury is permanent and enduring.

In ~~Beatrice~~ *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925, the nuisance complained of was that the water in plaintiff's well was rendered unfit for use, dangerous and unwholesome, by reason of impure matter percolating into it from a condense well erected by defendant on its premises. A judgment for plaintiff was reversed on grounds not pertinent to the topic under consideration; but speaking on the question of present interest the court said: "The general policy of the law is to avoid multiplicity of actions, and, if practicable, without injustice, to afford compensation in one action for all injuries. . . . The inquiry, we think, should have been as to whether or not the defendant's acts had caused a permanent and irremediable injury to plaintiff's property. If so, the plaintiff

was entitled to compensation in this action for all such injury, present or prospective. If, on the other hand, the injury was temporary in its character and capable of being avoided in the future without permanent injury to plaintiff's freehold, the case was one of a continuing nuisance, and damages should have been restricted to the commencement of the action."

In *Gartner v. Chicago etc. R. Co.*, 71 Neb. 444, 98 N. W. 1052, plaintiff sought to recover damages for the overflow of his lands, caused by a construction erected by defendant. It appeared that a prior owner of the land, through whom plaintiff deraigned title, had brought an action against defendant and another on the same cause of action, for damage to a part of said lands by reason of the construction, soon after its erection, and that in that suit judgment was given generally for the plaintiff, which was subsequently paid. It was held that the former judgment was a bar to the present suit. Said the court: "The general rule is that, where the obstruction causing the overflow of water and consequent damage to the land is of such a character that, unless interfered with by the hand of man, it will continue indefinitely, the damages, past and prospective, are recoverable in an action, and successive actions therefor cannot be maintained. . . . The construction complained of in this case is the same one that was alleged to have caused the damage in the former suit. It is of a permanent character, and one which will continue indefinitely, unless interfered with by the hand of man."

In *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A., N. S., 465, plaintiff claimed damages for the pollution of a stream which ran first through the property of defendant, then over her land. The defendant pleaded the statute of limitations, alleging that the stables and sewers claimed by plaintiff as polluting the stream were established some fifteen years before the filing of the suit, and were of a permanent character, and that the pollution of the stream had been continuous since the alleged nuisances were established. This plea was, on motion of plaintiff, excluded by the trial court and judgment went for plaintiff. The supreme court of appeals, after stating that the question presented was whether the nuisance complained of would support repeated actions as long as the nuisance continued, or whether the case was such that the whole damage accrued at once and was recoverable in a single action, held that the plea, if true, constituted a bar to the action under the five-year statute of limitations, and was therefore erroneously excluded.

In *Smith v. Point Pleasant & Ohio River R. R. Co.*, 23 W. Va. 451, the owner of property abutting on the public street of a town sought to enjoin the defendant railroad company from building its road through the street, until a court of equity could ascertain the damages he would sustain, giving as a reason for such injunction that a court of common law would furnish no adequate remedy, as he would have to bring repeated suits to recover the damages he might sustain. In refusing the injunction it was held that the nuisance complained of would be permanent in its character, and therefore complainant

could recover all damages he might sustain by reason of the building of the road in one action, and that no second suit would lie except for negligence in the operation of the cars of the defendant and not for the nuisance itself.

And this rule was applied in the later case of *Guinn v. Ohio River R. R.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87, where it was held that, in an action against a railroad company to recover damages for injury to a lot of land, consequent to the construction and operation of a railroad along a public street on which the land abutted, the injury complained of was a permanent nuisance and damages for the whole injury could be recovered in one action.

**b. When the Nuisance will Support Repeated Recoveries.**—In *St. Louis etc. Ry. Co. v. Biggs*, 52 Ark. 240, 20 Am. St. Rep. 174, 12 S. W. 331, 6 L. R. A. 804, plaintiff sought to recover damages for the overflowing of her lands in 1885, caused by the construction of defendant railway in 1873. The defendant claimed that as the alleged nuisance was of a permanent character the statute of limitations began to run from the date of the construction of the alleged nuisance. This contention was not sustained; the court saying that when a nuisance "is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries."

In *Donahue v. Stockton Gas & Electric Co.*, 6 Cal. App. 276, 92 Pac. 196, it was held that successive actions can be maintained against a gas company to recover damages to land resulting from seepage from the tanks, reservoirs and cisterns of such gas company. "The originator of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof."

And in proceedings under the statute for the penalty of five shillings per week for overflowing the lands of another, the penalty of one week only may be sued for at a time: *Chapman v. Chapman*, 1 Root (Conn.), 52. Likewise in *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 125 Am. St. Rep. 111, 67 Atl. 508, plaintiff was the owner of lands near the defendant city, and sought to recover damages for the pollution of a stream running through his land, caused by the defendant's discharge of sewage into the stream. Plaintiff had in a previous suit recovered a judgment against the city for damages resulting from the same nuisance, which was paid, and the former judgment was pleaded as a bar to the present action. It was held that every day's continuance of the nuisance rendered the defendant liable to a suit for the damages sustained thereby, and that the former judgment was therefore not a bar to this action. Said the court: "The construction of the sewers was lawful, and caused no damage to the plaintiff, and such construction for the purpose of discharging sewage into the river gave the plaintiff no cause of action; the sewers could be used for that purpose without invasion of the plaintiff's rights and without damage to his property; but when the

defendant discharged its sewage into the river in such quantities and in such manner that the same was carried undiluted and unpurified to the premises of the plaintiff two miles below, there producing a public nuisance to the plaintiff's special damage, the defendant did not make a lawful use but a misuse of its system of sewers; it did an unlawful act, and that unlawful act was a wrongful invasion of the plaintiff's legal rights, and each day such unlawful act was repeated the plaintiff suffered a fresh invasion of his legal rights." To same effect is *City of Chattanooga v. Dowling*, 101 Tenn. 342, 47 S. W. 700.

So, also, in *Danielly v. Cheeves*, 94 Ga. 263, 21 S. E. 524, where the action was brought to recover damages for overflowing plaintiff's tillable land. It was held that the nuisance, although resulting from a cause intended to be perpetually operative, and of a nature so to operate gradually and continuously, created in the year 1878, was actionable in 1884 for damage on account of diminished or suspended fertility occasioned thereby with reference to the crops for the years 1882 and 1883, and the same nuisance, having been continued with like effect, was again actionable in 1888 for damage on account of diminished or suspended fertility with reference to the crops for the years 1884, 1885, 1886, and 1887; and the same nuisance, having been continued with like effect, was again actionable in 1889 for damage on account of diminished or suspended fertility with reference to the crop for the year 1888. It was further held, however, that if the effect of the nuisance, at any stage, was to destroy wholly and permanently the fertility of the land, so that abating the nuisance and withdrawing the excess of water occasioned thereby would not restore the land and render it again fertile, the right to maintain successive actions relatively to subsequent years ceased, and a single action and recovery for such destruction could be maintained, and would be final.

The supreme court of Illinois in *Illinois Cent. R. R. Co. v. Grabill*, 50 Ill. 241, drew a very nice distinction in determining whether a former judgment for damages resulting from a nuisance will operate as a bar to a subsequent suit for the same injury. The injury complained of in this case grew out of the erecting and maintaining cattle-pens near the premises of plaintiff. It was held that plaintiff might elect to bring an action solely for the nuisance of rendering the air unwholesome, and in that event a similar recovery might be had in a suit brought to any succeeding term, while the nuisance should be kept up. But that when the plaintiff declared for the depreciation of his land as well as for the annoyance of the nuisance to him while occupying the premises, permanent damages would be allowed and the judgment would operate as a bar to any subsequent suit for injury due to the erection of the pens.

In *Ohio & M. Ry. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529, the action was to recover damages against a railroad company for constructing and maintaining an embankment across a natural watercourse in which its railroad track was laid, and which



obstructed the flow of the water and forced it back upon plaintiff's adjoining land. It was held that the duty of the railroad was a continuing one, and that every continuance of a nuisance is, in judgment of law, a fresh nuisance, and that each overflow upon plaintiff's land, caused by the alleged nuisance, creates a new cause of action against the defendant for injury thereby occasioned to the crops upon plaintiff's land; and to same effect is *Chicago P. & H. L. Ry. Co. v. Reuter*, 223 Ill. 387, 79 N. E. 166. The same doctrine was also applied in *Sanitary District of Chicago v. Ray*, 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048, where it was held that a judgment against a sanitary district for damages to a tenant's crops, caused by the wrongful obstruction of the waters of a river in times of freshet, does not bar a subsequent action by him for damages afterward suffered.

So, too, in the late case of *Tetherington v. St. Louis T. & E. R. Co.*, 226 Ill. 129, 80 N. E. 697, 12 L. R. A., N. S., 571, it was held that, where a railroad company constructed an embankment without necessary culverts, in violation of Hurd's Revised Statutes of 1905, chapter 114, section 20, and then transferred its property to another company, which maintained and rebuilt the embankment with knowledge that it backed water into adjacent property, the transferee was liable for damages, though not notified by the owners of the adjacent property to abate the nuisance created by the embankment, the statute imposing a continuing duty on the original railway company and its transferee, and each reconstruction of the embankment being an independent violation thereof.

In *Valparaiso v. Moffit*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909, plaintiffs were owners of a certain city lot used for residence purposes, and sought to recover from the defendant city damages caused by the pollution of a stream running through plaintiffs' lot, and resulting from the discharge of sewage by defendant into said stream. The defendant answered that part of the waste and noxious matter which flowed through the sewer and emptied into the stream came from gas works operated in the defendant city, and that some years prior to the commencement of this suit plaintiffs had brought action against the gas company and procured a judgment for damages for pollution of the stream caused by the sewer from the gas works, which had been paid. It was held that there was no error in sustaining a demurrer to this answer. "Every continuance of a nuisance makes a fresh one," said the court, "and he who continues a nuisance is liable to successive suits, each continuance being a new one in which there is a fresh injury and a fresh damage (citing cases). One recovery does not bar subsequent actions where the nuisance is continued."

The right to bring successive suits for a continuing nuisance was also recognized in *Peck v. City of Michigan*, 149 Ind. 670, 49 N. E. 800, where the suit was in three paragraphs. Each alleged that plaintiff was the owner of land fronting upon the basin of the harbor of defendant city, and maintained docks for the loading and unloading of merchandise to and from the water craft doing business in

said city. That in 1883 the city had constructed sewers emptying into the basin near plaintiff's docks, and by reason of the sewage and sand discharged from said sewers the basin had become too shallow to permit water craft to reach plaintiff's docks, and the sewage was so foul and offensive as to render the docks too offensive to conduct business thereon, by reason of which plaintiff's premises were rendered valueless. The third paragraph alleged that the damage accrued since 1890. It was held the first and second paragraphs of the complaint which alleged complete destruction of the property long before the statute of limitations were barred, but the third alleging that the damages were sustained since 1890 were not barred.

In *Cumberland etc. Canal Corp. v. Hitchings*, 65 Me. 140, a canal company acting under authority of the city of Portland had extended one of the streets of the city over and across a canal by means of a solid embankment, leaving no opening for the passage of either boats or water. Plaintiff brought this action to recover damages for filling about two hundred yards of the canal bed. It was held that in an action to recover damages for a continuing nuisance a charge authorizing a recovery for diminution in the value of plaintiff's property was erroneous. Said the court: "Assuming that this embankment was unlawfully placed there—that the canal should have been bridged, not filled up—and we have a nuisance upon the plaintiff's land; something placed there which can, and in contemplation of law ought to be, removed. For such an injury successive actions may be maintained till a removal is compelled." As the character of the nuisance complained of in this case would certainly fall within the rule that a nuisance is permanent, if it would "continue without change from any cause but human labor," it would seem that the state of Maine must be added to those of New York and Wisconsin, which we have seen hold in effect that no nuisance will be presumed to be permanent, and therefore only those damages resulting therefrom which have accrued up to the time an action is brought can be recovered, and that repeated actions must be brought for each successive injury.

In *Van Hoozier v. Hannibal etc. R. R. Co.*, 70 Mo. 145, the action was to recover damages arising from the diversion, by defendant in 1873, of the stream of running water, whereby portions of the plaintiff's land were, in the year 1875, overflowed and rendered unfit for cultivation, his crops destroyed, and his timber injured. Defendant pleaded a former recovery, and introduced in evidence the pleadings in a suit for damages instituted by the plaintiff against it in 1875, together with the verdict of the jury and the judgment of the court therein in favor of the plaintiff. It was then admitted by the parties "that the land injured is the same in both suits, that the parties plaintiff and defendant are the same, that the cause of the injury is the same, and the cause of the injury, defendant's railroad and plaintiff's land are all in the same condition as at the commencement of this suit, the judgment in which is pleaded in bar of this action, the only

difference being that said former suit was prosecuted for damages during the years 1873 and 1874, while the present suit is for damages during the year 1875, and since the institution of the prior suit and prior to the institution of the present suit." It was held that the court did not err in overruling the plea of former recovery. Said Judge Hough, speaking for the court: "In cases of nuisance, the rule is well settled that the plaintiff cannot recover for injuries not sustained when his action is commenced. It is equally well settled that when the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had, therefore, in a single suit, and no subsequent action can be maintained for the continuance of such injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained, and former suit will be no bar to a recovery in another action for damages suffered subsequent to the institution of the first suit. . . . It is plain the injury is a continuous one, susceptible of periodical apportionment, and therefore capable of being redressed by successive actions." To the same effect are the later cases of *Dickson v. Chicago etc. R. R. Co.*, 71 Mo. 575; *Markt v. Davis*, 46 Mo. App. 272, and *Scott v. City of Nevada*, 56 Mo. App. 189.

In *Ridley v. Seaboard etc. R. Co.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, the court adopted the rule laid down by the supreme court of Illinois in *Illinois Cent. Ry. Co. v. Grabill*, 50 Ill. 241, and held that, in an action against a railroad company for injury to land caused by ponding of water by defendant's roadbed and bridge, either party could elect to have permanent damages assessed upon demand made in the pleadings, and when either made the demand the judgment would be a bar to any subsequent action; but it was further held that if plaintiff was allowed without objection to have the damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and, upon proof of a previous partial assessment, the jury may consider that fact in diminution of the permanent damage.

In *Texas & P. Ry. Co. v. O'Mahoney* (Tex. Civ. App.), 50 S. W. 1049, plaintiff sought to recover damages for an overflow of defendant's water reservoir in the year 1894, alleging that such overflow destroyed plaintiff's garden and produced sickness in his family. Defendant pleaded a former suit in 1890 for the same cause of action by plaintiff's grantor, and a settlement thereof. It was held that the former suit was not a bar to the present action, the court saying: "The plea in this case does not allege that the damages compromised and settled were for permanent injuries to the land, or of such a character as would prevent a recovery for damages to the same land, caused by other and additional acts of defendant. The seepage and overflow complained of in this case resulted from the raising of the banks of the pond in 1894, thereby increasing the height and quantity, and as a natural result the pressure, of the water."

So, also, in the recent case of *International & G. M. R. Co. v. Kyle* (Tex. Civ. App.), 101 S. W. 272, it was held that, where the building of a railway embankment is not of itself a nuisance, but becomes so only at intervals by diverting water from rainfalls from its usual flow upon plaintiff's land, the cause of action arises upon receipt of each injury, and successive actions may be brought for each injury as it occurs, and an action for such injury would not be barred by limitations for two years thereafter.

In *Pickins v. Coal River Boom & Timber Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, the action was for damages from the maintenance of a boom, which caused a wrongful deposit of sand on plaintiff's premises. It was held that the boom was not a permanent structure, and therefore that plaintiff could only recover temporary damages, but the court said: "Defendant must abate the nuisance, or be liable to repeated actions from time to time, growing in severity, until the time is abated."

And in *Doran v. Seattle*, 24 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 230, 54 L. R. A. 532, it was held that, if a trespass is followed by injury constituting a continuing nuisance, the damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for the continuation of the wrongful condition.

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## ROANOKE RAILWAY COMPANY v. STERRETT.

[108 Va. 533, 62 S. E. 385.]

### **CARRIERS—Injury to Passenger from Collapse of Bridge.—**

A street railway company is not answerable to a passenger injured by the collapse of one of its bridges occasioned by an imperfect weld which could not have been detected by the utmost scrutiny, where the bridge was constructed by a competent and reliable company. (p. 975.)

### **CARRIERS—Injury to Passenger from Collapse of Bridge.—**

In an action against a street railway company for injuries sustained by a passenger through the collapse of a bridge, an instruction is proper that the "slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been sustained, renders" the carrier liable. (p. 976.)

### **CARRIERS—Collapse of Bridge—Burden of Proof.—**

When a passenger in an action against a street railway company for personal injuries shows that they resulted from the breaking down of one of the company's bridges, this places on the carrier the burden of establishing, by a preponderance of evidence, that the accident and resulting damage were occasioned by inevitable casualty, or by some cause which human foresight could not have prevented. (p. 977.)

### **CARRIERS.—A Presumption of Negligence Against a Carrier**

does not arise from the abstract fact of an accident to a passenger, but from a consideration of the nature and quality of the accident. It must appear that the accident was such as does not, in the usual course of things, happen to passengers when due care is exercised by the carrier. (pp. 977, 978.)



Robertson, Hall, Woods & Jackson and Dupuy & Whittle, for the plaintiff in error.

N. H. Harrison & Son and Hoge & Penn, for the defendant in error.

**534** HARRISON, J. This action was brought by Mary E. Sterrett against the Roanoke Railway and Electric Company to recover damages for injuries alleged to have been sustained by her, in consequence of the negligent failure of the defendant company to maintain one of its street railway bridges in a safe condition. The trial resulted in a verdict and judgment in favor of the plaintiff, the propriety of which is called in question by this writ of error.

In the view we take of the case, it will conduce to clearness and brevity to consider first the assignment of error which involves the action of the circuit court in refusing to set aside the verdict of the jury, upon the ground that it was contrary to the law and the evidence.

The record shows that one branch of the defendant's street-car system ran from Roanoke city for a distance of some two and a half miles to the suburban town of Vinton. Before reaching the corporate limits of Vinton, this line crossed Tinker creek on an iron truss bridge, which was about seventy-five feet long, made into one span composed of six sections of twelve and one-half feet each. Upon each section of the span was placed wooden stringers running the length of each section. These stringers were twelve by ten inches in size, and were **535** supported at either end of the twelve and one-half foot section by resting about two or two and one-half inches on metal plates, called floor beams, about five inches in width. These wooden stringers were fastened together with straps, so as to hold them together and prevent lateral movement. Upon these stringers were placed the cross-ties, which were securely fastened, and to the ties were spiked the rails. The record further shows that this bridge is what is known as a pin-connected Pratt truss bridge; that the truss is supported by long iron cords, known as top and bottom cords, made of wrought iron. These cords come together at a point just under the track, and are connected by a pin or post, made of wrought iron, which pin runs through loops at the ends of these cords. It is shown that the entire weight of the bridge is held up by these cords, and the bridge so constructed that if the connecting pin is broken, or any one of the cords is broken, the bridge will collapse. It appears that the iron bridge in question was made to order for the defendant com-

pany by the Virginia Bridge and Iron Company, of Roanoke, Virginia, which is shown to have been, and still to be, a thoroughly reputable, competent and reliable manufacturer. It further appears that at the time of the accident the bridge had been continuously in use for six years, and was believed by the defendant railway company to be perfectly safe and suitable for the use to which it was put. It further appears that some eight or ten months prior to the accident this bridge was thoroughly overhauled, new stringers were put in, and the entire structure examined and inspected. It is also shown that about two months prior to the accident new sixty-pound rails were substituted for old rails, and the entire bridge at that time again examined and inspected. It further appears that a competent inspector of bridges was kept in the employment of the defendant company, who examined this bridge every few weeks, and that no defect was discovered except those which were repaired in the manner already mentioned. The capacity of the bridge is shown to have been very much greater than was <sup>536</sup> actually necessary for the purposes and uses to which the bridge was put.

On the morning of the accident several cars, heavily loaded with passengers, had passed over the bridge safely, with nothing occurring to suggest or indicate any defect therein. Finally, the car involved in the accident under consideration, containing about eighty-five or ninety passengers, came upon the bridge on its way from Vinton to Roanoke. It had passed over about three-fourths of the bridge, when suddenly and without warning the structure collapsed, and the bridge, with the exception of a portion of its western section, fell into the stream. The car, with its passengers, was for a while held up by the rails, but these rails gradually bent until one of them broke, precipitating the rear end of the car into the stream. Mary E. Sterrett, the defendant in error, was a passenger on this car, and received the injuries of which she complains.

Totally different theories are advanced by the parties, respectively, as to the cause of this accident. The defendant in error contends that some of the stringers, the ends of which rested upon the floor beams, had slipped until the lap or catch was reduced from two or two and one-half inches to only one inch and a half, and that the defendant company had, or ought to have had, notice of this alleged defect. The contention of the defendant in error is, further, that the weight of the car upon these stringers caused them, at the time of the

accident, to slip entirely off of the floor beams, thus leaving nothing to support the car.

The contention of the plaintiff in error is that one of the iron cords, which was found broken, had a defective weld just where the loop was made in the cord, and that the break was in this weld; that the defect in the weld was latent and could not be discovered by any external examination, and only appeared after the weld was broken; and that the hidden defect in the weld caused the cord to break and the bridge, which was supported by the cord, to collapse.

537 We are of opinion that the evidence fails to sustain the contention of the defendant in error, that the accident was caused by the stringers slipping off of the floor beams, and establishes the theory of the plaintiff in error, that the accident resulted from the defective weld which caused the cord supporting the entire structure to break, thereby effecting the inevitable collapse which followed.

The witnesses introduced by the defendant in error, for the purpose of showing that the bridge was not in a safe condition, were without knowledge or experience in the construction of bridges or in bridge engineering. They do not profess to know that the stringers were in an unsafe condition, or whether they had been built into the bridge as situated when seen by them. They do not say that the slipping of the stringers, which they supposed had taken place, caused or contributed to the accident. They merely state, without having made any measurement, that the stringers only rested upon the floor beams one and one-half inches; the statement that they had slipped being mere assumption. Further, these witnesses made their observations of the stringers, in most instances, some time before the accident, and locate most, if not all, of the stringers observed by them at a point other than the section of the bridge where the collapse occurred. This theory of the defendant in error, that the stringers had slipped and thereby caused the accident is, however, shown to be fallacious and without foundation by the testimony of competent experts, whose evidence is not in conflict with the plaintiff's witnesses who admit their inability to say whether the conditions they describe did, or did not, cause or contribute to the collapse of the bridge.

Two experts were introduced by the plaintiff in error—one a bridge builder and the other a bridge engineer—both competent, with long experience in their line and familiar with the character and construction of the bridge in question. They show that the conditions described by the plaintiff's

witnesses, if true, could not have caused the accident, and did not in any <sup>538</sup> way contribute thereto. The undisputed testimony of these experts is that, if the stringers had slipped and fallen, it would not have caused the bridge to fall, for the reason that the stringers get their support, in part, from the bridge, while the latter gets no part of its support from the stringers.

These experts explain the mechanism of the bridge, and show that while it is built in six sections of twelve and one-half feet each, yet these sections are all connected into one entire span which makes the whole bridge. The iron cords which unite these several sections and bind them into one span are what holds up the bridge, the stringers performing no function of that sort. If one of these cords breaks, the bridge falls. It is further shown that if one or more of the stringers had slipped from the beams and fallen into the creek, neither the bridge nor the car would have fallen from that cause.

These experts inspected the bridge after it had fallen, and found no unsound or broken timbers therein, and found no faulty condition of anything about the bridge, except the defect in the loop of the bottom cord where there had been an imperfect weld. The broken cord was produced in court, and the unqualified testimony of these experienced bridge men is that the breaking of that cord was the sole cause of the accident; and that the defect in the cord was the imperfect weld, which could not have been detected by the utmost scrutiny.

"Where an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary compensation": 2 Hutchinson on Carriers, 3d ed., secs. 903, 904. The liability of a carrier of passengers as thus defined is now almost universally adopted.

As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only <sup>539</sup> that the defendant owed a duty, but also that he did not perform it; and if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent



its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, therefore, be a case of negligence: 1 *Shearman and Redfield on Negligence*, secs. 15, 16.

Applying these well-settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against, and that no liability attaches to the plaintiff in error on account thereof.

Notwithstanding the conclusion reached on the merits, the case must, under our practice, be remanded for another trial, if the plaintiff be so advised. It is, therefore, necessary that objections taken to two of the instructions given by the circuit court should be considered.

The first of these is instruction No. 4, given on behalf of the plaintiff, which is as follows: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury."

The objection made to this instruction is that the jury are told that negligence that may have occasioned the plaintiff's injury will justify a recovery; it being insisted that the negligence must have caused the injury in order to justify a recovery.

This instruction, in the same language that is here employed, has been more than once approved by this court in cases of a like nature: *Baltimore & O. R. Co. v. Wightman's Admr.*, 29 Gratt. 431, 26 Am. Rep. 384; *Baltimore & O. R. Co. v. Noel's Admr.*, 32 Gratt. 394. In both of these cases the accident resulted to a passenger from the falling of a railroad bridge. <sup>540</sup> An examination of the records and the briefs filed in both cases shows that the same objection, and the same argument in support thereof, was there made to this instruction that is now made.

In the first case cited, Judge Staples, speaking for a unanimous court, in referring to this instruction in common with four others, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country."

The case of Noel's Admr. (32 Gratt. 394) is to the same effect.

In the light of these authorities, the objection to the instruction under consideration was properly overruled.

The second objection taken by the plaintiff in error is to the modification made by the circuit court of its instruction No. 2. The instruction, as asked for, was as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds. They are further instructed that the evidence must show more than a probability of a negligent act, and the plaintiff cannot recover if it is just as probable that the accident in which the plaintiff was injured resulted from one of two causes, for one of which the defendant is not responsible."

This instruction was modified by the court and made to read as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds, and the evidence must show more than a probability of a negligent act; but when the plaintiff has shown that she was injured by the breaking down of the bridge and overturning the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated; and then the burden of proof is on the company <sup>541</sup> to establish, by a preponderance of evidence, that it has been guilty of no negligence whatsoever which caused the accident, and the damage has been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent."

There was no error in this action of the circuit court. Under the instruction, as asked for, the defendant company would merely have to raise a doubt as to the cause of the accident, and thereby shift to the plaintiff a greater burden than the law imposes in such cases. In the case of a passenger, when the plaintiff shows that his injury resulted from an accident which was caused by the breaking down of one of the carrier's bridges, it is sufficient proof of negligence on the part of the defendant company to put the burden upon it of establishing, by a preponderance of evidence, that the accident and the resulting damage was occasioned by inevitable casualty, or by some cause which human care and foresight could not have prevented. The presumption of negligence suggested does not arise from the abstract fact of an accident

to a passenger, but arises from a consideration of the nature and quality of the accident; and it must appear that it was such an accident as does not, in the usual course of things, happen to passengers when due care is exercised on the part of the carrier: 3 Thompson on Negligence, sec. 3484; Richmond Ry. & Elec. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736.

Because of the error of the circuit court in not setting aside the verdict as contrary to the law and the evidence, its judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

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*A Railway Company Owes to Its Passengers* the duty of exercising a high degree of care in maintaining its bridges and roadbed in a safe condition: Louisville etc. Ry. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60; Illinois Cent. R. R. Co. v. Beebe, 174 Ill. 13, 66 Am. St. Rep. 253; Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438, 22 Am. St. Rep. 781; Ohio Valley Ry. Co. v. Watson, 93 Ky. 654, 40 Am. St. Rep. 211, and cases cited in the cross-reference note thereto. A railroad company is liable for an injury to a passenger resulting from the collapse of its bridge unless it can show that the bridge, as originally constructed, was as safe as the highest degree of care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, it was inspected for discovering and remedying any defect that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the material, then that the material was tested before being put into position: Jackson v. Natchez etc. Ry. Co., 114 La. 981, 108 Am. St. Rep. 366.

*Presumptions of Negligence* from the happening of an accident are considered in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

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## STEINMAN v. HAGAN.

[108 Va. 563, 62 S. E. 348.]

**SPECIFIC PERFORMANCE—Necessary Parties.**—In suits for specific performance, the only necessary parties are ordinarily the parties to the contract. (p. 980.)

**SPECIFIC PERFORMANCE.—A Person is not Ordinarily a Necessary Party** to specific performance when there is no proper privity or common interest between him and the plaintiff such as would warrant the court in decreeing between them. (p. 980.)

**SPECIFIC PERFORMANCE—Subpurchaser not Necessary Party.**—In a suit by a vendor, who has not parted with the legal title, for specific performance of the contract of sale, a purchaser of the vendee is not a necessary party, and he is bound, although not made a party, by any decree in the action affecting the title. (pp. 980, 981.)

Irvine & Morison, George A. Smith and A. C. Anderson, for the appellant.

Bond & Bruce and C. T. Duncan, for the appellees.

<sup>563</sup> WHITTLE, J. The essential facts of this case are these: On June 2, 1870, the appellee, Patrick Hagan, conveyed two hundred sixty-four acres of land situated in Wise county, Virginia, which included the eighty acres <sup>564</sup> involved in this litigation, to Felix Campbell, by deed recorded September 5, 1870. On June 3, 1870, Campbell, for the same consideration, reconveyed the identical land to Hagan, who withheld the deed from record until June 29, 1881. In the meantime, namely, on August 22, 1870, the attorney in fact for Campbell executed a title bond for the eighty acres to Anderson Wells, the bond reciting that it was in ratification of a previous contract between Hagan and Wells. And on December 15, 1874, Wells conveyed the coal and minerals underlying the tract to the appellant Steinman and Price. On the day following, Price conveyed his half interest to Steinman, who put both deeds to record.

In 1876 Campbell instituted for Hagan's benefit a suit in equity against Wells to enforce specific performance of the contract of sale; whereupon the land having been decreed to be sold was bought by Hagan for the amount of purchase money due, with interest and costs. The sale was confirmed and title conveyed to Hagan by a special commissioner of the court; and the deed recorded December 10, 1877. In 1894 Hagan leased the coal under a large boundary of land, including the Wells tract, to the Ayers Coal Company, who in turn assigned their lease to the Norton Coal Company.

On December 19, 1906, this suit in equity was brought by Steinman against the appellees, alleging the foregoing facts (and others not material to be stated), for the purpose of setting aside the commissioner's deed to Hagan, and the mining lease to the Norton Coal Company, so far as they affected the coal and minerals in dispute. The prayer of the bill is that the land may be sold (the surface primarily); or at Hagan's election that his deed be permitted to stand, and that he be required to convey the coal and minerals to Steinman; and also that the mining lease to the Ayers Coal Company, and certain supplemental leases to the Norton Coal Company, to the extent to which they affect the coal and minerals in question, be set aside and canceled.

<sup>565</sup> From a decree dismissing on demurrer the original and amended bills this appeal was allowed.



Though the alleged laches of Steinman is relied on by Hagan as constituting a complete bar to his recovery, we deem it only necessary to consider the question of the conclusiveness of the decrees in the case of Campbell, for Hagan, against Wells, upon Steinman's right to the relief sought in this suit.

In its last analysis, that proposition depends upon whether or not Steinman was a necessary party to the former litigation. The general rule is well settled that a person is not a necessary party when there is no proper privity or common interest between him and the plaintiff, such as would warrant the court in decreeing between them.

Here we have no allegation that Hagan knew of the conveyance from Wells to Steinman at the time he brought suit to enforce his vendor's lien; and the law devolved no duty upon him to search the records in quest of derivative purchasers from Wells. On the other hand, Steinman had constructive notice that Wells was not the holder of the legal title; and he was, therefore, informed that any interest which he might acquire from that source would be taken in subordination to the superior rights of the owner of the legal title. With respect to such owner, he was a mere intruder, and as against the paramount title the deed from his vendor invested him with no estate, either legal or equitable. Upon this principle is founded the general doctrine that in suits of this character the only necessary parties are parties to the contract.

The rule is thus stated in Story's Equity Pleading, tenth edition, sections 226-226b: "In the first place (as we have seen), the rule as to necessary parties does not extend to all persons who may be consequentially interested, or affected by the suit. . . . So, in the case of a common bill for the specific performance of a contract of sale of real estate, the only proper parties in general are the parties to the contract itself. Special cases may indeed exist in which the rule may be otherwise; but they stand upon their own peculiar grounds."

<sup>566</sup> Waterman on Specific Performance, at section 59, states the rule as follows: "Subpurchaser not to be Made a Party: A purchaser from the vendee is not, as a rule, a proper party to a bill filed by the vendor; nor the original purchaser, when his vendee has been accepted in his place by the vendor. Where a suit was brought by the vendor against both the purchaser and the subpurchaser, it was dismissed by the vice-

chancellor as against the latter, though specific performance was decreed against the original contractor, and the case was affirmed on appeal."

To the same effect is Frye on Specific Performance, section 140: "The general rule with regard to suits to enforce contracts was, that the parties to the contract, or their representatives, were the necessary and sufficient parties to the suit—that all the parties to the contract should be parties to the suit and no one else. The contract is what constitutes the rights and regulates the liabilities of the parties. In a stranger there is no liability; and against him, therefore, there was no more right to enforce specific performance in equity than to recover damages at law": See, also, 20 Am. & Eng. Ency. of Pl. & Pr. 414; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501.

The effect of the outstanding legal title was to admonish Steinman that what was actually done in the suit against his vendor might lawfully be done, and that he, although not a party, would be concluded by the proceeding. He dealt with the property with open eyes, and must abide the consequences of his own imprudence: Devlin on Deeds, sec. 711.

We find no error in the decree of the circuit court, and it is affirmed.

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*As to Who are Necessary Parties in suits for specific performance, see Hickey v. Dole, 66 N. H. 336, 49 Am. St. Rep. 614; Maguire v. Heraty, 163 Pa. 381, 43 Am. St. Rep. 800; Swepson v. Rouse, 65 N. C. 34, 6 Am. Rep. 735; Allison v. Shilling, 27 Tex. 450, 86 Am. Dec. 622; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505.*

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## TOWN OF WYTHEVILLE v. JOHNSON.

[108 Va. 589, 62 S. E. 328.]

**TAXATION.**—Equity has Jurisdiction to Enjoin the enforcement of an unauthorized tax, although there is an adequate remedy at law. (p. 982.)

**INHERITANCE TAXATION.**—Power of City to Impose.—The power of a city to impose an inheritance tax can be conferred only by express grant clear and unmistakable in its terms. (p. 985.)

J. J. A. Powell, for the appellant.

B. F. Buchanan, for the appellee.

<sup>590</sup> WHITTLE, J. This appeal is from a decree of the circuit court of Wythe county, enjoining the treasurer of the town of Wytheville from levying and collecting a collateral inheritance tax on property, real and personal, devised and bequeathed to the appellee, Nannie L. Wadley, by the will of her deceased aunt, Emily L. Johnson.

The jurisdiction of a court of equity to enjoin the enforcement of an unauthorized tax is too firmly established in this jurisdiction to admit of serious question: *Goddin v. Crump*, 8 Leigh. 120; *Bull v. Read*, 13 Gratt. 78; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Miller v. City of Lynchburg*, 20 Gratt. 330; *Johnson v. Drummond*, 20 Gratt. 419; *Llewellen v. Lockharts*, 21 Gratt. 570; *City of Richmond v. Richmond & D. R. Co.*, 21 Gratt. 604; *Redd v. Supervisors*, 31 Gratt. 695; *Schoolfield's Exr. v. City of Lynchburg*, 78 Va. 366. There is no merit, therefore, in the first assignment of error, which questions the jurisdiction of the court on the ground that section 571, Virginia Code of 1904, affords a complete and adequate remedy at law.

The essential facts are these: The testatrix, Mrs. Johnson, a resident of the town of Wytheville, died June 21, 1907, and shortly thereafter her will was admitted to probate. The collateral inheritance tax imposed on behalf of the state was paid by the executor. On August 2, 1907, more than a month after the death of the testatrix, the town council passed an ordinance laying a collateral inheritance tax, for the use of the town, of five per centum on every hundred dollars in value of the estate of any decedent in the town, and declared that the ordinance should take effect from January 1, 1907.

On the merits, the only question material to be considered is whether the power to impose a collateral inheritance tax has been delegated to the town of Wytheville, either by general statute or charter.

The enactment found in section 1043, Virginia Code of 1904, is as follows: "The council of every city and town shall cause to be <sup>591</sup> made up and entered upon their journal an account of all sums lawfully chargeable on the city or town, which ought to be paid within one year, and order a city or town levy of so much as in their opinion is necessary to be raised in that way, in addition to what may be received for licenses and from other sources. The levy so ordered may be upon the male persons in the said city or town above the age of twenty-one years, and upon any property therein, and

upon such other subject as may at that time be assessed with the state taxes against persons residing therein."

Section 42 of the town charter provides, that "For the execution of its powers and duties, the council may raise taxes annually by assessments in said town on all subjects taxable by the state, such sums of money as they may deem necessary to defray the expenses of same, and in such manner as they may deem expedient (in accordance with the laws of the state, and the United States . . . . )."

A statute substantially similar to section 1043 (Code of 1873, sec. 33, c. 54), in connection with the charter of the city of Lynchburg and an ordinance imposing a collateral inheritance tax, came under review by this court in *Peters v. City of Lynchburgh*, 76 Va. 927, and *Schoolfield's Exr. v. City of Lynchburg*, 78 Va. 366. Though the charter powers of the city in the matter of taxation were exceedingly broad, it conferred no express authority upon the common council to levy a collateral inheritance tax. In the first named case the validity of the ordinance was upheld by a divided court. Two of the judges, Burks and Christian, were of opinion that the power to impose such tax was conferred by the general law. Judge Anderson maintained the view that the legislature, if it had the right, did not intend to confer power upon cities and towns to levy a collateral inheritance tax; and Judge Staples, while not doubting the authority of the legislature to tax collateral inheritances, and to delegate that power to municipal corporations, was, nevertheless, of opinion that the power had not been conferred upon the city of Lynchburg, either by general law or charter.

<sup>592</sup> Two years later the precise question again arose, in the case of *Schoolfield's Exr. v. City of Lynchburg*, 78 Va. 366, when the court unanimously denied the power of the city to impose such tax, either by charter delegation or otherwise. The court in that case observes: "Upon an inspection of the charter . . . . , we find the subjects upon which the city of Lynchburg is authorized to levy a tax enumerated at great length. until they seem to cover every conceivable subject which might find place in a tax list, and yet we find no authority for the levying of this tax. Under the authorities cited and a plain rule of construction, we cannot conclude otherwise than that, for reasons deemed wise, the legislature intended to withhold this power. And we are of opinion that the decision of the learned judge who decided that this



power was to be found in section 33 of chapter 54 is not sustained by the terms of that section. The words, 'upon any property in said town' cannot be held to confer the power, because, as we have seen, this is not a property tax. . . . In the light of the authorities cited, and upon reason, the concluding sentence cannot be construed to apply to other subjects than **such as are** assessed annually with state taxes. The provision is general, and was intended to apply to the general subjects of taxation, such as are provided for taxing generally, and ought not to be extended to include a special power to levy this special tax, unless the authority be expressly given by law."

We concur in the construction placed by the court both on the general statute and city charter.

The doctrine is well settled that, "In construction of the grant of any power to tax, made by the state to one of its municipalities, the rule accepted by all the authorities is that it should be with strictness. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all that it has intended to grant, and whatever authority the municipal officers assume to exercise, they must be able to show a warrant for it in the words of the grant": Cooley on Taxation, 209, 468; *City of Lynchburg v. Norfolk & W. Ry. Co.*, 80 Va. 237, 56 Am. Rep. 592; *Green v. Ward*, 82 Va. 324.

<sup>593</sup> In *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, the court held that a collateral inheritance tax was not in any proper sense a tax on property, but merely on the transitus of property—a privilege granted by the state of acquiring property by inheritance. Judge Lee in that connection says: "The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment." See, also, authorities cited in footnote to the principal case in Va. Rep. Anno.

It is apparent that section 1043 and the charter of the town of Wytheville apply only to the ordinary annually recurring tax on property and other subjects of taxation, and not to sporadic subjects which, though connected with the transmission and enjoyment of property, are casual in their nature and not recurrent. It was to the former subjects of taxation that the court had reference in *Ould v. City of Richmond*, 23 Gratt. 464, 14 Am. Rep. 139, and *City of Norfolk*

v. Norfolk Landmark P. Co., 95 Va. 564, 28 S. E. 959, and cases of that type, and not to a special exaction imposed by the state upon the recipient of a collateral inheritance. It would seem clear from the authorities that the power of a municipality to attach such burden to the devolution of property can only be conferred by express grant.

This view of the case renders it unnecessary to consider the remaining contention, namely, that the ordinance in question is retroactive and void, because it affects vested rights.

The decree appealed from is without error, and must be affirmed.

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*The Principal Case is Cited* in the recent note to English v. Crenshaw, 127 Am. St. Rep. 1044, on the taxation of inheritances.

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### HOOVER v. BAUGH.

[108 Va. 695, 62 S. E. 968.]

**SPECIFIC PERFORMANCE.**—A Subvendee of a Portion of the land which the vendor agreed to sell cannot compel a conveyance to himself from the vendor, except upon the payment of the whole amount due from the original vendee of the entire tract. (p. 987.)

**SPECIFIC PERFORMANCE**—Parol Contract Partly Performed.—Equity will compel the performance of a parol contract for the sale of real estate which is certain and definite when there have been such acts of part performance that neither party can be restored to his former position, but for a vendee to remove the briars and weeds from a tract so as to pasture it, and to make costly improvements to his house on the adjoining lot, which he would not have been justified in making, except on expectation of acquiring title to the tract, are not such acts of part performance as to be insusceptible of compensation in damages. (p. 987.)

**SPECIFIC PERFORMANCE.**—A Parol Contract by a Vendee to sell a portion of the land purchased to a subvendee, assented to by the vendor, is within the statute of frauds and unenforceable if there have been no acts of part performance other than such as may be compensated in damages. (p. 988.)

C. R. Winfield and D. O. Dechert, for the appellant.

Sipe & Harris, for the appellees.

<sup>696</sup> CARDWELL, J. Appellant, S. E. Hoover, filed his bill in this cause against appellees, W. S. Baugh and Carson Fitzwater, averring that he was a subvendee of Fitzwater, who had purchased a tract of twenty-two acres of land from

Baugh at the price of \$2,950, and that he, appellant, had purchased nine acres of said land from Fitzwater, the purchase price thereof to be paid to Baugh. The bill then alleges that Baugh's contract with Fitzwater was in writing, dated the — day of August, 1907, whereby it was agreed that in consideration of \$50 in hand paid, and \$2,950 to be paid by Fitzwater to Baugh on the fifteenth day of December, 1907, Baugh would upon the completion of said payments convey the twenty-two acres of land to Fitzwater, etc.; that on the next day after the contract in writing between Baugh and Fitzwater, appellant had a verbal agreement with Fitzwater, by which appellant was to take, at the sum of \$850, payable \$20 in cash to Fitzwater and \$830 to Baugh on the delivery of a deed on the fifteenth day of December, 1907, all of the Baugh land on the east side of a certain lane or roadway—about nine acres; that Baugh verbally assented to this arrangement, but subsequently, about the 1st of December, 1907, canceled the written agreement with Fitzwater, without the knowledge or consent of appellant.

While Fitzwater answered this bill, and practically admitted as true its averments, Baugh demurred thereto, and for the purpose of pleading specially the statutes of fraud filed his answer, in which he denied all the allegations of the bill, and avers that the purchase price of the twenty-two acres of land to be paid by Fitzwater was \$3,000; and, while admitting that he had been informed that Fitzwater and appellant had some verbal understanding <sup>697</sup> as to a subsale of a portion of the land to appellant, he never consented to such sale. It is further admitted as true that appellant had requested him, Baugh, to make a deed for the parcel of land which the latter claimed to have contracted verbally with Fitzwater to purchase, but that he declined to do so, as the sale was of the entire tract of twenty-two acres, and denies that either Fitzwater or appellant had ever been on the premises or done a "lick" of work thereon.

The cause being heard upon the bill, demurrer and answer, the circuit court dismissed the bill, with costs to Baugh, and this ruling is assigned as error.

This court is of opinion that there is no error in the ruling of the circuit court. It will be observed that the bill is not to enforce the contract signed by Baugh, agreeing to sell to Fitzwater the twenty-two acres of land at the price of \$2,950, or \$3,000, as the case really was, but to compel Baugh to convey to appellant nine acres of the land upon the receipt of \$830,

less than \$100 per acre, which appellant alleges was the verbal contract between him and Fitzwater, assented to by Baugh.

Counsel for appellees concede that a subvendee of a portion of the land which the vendor had agreed to sell cannot compel the vendor to make a conveyance to the subvendee, except upon payment of the whole amount due from the original vendee of the entire tract, as all of the land would stand as security for the entire amount due the original vendor, who could not be compelled to release any part of his security until the entire purchase money was paid; but the effort is made to distinguish such a case from the case at bar, upon the hypothesis that the original vendor, Baugh, is a party to the contract of subsale, assented thereto and agreed to receive the proceeds thereof.

This argument leaves wholly out of view the fact that this case is heard on the bill, demurrer and answer; the answer of Baugh denying any such agreement as is alleged in the bill, and of which no proof is offered. The alleged agreement with appellee, Baugh, with respect to the subsale to appellant is not <sup>698</sup> only flatly denied, but is unreasonable upon its face. What conceivable reason was there in the alleged agreement of Baugh to receive of appellant \$100 per acre for land he had bargained to sell to Fitzwater at about \$150 per acre? Moreover, if that agreement was ever entered into, there has been no such part performance thereof on the part of appellant as to make it inequitable or unjust to refuse its specific enforcement. It is very true that a court of equity will compel the specific performance of a parol contract for the sale of real estate, where the contract is certain and definite and there have been such acts of part performance that neither party can be restored to his former position, but that is by no means the case here. Appellant only claims a verbal agreement with Fitzwater, assented to by Baugh, that in consideration of \$830 to be paid to Baugh, Fitzwater would, when he obtained a conveyance for the whole of the tract of twenty-two acres, convey a certain part thereof—a field of about nine acres—to appellant; and even if Baugh did assent to this agreement, the only acts of part performance thereof alleged are, that appellant got the briars and weeds off the field, so as to pasture the same, and after taking possession of the field made costly improvements to his house on his adjoining lot, which he would not have made and would not have been justified in making, except on the expectation of acquiring title to said field.

Such acts of part performance are not of such a character as to be incapable of compensation in damages if specific per-



formance of the alleged agreement be denied: *Hudson v. Max Meadows L. etc. Co.*, 97 Va. 341, 33 S. E. 586; *Venable v. Stamper*, 102 Va. 30, 45 S. E. 738; *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370, 1 Va. App. 540.

The authorities cited in support of the proposition that specific performance will be decreed against the party who signed the contract, although the other party did not sign, and although there was no mutuality of remedies between the parties at the time the contract was made, have no application whatever to this case.

699 Aside from the foregoing considerations, the alleged contract here sought to be enforced was, as held by the circuit court, a parol contract, so alleged in the bill, and as such is not enforceable. The statute on the subject (commonly spoken of as the statute of frauds) is explicit, and provides, *inter alia*, that no action shall be brought upon any contract for the sale of real estate, unless the contract or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent: Code, sec. 2840.

The ingenious argument of counsel that the contract which appellant is seeking to enforce is not a contract for the sale of real estate, but a contract by which appellee, Baugh, agreed that upon the receipt of the \$830 he would release his vendor's lien on the nine acres of land which appellant claims to have purchased of Fitzwater, has nothing in the record to rest upon. If we were disposed to concede that such a contract would not be controlled by the statute, that is not the contract appellant's bill asks to be enforced. The contract asked to be enforced is a verbal contract, said to have been made by appellee, Baugh, with appellant at the time of the surrender and cancellation of the original contract to Fitzwater, by which Baugh bound himself to convey, either directly or through Fitzwater, to appellant a part of the twenty-two acres of land which Baugh had originally agreed to sell to Fitzwater. If the bill could be construed as a bill to enforce the original contract, it would be clearly demurrable, since it does not allege an offer to perform that contract nor ask its enforcement.

In any view that may be taken of the case, the decree complained of is without error and should be affirmed.

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*A Parol Contract, Partly Performed*, will, under some circumstances, be specifically enforced: *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490; *Lothrop v. Marble*, 12 S. D. 511, 76 Am. St. Rep. 626; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741; *Cauble v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871; *McLeod v. Despaigne*, 49 Or. 536, 124 Am. St. Rep. 1066.

**LIFE INSURANCE COMPANY OF VIRGINIA v. HAIRSTON.**

[108 Va. 832, 62 S. E. 1057.]

**LIFE INSURANCE—Opinion as to When Consummated.**—It is not competent for a witness to state whether a policy of life insurance, after issuance and delivery by the insured, is binding on him. (p. 999.)

**LIFE INSURANCE—Waiver of Cash Premium.**—A condition for the prepayment in cash of the first premium before a life insurance policy takes effect is waived when an agent, in accordance with a practice approved by the company, delivers the policy and accepts the premium, part in cash, and a note for the balance, which is not paid until several days after maturity. (p. 1002.)

**LIFE INSURANCE.—The Declarations by the Insured to His Physician,** after the policy payable to his wife has become effective, to the effect that he is addicted to the opium habit, are not admissible under the rule barring statements to a physician, unless made to the knowledge of the declarant against his obvious and real interest of a pecuniary or proprietary nature. (p. 1002.)

**LIFE INSURANCE.—Evidence of the Health and Habits of the Insured** after the contract of insurance is complete is no longer material. (p. 1002.)

**LIFE INSURANCE—Suicide—Statements of Insured as Res Gestae.**—A letter written by an insured to his wife in the morning is not admissible as part of the res gestae of the issue whether he committed suicide, where his death occurred in the evening of that day. (p. 1003.)

**INSTRUCTIONS—Hypothetical Statement of Facts.**—It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, if the statement fairly presents the case shown in evidence. (p. 1003.)

**INSTRUCTIONS—Hypothetical Statement of Facts.**—When the court chooses to present a hypothetical case to the jury, it should be careful to put before the jurors all facts bearing upon the issues which the evidence proves or tends to prove. (p. 1003.)

**LIFE INSURANCE—Evidence and Instructions as to Suicide.**—The jury should be instructed that the evidence to warrant a verdict for the insurer on the ground that the insured came to his death by suicide should exclude every reasonable hypothesis of accidental death. (pp. 1003, 1004.)

**LIFE INSURANCE—Fraud and Misrepresentation by the Insured.**—Under the Virginia statute no answer to interrogatories by the applicant for life insurance vitiates the policy by reason of any warranty in the application, unless it is clearly proved that the answer was "willfully false or fraudulently made, or that it was material." The defense of fraud in an action on a policy must be established by clear and satisfactory proof such as to overcome the presumption of innocence of moral turpitude or crime. (p. 1004.)

**LIFE INSURANCE—Proof of Suicide.**—The Defense of Suicide in an action on a life insurance policy must be established by clear and satisfactory proof—not proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence of moral turpitude or crime; but not that degree of proof is required which is necessary to convict of crime. (p. 1004.)

The following instructions were given at the request of the plaintiffs over the objection of the defendant:

“(1) The court instructs the jury that although you may believe from the evidence that the deceased was found the evening of his death, having convulsions, and that he continued to have them until he died, and that strychnine was found in his stomach, this alone is not sufficient to prove suicide. The defendant company must go further and show that the deceased intentionally and willfully, for the purpose of committing suicide, took strychnine, and this must be shown by such evidence as will exclude every reasonable supposition of accidental death, and unless this is so shown from all the evidence, you must find for the plaintiff on the issue of suicide.

“(2) The court further instructs the jury that if the defendant company seeks to avoid the payment of the policy on the ground that the accused came to his death by suicide, the defendant company must show that every hypothesis of accidental death is excluded by the evidence. Accidental death is presumed by the law, and this presumption cannot be overcome except by proof of facts which exclude every hypothesis of death except by suicide.

“(3) The court instructs the jury that no answer to any interrogatories made by an applicant for a policy of life insurance shall bar the right to recover upon any policy issued upon such application, by reasons of any warranty in said application of policy contained, unless it be clearly proved that such answers are willfully false, or fraudulently made, or that it was material.

“(4) The court instructs the jury that if they believe from the evidence that the defendant company delivered the policy sued on to A. H. Ayers, agent, who delivered it to the deceased, D. P. Willis, and further believe that at no time after the policy was so delivered and before the death of D. P. Willis, did the defendant company give said Willis notice that it wished to cancel the policy, this was a waiver of the condition of prepayment to deliver a policy without requiring the prepayment of the premium.

“(5) The court instructs the jury that if the defendant company seeks to avoid the payment of said policy on the grounds that the deceased has been guilty of material misrepresentations and fraud, the burden of proving the misrepresentations and fraud is on the defendant company; that he who alleges fraud must clearly and distinctly prove it. It is



not to be assumed on doubtful evidences or circumstances of mere suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty."

The following instructions were first asked by the defendant and were refused:

"1. The court instructs the jury that all the defendant company is required in this action to do is to prove by a preponderance of the evidence the facts necessary to be shown to entitle it to a verdict according to the other instructions given to the jury. By the term 'preponderance of the evidence' as applied to the proof of any particular fact in this case is meant that the greater probability from the evidence is in favor of the existence of such fact. That is to say, if the jury believe, considering all the evidence in the case relating to any given fact, that the greater probability from all the evidence before them is in favor of the existence of that particular fact, then they must so find. For example, if the defendant relies upon the fact that the deceased died from strychnine poisoning and not from other causes, and if the jury believe from all the evidence on that subject that that contention, to wit, that the deceased died from strychnine poisoning, is more probably true than the contrary contention, then it is their duty to determine, in making up their verdict, that said fact has been shown.

"2. The court instructs the jury that in determining whether the deceased, Willis, died from suicide or from natural or accidental causes they shall consider, first, what facts are established by a preponderance of all the evidence on that subject, and, having ascertained what facts are thus established, they shall further consider whether there is any reasonable hypothesis based upon those facts and those facts alone, which are consistent with death from natural or accidental causes; and, if the jury believe that those facts, considered as a whole, and taken together, are inconsistent with death from natural or accidental causes, then they must find for the defendant company.

"3. The court instructs the jury that if they believe from the evidence that the statements testified to by witnesses Wright and Hale in reference to the use by the deceased in respect to indulgence in wine, ardent spirits or malt liquors, were substantially true, and that the same were not substantially embodied in the answers to questions 11 and 12 of the application aforesaid; and, if they further believe from the evidence that if said statements had been substantially set



out in said application the application would have been denied and the policy in question would not have been issued, then the jury are instructed that they must find for the defendant company.

"4. The court instructs the jury that if they believe from a preponderance of the evidence as above defined the deceased, Willis, on the twenty-third day of March, 1906, died not from natural or accidental causes but by his own hand or act, whether sane or insane, they must find for the defendant company.

"5. The court further instructs the jury that if they believe from the evidence that at the time when the balance due on the first premium under said policy was paid, and witness Ayers delivered the premium receipt therefor, the said Willis was not then in sound health, they must find for the defendant company.

"6. The court instructs the jury that if they believe from the evidence that the answers to questions 11 and 12, or either of them, in the report of the medical examiner, were not substantially true, and that said questions and the answers thereto are clearly shown to have been material, then they must find for the defendant company."

The following instructions were given by the court in lieu of the foregoing ones requested by the defendant:

"(1) The court instructs the jury that all the defendant company is required in this action to do except the proof of suicide is to prove by a preponderance of the evidence the facts necessary to be shown to entitle it to a verdict according to the other instructions given to the jury. By the term, 'preponderance of the evidence,' as applied to the proof of any particular fact in this case, is meant that the greater probability from the evidence is in favor of the existence of such fact. That is to say, if the jury believe, considering all the evidence in the case relating to any given fact, that the greater probability from all the evidence before them, is in favor of the existence of that particular fact, then they must so find. For example, if the defendant relies upon the fact that the answers to certain questions in the application introduced in evidence are not true; and, if the jury believe from all the evidence on that subject that that contention is more probably true than the contrary contention, then it is their duty to determine, in making up their verdict, that said fact has been shown.

"(2) The court instructs the jury that in determining whether the deceased, Willis, died from suicide or from natu-

ral causes, they shall consider, first, what facts are established to the exclusion of every other hypothesis, and having ascertained what facts are thus established, they shall further consider whether there is any reasonable hypothesis based upon those facts and those facts alone, which are consistent with death from natural or accidental causes; and if the jury believe that those facts, considered as a whole, and taken together, are inconsistent with death from natural or accidental causes, then they must find for the defendant company.

“(3) The court instructs the jury that if they believe from the evidence that the statements testified to by witnesses Wright and Hale, in reference to the use by the deceased of wine, ardent spirits or malt liquors, substantially were true, and that the same were not substantially embodied in the answers to questions 11 and 12 of the application aforesaid, and if they further believe from the evidence that if said statements had been substantially set out in said application, the same would have been denied and the policy in question would not have been issued, then the jury are instructed that they must find for the defendant company; and it is for the jury alone to determine from the whole evidence whether such statements 11 and 12 were false.

“(4) The court instructs the jury that if they believe from the evidence to the exclusion of every other hypothesis that the deceased, Willis, on the twenty-third day of March, 1906, died by his own hand or act, whether sane or insane, they must find for the defendant company.

“(5) The court instructs the jury that if they believe from a preponderance of the evidence as hereinbefore defined that the answers to questions 11 and 12, or either of them, in the report of the medical examiner, were clearly not true, and that said questions and the answers thereto are clearly shown to have been material, then they must find for the defendant company.”

To which action of the court in refusing to give the instructions as asked for by the defendant, and to the giving in lieu thereof of the five instructions last above mentioned, the defendant, by counsel, excepted.

And thereupon, after the said instructions had been given to the jury by the court, and after the refusal of the court to give the instructions as asked for by defendant, the defendant asked the court to further instruct the jury as follows:

The following are second instructions requested by the defendant, of which A, B and E were refused, and B, C and F were given.

“(A) The court further instructs the jury that while the facts set out in plaintiff’s instruction No. — are alone not sufficient to prove suicide as set out in said instruction, but those facts, accompanied by such other facts as these, namely, the leaving by the person referred to, of the house of an acquaintance where he had been conversing for an hour and a half or two hours, without any symptoms of being affected by poison, saying he was going to his daughter’s house; his being seen within half an hour to stagger and fall; his subsequent death within three and one-half hours, preceded by undoubted symptoms of strychnine poisoning; his exclamations of pain or suffering in the first manifestations of those symptoms; the failure of the person so attacked to ask for relief when approached shortly afterward, or to give any explanation of his condition, he being then rational; the refusal by such person of assistance or medical aid, when rational, during the manifestations of said symptoms, and the statements by him, when first found and rational, that he wanted to be let alone, saying, ‘I came here to die; I want to die, and I am going to die right here’; that he did not want to be carried to anybody’s house, and denying that anything was the matter with him—are sufficient to justify a verdict in this case for the defendant company.

“(B) The court further instructs the jury that while it is true that where a defendant company seeks to avoid the payment of a policy on the grounds that the deceased has been guilty of material misrepresentations and fraud, the burden in proving the misrepresentations is on the defendant company; that where fraud is relied upon, it must be proved clearly and distinctly and not assumed on doubtful evidence, and the law never presumes fraud as set out in plaintiff’s instructions Nos. 3 and 5, yet it is not incumbent upon the defendant company in this action to prove more than that the misrepresentations relied on were false and material; and if it be true that the answers to the questions in the report of the medical examiner were merely false and also material, then the proof of such facts in the manner set out in these instructions will entitle the defendant to a verdict in its favor.

“(C) The court further instructs the jury that if they believe from the preponderance of all the evidence in the case that the deceased, Willis, was not in sound health at the time

of the delivery of the policy sued on in this case, they must find for the defendant.

“(D) The court further instructs the jury that if it is clearly shown by a preponderance of all the evidence in this case that the deceased was addicted to the use of opium at any time prior to the date of his examination by the medical examiner of the company, Dr. Simmons, and that his answers to the questions in the report of said medical examiner were material, then they must find for the defendant.

“(E) The court instructs the jury that under the contract of insurance sued on in this case, each premium, unless paid at the home office, can only be paid in exchange for the defendant company's receipt signed by the president or secretary, and countersigned by the local agent designated therein; and that under its terms the policy sued on does not take effect until the first premium is paid, and not then if the insured is not in sound health on the date of such payment. Therefore, if the jury shall believe from the evidence that the said first premium was not paid by an exchange for the receipt of the company signed by the president or secretary of the company, etc., until the sixteenth day of March, 1906, and if they further believe from the evidence that the insured was not in sound health on said date, then they must find for the defendant, unless the company had by its president, a vice-president or secretary, changed said contract in respect to requiring such receipt in exchange for such premium.

“(F) The court instructs the jury that in considering this case you must not go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely chimerical or conjectural.

“A doubt as to the fact of suicide must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case. If after considering all the evidence you can say that you have an abiding conviction of the truth of the charge of suicide, you are satisfied beyond a reasonable doubt, and must find for the defendant.”

The following is the letter referred to in the opinion of the court and written by the assured to his wife:

“Since coming down town I find I have to raise a little more money than I have got on hand, so as George Wright wants to buy me out at Leah's I will just go over there to-day and get the money and come back to-day. So don't get



uneasy. I will certainly get back to-night; or at 12 o'clock to-morrow.

"I feel ashamed of myself for not having the money for Moir and Trout, as my word is out on Saturday, 24th. I must try and get it for them, while I do not feel like going over there. I feel very bad. I could not sleep any last night. Maybe I will feel better after the morning. I am at Starkey's and feel so sick I can hardly sit up in my seat; oh, I do feel so weak and bad.

" D. P. WILLIS."

Scott & Buchanan and Dillard & Lee, for the plaintiff in error.

N. H. Hairston and Hunt & Staples, for the defendants in error.

<sup>842</sup> KEITH, P. S. W. Hairston, as the next friend of certain infants, recovered a judgment against the Life Insurance Company of Virginia in the circuit court of the city of Roanoke, and upon the petition of the defendant company, the record is now before us to review certain rulings of the trial court.

On the 6th of February, 1906, the company issued a policy of insurance upon the life of David Peter Willis, the father of the infant plaintiffs, in consideration of the application for said policy, which is made a part thereof, and upon condition that the quarterly annual premium of \$20.41 should be paid in advance on the delivery of said policy, which the declaration alleges was duly paid. It is also averred that Willis died on the 23d of March, 1906, while the policy was in force; that due proof of his death had been furnished the defendant; that all the conditions of the policy had been complied with; and that, nevertheless, the defendant refused to pay it.

<sup>843</sup> The application which was signed by Willis, the applicant, and countersigned by the agent of the company, contains, among others, the following provisions:

1. "That I warrant the statements and representations made above, as well as those made or to be made to the company's medical examiner, to be full, complete and true, whether written by my hand or not, and that they, together with this agreement, shall form the basis and become a part of any contract of insurance that may be issued under this application."

2. "That the liability of the company under said policy will be limited to the amount of reserve under said policy accord-

ing to the American experience table of mortality, and 3 per cent interest, if during the next two years following the date of issue of the policy of insurance for which application is hereby made . . . . I die by my own hand or act, whether sane or insane, or if my death be caused by the use of narcotics or alcoholic stimulants within two years from the date of said policy."

4. "That the company shall incur no liability under this application until it shall have been received and approved at the home office of said company, the policy issued and the first premium paid and accepted by the company or by its authorized agent during my lifetime and my good health."

6. "That if any premium be not duly paid, all rights, claims or interest in the policy hereby applied for, or in any of its provisions, guaranties or benefits other than those stipulated in the said policy, whether required or provided for by the statute of any state or not, are hereby specifically waived and relinquished."

7. "That I shall have the right to change the beneficiary or beneficiaries in the policy applied for, whenever or as often as I may desire, except when the beneficiary is a married woman or a married woman and her children or her husband's children, and, further, that I as the insured may without the consent of the beneficiary or beneficiaries receive any benefit, exercise <sup>844</sup> every right and enjoy every privilege conferred upon the insured by the policy applied for if one be issued."

In the medical examination referred to in this application it was asked:

"Have you ever used malt or spirituous liquors to excess? A. Fifteen years ago used whisky slightly to excess.

"Q. State the quantity you use each day of—malt liquors—wines—spirits? A. Average about two drinks of whisky or beer a week. Do not drink either daily.

"Q. Have you ever used opium? A. No.

"Q. Chloral? A. No.

"Q. Or any narcotic? A. No."

The policy sued on appears on its face to have been issued subject to certain conditions, among others, that it "shall not take effect until the first premium is paid, nor unless on the date of said payment the insured is living and in sound health, and when this contract is completed by its delivery and by the payment of the first premium, it shall be construed as having been in force from the date of its execution,

as stated on the first page thereof. Each premium is due and payable at the home office of the company in the city of Richmond, but at the pleasure of the company will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary and countersigned by the local agent designated therein"; that "thirty days' grace, during which time the policy will remain in force, will be allowed in the payment of any premium except first"; that "agents are authorized to receive and forward applications for insurance, but only the president, the vice-president or secretary has power on behalf of the company to make or modify this or any other contract of insurance, or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of the said officers."

<sup>845</sup> The defendant filed certain special pleas, presenting the defenses arising upon these warranties and stipulations in the policy.

One plea avers that the applicant "did, within two years from the date of the policy, to wit, on March 23, 1906, die by his own hand, by administering to himself strychnine poison which caused his death; that the amount of the reserve under said policy, according to the tables aforesaid on the date of his death, was fourteen dollars and twenty-one cents, which amount with interest had been duly tendered the plaintiffs, and being refused was brought into court."

The defendant also pleaded that the insured had warranted the answers given on the medical examination to be full, complete and true; and that the warranty had been broken, in this, that the answers above mentioned were not full, complete and true, but were false.

Upon these pleas issue was joined.

The first assignment of error in the petition is as to the admission of evidence set out in bills of exceptions Nos. 1, 2 and 3.

The plaintiff put the witness Ayers upon the stand to prove the due payment in advance of the first quarterly premium, amounting to twenty dollars and forty-one cents. After testifying that he was, in January and February, 1906, the special agent of the defendant company; that he received from D. P. Willis the application and delivered the policy attached to the declaration during his lifetime, the witness was asked by the attorney for the plaintiffs if the premium

mentioned in the policy was paid to him as agent for the company before the policy was delivered on February 6, 1906. To this question the witness answered as follows: "The amount of five dollars and forty-one cents was paid to me when this policy was delivered and note given for fifteen dollars, for the balance of the premium, made personally to me." On the 10th of March following he indorsed this note and put it in bank for collection, and never accounted to the company or delivered the premium <sup>846</sup> receipt until the note was paid, March 16th, six days after its maturity. He stated that the note was given to him for the payment of the premium. Thereupon counsel for plaintiff asked the witness the following question: "What is the rule of your company, according to your instructions and according to the practice of your company, with reference to the delivery of a policy? A. When a policy is delivered—when it is issued and delivered by the company—it is binding on the company." Objection was made to this question and answer by the plaintiff in error, but the court overruled the objection and allowed the evidence to go to the jury.

Defendant in error, in answer to this assignment, asserts that the answer of the witness was no more than a statement of a rule of law which is unquestionably correct—that is to say, that the policy is binding when it is issued and delivered by the company; all of which is true. But it is something more than a statement of a rule of law. It is a statement of a rule of law which is predicated upon the proof of certain antecedent facts. It is the application of the law to the facts, and calls upon the witness to express an opinion upon the point in issue between the plaintiffs and defendant.

In *May on Insurance*, fourth edition, section 43-a, it is said to be incompetent for a witness to say that in his opinion insurance is effected and completed by the acceptance of the order.

And in *Lindauer v. Delaware etc. Ins. Co.*, 13 Ark. 461, the opinion was expressed by a witness in his deposition "that the insurance is effected and completed by the acceptance of the order for insurance, and the company would have been bound to pay in this case if loss had accrued." The court was of opinion that "the admission of such a statement as evidence, against the objection of the defendant, was a violation of the rules of evidence. Inasmuch as the merits of the case turned on the question whether, upon the facts stated, the company had incurred any risks, so as to have earned the



premium, the witness might as well have testified that the plaintiff is entitled to recover in this case."

<sup>847</sup> We shall again refer to this question when we come to consider the instructions given by the court to the jury.

Bill of exception No. 2 taken to a ruling of the court refusing to permit plaintiff in error to propound certain questions to a witness; but it appears that the questions were afterward asked the witness and answered without objection, so that plaintiff in error was not aggrieved by this ruling of the court.

The next exception was taken to the refusal of the court to permit a physician to testify as to certain statements made to him by the insured on the fourteenth day of March, 1906. The physician testified that on that day he found Willis, the insured, under the influence of opium; that from his personal examination and from information at the time received from the insured he was confident that he was under the influence of opium; that in answer to his question Willis told him "that he could take two or three bottles of laudanum a day, and had been taking that much for two or three years." When asked how he got in the habit of taking the drug, he replied that it was from the fact of its having been prescribed by a physician. The court refused to permit this evidence to go before the jury, upon the ground that this conversation occurred on the fourteenth day of March, while the policy in suit had been delivered to the insured on the twenty-eighth day of February, who had previously paid a portion of the first premium and had given his note for the balance thereof payable to the agent who had delivered the policy, and of this partial payment the company had notice prior to the fourteenth day of March, the date of the conversation of the physician with the insured; that the general agent of the company knew that the special agent who wrote and delivered the policy had taken a note payable to himself on the 10th of March for the balance of the first premium; and that the special agent was responsible to him for the amount of the note.

We think it fully appears that the general agent was informed as to every detail of the transaction—the partial payment, the taking of the note, that the note was not paid at <sup>848</sup> maturity on the 10th of March, and that it was subsequently paid on the sixteenth day of that month.

Vance on Insurance, at page 206, says: "The insurer may always accept in payment of the premium the liability of a third party, and, therefore, if the insurer debits the premium to the agent, and looks to him ultimately for payment, then, as

between the insured and the insurer, the premium is paid." And on page 178 it is said: "Even though the parties may have expressly agreed that the contract shall not be deemed complete until payment of the (first) premium in cash and in full, this stipulation may be waived by the insurer or any of his agents having competent authority. As a general rule, any agent having power to execute and issue contracts on behalf of the insurer has power to waive a condition of prepayment. And an absolute delivery of the policy by such an agent without payment of the premium, under such circumstances as will justify inference that credit is to be given, will constitute a waiver of a condition of prepayment."

In this case, the special agent, Ayers, had given the bond of a guaranty company to make good all that might be due by him to the insurance company; and it appears from the evidence of the general agent that it was a practice known to and approved by the company for agents to take such notes, payable to themselves, and charge themselves therewith in their agency account, the company holding the agent responsible as for a cash collection.

In *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861, and in *Kimbro v. New York L. Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A., N. S., 421, it is held that such a transaction is a payment of the premium as between the insured and the company.

We think this is shown by the following questions and answers of the general agent:

"Q. When he [Ayers] accepted the note, he was responsible to you for the amount of the note? A. Yes, sir.

849 "Q. Then when he became responsible to the company, or to you, for the amount of that note, it was because the company had given some value for the amount of that note, and had a right to the money, was not it? A. Yes, sir.

"Q. What other value could you have given except the delivery of the policy? A. No other."

It also appears that it was a practice of the company to permit its agents to give credit for premiums, and to be themselves responsible for the payment thereof.

These admissions were brought out during the cross-examination of the general agent, and he did, without doubt, make statements in apparent conflict with the quotations which we have made from his evidence; but we think that it may fairly be deduced from all that this witness said that the company was advised of what had occurred in this case between the

special agent and the applicant for insurance; that while they did not trust to the personal liability of Ayers, they did rely upon the bond which he had given as surety for the faithful performance of his duties; and it further appears that what occurred in this case was in accordance with the practice of the company in other cases.

The policy, then, being in force on the fourteenth day of March, the question as to the admissibility of the statements made by the insured to his physician turns upon whether or not they were statements made against the interest of the insured.

In 16 Cyc., page 1218, it is said that such testimony is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least require the evidence to be brought clearly within the conditions requisite for its reception. They are not admissible unless they were made to the knowledge of the declarant against his obvious and real interest (*Turner v. Dewan*, 41 N. O. Q. B. 361), and that interest must have been of a pecuniary or proprietary nature: *Burton v. Scott*, 3 Rand. 399; *Tate v. Tate's Exr.*, 75 Va. 522.

<sup>850</sup> Looking to the provisions of the policy in this case, the interests of the insured were so remote and contingent as scarcely to be deemed of a pecuniary or proprietary nature, and were not so direct and obvious as presumably to have been present in his mind at the time of the declaration.

We think there was no error in this ruling of the court.

Bill of exception No. 4 is to the refusal of the court to permit plaintiff in error to show by a witness the condition of the deceased on March 14, 1906, and his habits at that time as to the use of intoxicants.

We are of opinion that this evidence was properly excluded. The contract was at that time complete, and the condition of the insured was no longer material. If the theory of plaintiff in error, that the policy did not become effective until March 16th, when the note for a part of the initial premium was actually paid, were correct, its contention would not be without force, and it might be proper to inquire as to the condition of his health on March 14th, under that clause of the policy which provides that it shall not take effect unless at the date of payment of the first premium the insured is in sound health; but being of opinion that, under all the circumstances of this case, the policy became effective when it was delivered by the special agent, evidence as to the condi-

tion of the insured on the 14th of March is immaterial and inadmissible.

The fifth bill of exception is to the action of the court in permitting the wife of the deceased to read in evidence the letter received by her from him on the date of his death.

This letter was written by Willis on the morning of the 23d of March, 1906, and received by his wife about 4 o'clock in the afternoon of that day. It is postmarked as mailed at Roanoke at 1 o'clock P. M., and was certainly written before that hour. We do not think it of much importance to the case, but are of opinion that it constitutes no part of the *res gestae* and should have been excluded.

We come now to the instructions given and refused at the trial.

<sup>851</sup> Instruction No. 1, given on behalf of the plaintiff, is erroneous in this, that it is predicated upon only a portion of the facts shown in evidence, bearing upon the question of suicide. It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, but that statement must present the case shown in evidence fairly to the jury. The instruction under consideration tells the jury that if the deceased on the evening of his death was found in convulsions, which continued until he died, and that strychnine was discovered in his stomach, this alone is not sufficient to prove suicide. Another instruction, then, might have been given presenting another part of the evidence, in which the jury might with propriety be told that it was insufficient to warrant a conviction; while, if all the facts had been grouped in one instruction, a wholly different conclusion should have been reached.

The tendency of such a method of presenting the facts of a case to the jury is to distract and mislead them, and the court should content itself with giving the jury general principles of law and leaving them to apply those principles to the facts in evidence before them, or else it should be careful, if it prefers to present a hypothetical case to the jury, to put before the jurors all the facts bearing upon the issue which the evidence proves or tends to prove.

The second instruction propounds to the jury a general principle, and propounds it correctly, except that it would have been better to have said that the evidence to warrant a verdict for the defendant on the ground that the accused came to his death by suicide should exclude every reasonable hy-



pothesis of accidental death: See *Cosmopolitan L. Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166.

The third instruction is in the language of the statute, and was properly given.

The fourth instruction should not have been given in the form in which it was presented. Under that instruction, it might be that the defendant company placed the policy in the <sup>852</sup> hands of its agent, Ayres, who delivered it to the insured, and by such delivery he may have violated express instructions limiting his authority, which limitations were known to the applicant, and the company have been ignorant of the fact of delivery in violation of its instructions, and yet it would be liable, unless it gave the applicant notice that it wished to cancel the policy, upon the ground that it would thereby have waived the condition of prepayment of the premium.

Our view is, as we have already stated, that the policy was in effect in this case, because the company, through its general agent, knew of all that had taken place between the special agent and the insured, and because, under the circumstances of the case and in accordance with the practice of the company, there had been, as between the applicant and the company, a payment of the premium before the policy was delivered.

The fifth instruction was properly given: See *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8.

The first instruction given by the court was doubtless in lieu of the first instruction asked for by plaintiff in error. We do not think that either of them is strictly accurate. We are of opinion that the defense of suicide should be established by clear and satisfactory proof, such as is required to establish a fraud.

As was said by this court in *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8, the burden of proof to establish such a defense is upon the defendant, and he must make it out by clear and satisfactory proof—no proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence of moral turpitude or crime.

But, on the other hand, it does not require that degree of proof which is necessary to convict in a criminal prosecution, where it is proper to instruct the jury that they should acquit, unless the evidence is sufficient to establish guilt be-

yond a reasonable doubt. As applied to the proof of fraud or of suicide, <sup>853</sup> the preponderance of the evidence should be such as to overcome the presumption of innocence of moral turpitude or crime; and, if upon a consideration of all the evidence relating to any fact, the jury should be of opinion that the greater probability from all the evidence is in favor of the existence of that particular fact, then they must so find, and the result of the facts thus ascertained must be such as to overcome the presumption of innocence of moral turpitude or crime.

The second instruction given by the court was in lieu of the second instruction asked for by plaintiff in error. It follows from what we have said that in our opinion the instruction asked for should have been given.

Instruction No. 3, given by the court, is in the place of No. 3 asked for by plaintiff in error. They are substantially the same—at least, we discover no such difference between them as would render the substitution by the court of its own instruction and the refusal by it of that asked for by plaintiff in error ground for reversal.

The fourth instruction given by the court we think is open to the objection already considered with reference to other instructions. As we said with reference to the second instruction given at the request of defendants in error, it would have been proper for the court to have told the jury that the evidence should exclude every reasonable hypothesis.

We think instruction No. 5, given by the court, was correct, upon the authority of *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8.

Plaintiff in error asked for a second set of instructions, the first of which, taking up instruction No. 1, given by the court on motion of the plaintiff, undertakes to state the case made by the record upon the issue of whether or not the insured came to his death by his own act. It embraces much that was omitted from the instruction given by the court, but we think that the court rightly concluded that it was wiser to leave the jury to apply the evidence, with such aid as the court could afford by propounding general principles of law. <sup>854</sup> All of the second set of instructions asked for by plaintiff in error were given, except the first and those marked, respectively, "D" and "E."

In instruction "D" the court was asked to tell the jury that if it was shown by a preponderance of all the evidence that the deceased was addicted to the use of opium prior to

the date he was examined by the medical examiner, they must find for the defendant. This was properly refused, because there was no sufficient evidence before the jury to warrant an instruction upon that point.

Instruction "E" goes back to the original proposition, that each premium, unless paid at the home office, can only be paid in exchange for the defendant company's receipt, signed by the president or secretary, and countersigned by the local agent designated therein; and that the policy did not take effect until the first premium was paid, and not then if the insured was not in sound health on the date of such payment; and that, therefore, if the jury should believe from the evidence that the first premium was not paid in exchange for the receipt of the company signed by the president or secretary of the company, etc., until the sixteenth day of March, 1906, and if they further believe from the evidence that the insured was not in sound health on said date, then they must find for the defendant, unless the company had, by its president, vice-president or secretary, changed said contract in respect to requiring such receipt in exchange for such premium.

This leaves out all the evidence with respect to the general agent and the general course of business on the part of the company, and was properly refused.

As the case must go back for the reasons given, we shall refrain from any expression of opinion as to the evidence.

The judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a trial to be had in accordance with the views herein expressed.

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*The Forfeiture of a Life Insurance Policy* by the failure to pay a premium note when due is considered in the recent cases of *Iles v. Reserve Life Ins. Co.*, 50 Wash. 49, 126 Am. St. Rep. 886; *Union Life Ins. Co. v. Parker*, 66 Neb. 395, 103 Am. St. Rep. 714; *Galvin v. Union Central Life Ins. Co.*, 115 Ky. 547, 103 Am. St. Rep. 336.

*A Contract of Insurance may Exist without the Payment of the premium:* *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902. Compare *McDonald v. Provident etc. Assur. Soc.*, 108 Wis. 213, 81 Am. St. Rep. 885. A provision in a policy that the insurer shall not be liable thereon until the first premium is actually paid is waived by an unconditional delivery of the policy as a complete contract under an agreement that credit shall be given: *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869. And a general agent of a life insurance company may waive the payment of the premium and deliver the policy, and thereby make it a valid and subsisting contract, notwithstanding a provision in the policy that it shall not take effect until the premium is paid: See the note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 150.

Compare Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 90 Am. St. Rep. 846; Russell v. Prudential Ins. Co., 176 N. Y. 178, 98 Am. St. Rep. 656; and see Summers v. Mutual Life Ins. Co., 12 Wyo. 369, 109 Am. St. Rep. 992.

*Suicide as a Defense to an Action to Recover Life Insurance* is the subject of a note to Supreme Conclave etc. v. Miles, 84 Am. St. Rep. 539. In case of the death of an insured person the presumption of law is against suicide, and if the insurer relies on self-destruction as a defense he has the burden of proof: Masonic Life Assn. v. Pollard, 121 Ky. 349, 123 Am. St. Rep. 198; Equitable Life Ins. Co. v. Hebert, 37 Ind. App. 373, 117 Am. St. Rep. 324; Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 117 Am. St. Rep. 666.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**VOUGHT v. STATE.**

[135 Wis. 6, 114 N. W. 518, 646.]

**LARCENY—Acquittal of One of Several Defendants.**—Where several officials are jointly indicted for larceny in participating in a scheme to issue town orders to fictitious persons for the purpose of misappropriating public funds, the acquittal of one of them who did not cash or receive any money on the orders does not interfere with the conviction of another who did. (p. 1012.)

**LARCENY—Testimony of One of Several Defendants.**—Where several officials are jointly indicted for larceny in participating in a fraudulent scheme to issue town orders for the purpose of misappropriating public funds, the testimony of one of them, corroborated in many respects, will sustain a conviction of others. (p. 1012.)

**LARCENY.—A Town Order is the Subject of Larceny** under the Wisconsin statutes. (p. 1013.)

**LARCENY—Fraudulent Issue of Town Orders.**—Larceny is committed where, in pursuance of a scheme between the members of a town board and other officials, they allow claims of fictitious persons, issue orders regular on their face therefor, and cash them in an amount over one hundred dollars. (p. 1014.)

**LARCENY.—A Trespass in the Technical Sense is not necessary** to constitute larceny, when the taking is by artifice, fraud or false pretense. (p. 1015.)

**GRAND JURY.**—The Statute of Wisconsin providing for the selection of grand jurors does not contravene the state or federal constitution. (p. 1015.)

Sanborn, Lamoreux & Pray and H. B. Walmsley, for the plaintiff in error.

Frank L. Gilbert, attorney general, J. E. Messerschmidt, third assistant attorney general, and V. T. Pierrelee, district attorney, for the defendant in error.

<sup>7</sup> **KERWIN, J.** The plaintiff in error, hereinafter called defendant Vought, was tried and convicted of larceny of sev-

eral alleged town orders. The indictment was against defendant Mert H. Vought and four others, namely, Michael J. Collins, Alexander McDonald, H. B. Templin, and Peter Fishbach. Templin was not arrested and a nolle was filed as to Fishbach. Collins and McDonald filed a plea in abatement, which was demurred to by the state and the demurrer sustained and exception taken. A trial was had and resulted in a verdict finding the defendants Vought and Templin <sup>s</sup> guilty and Collins and McDonald not guilty. A motion by defendant Vought to set aside the verdict and for a new trial was denied, and Vought was sentenced to state's prison at Waupun for one year beginning at 12 o'clock noon on the twenty-second day of April, 1907. Defendant Vought brings error.

There is evidence tending to show that the defendant Vought and McDonald were members of the board of supervisors of the town of Morse, Ashland county, and Collins chairman of the board, Peter Fishbach highway commissioner, and Templin town clerk; that on the first day of November, 1902, the town board was in session doing its regular business and passing upon claims presented against the town; that during the proceedings and before the completion of their work it was suggested by one of the members that it was about time they were having another rake-off, and for the purpose of carrying out this scheme and fraudulently obtaining money for each of the five parties concerned, namely, the three members of the board, the clerk, and highway commissioner, it was proposed to present claims in names of fictitious persons and have them allowed, orders issued therefor, and the money collected and distributed among the parties; that defendant Vought took an active part in the scheme, whereupon seven fictitious names were presented by the members of the town board, the clerk and the commissioner of highways, and claims for alleged road work entered in their favor, varying in amounts from thirty-five dollars to forty-dollars and twenty-five cents. <sup>9</sup> These claims were entered up among the legitimate claims and placed upon the pay-roll, voted upon by the board and allowed, all members of the board voting in favor of such allowance. The minutes of the town meeting show that these claims were regularly presented and O. K.'d by the chairman, and regularly voted upon, passed, and allowed in favor of the parties named as claimants in the claims presented. After the claims were allowed, in pursuance of the scheme orders were drawn up

by the clerk (Templin) in the regular form of town orders and regularly numbered from 1854 to 1860, inclusive, and signed by Collins, chairman of the board of supervisors, and Templin, clerk. The clerk then tore out the orders and passed them around, one to the chairman, one to each of the supervisors, one to the highway commissioner, and had three left. Whereupon it was suggested by one of the party that all the orders be given to Collins (chairman) to have cashed and the money divided, and they were delivered to Collins accordingly. The understanding was that the parties should have about fifty dollars apiece out of the rake-off, which was represented by these seven orders. The orders when taken out of the order-book were receipted for by Fishbach signing on the stub the names of the payees and his own initials below. Shortly after the orders were delivered to Collins, Fishbach called at Collins' saloon and received something over fifty dollars as his portion of the plunder. The seven orders aggregated two hundred and sixty-five dollars and twenty-five cents. Three of these orders, aggregating over one hundred dollars, were presented at a bank by defendant and Vought and cashed. Several propositions based upon the errors assigned are discussed by defendant.

1. It is insisted that because the indictment charges Collins, McDonald, defendant Vought, Templin, and Fishbach jointly it cannot be sustained against any one of the persons jointly indicted unless the alleged offense was committed in the manner detailed by Fishbach, one of the principal witnesses for the state; that it was impossible for defendant <sup>10</sup> Vought alone or in conjunction with Templin or Fishbach to do the thing charged, and that the offense could not have been committed unless McDonald and Collins were equally guilty with defendant Vought; that in clearing Collins and McDonald the jury found Fishbach was a perjurer and his story a fabrication; therefore all persons accused with Collins and McDonald were necessarily exonerated. We do not think the acquittal of Collins and McDonald had any such effect, nor do we think the jury necessarily found by the acquittal of Collins and McDonald that Fishbach was a perjurer or that his testimony respecting the making of the orders and pay-roll was necessarily false. Fishbach's story was corroborated in many particulars by other evidence tending to fix guilt upon defendant Vought. The evidence respecting the guilt of Vought and the other defendants was different. Each defendant testified in his own behalf. The jury may well have found the evidence of Fishbach on the

making of the orders true and yet have found that Collins and McDonald were not guilty of larceny of the orders or any of them. The jury may have found, as testified to by Fishbach, that McDonald took all the orders and carried them away, and also have found that defendant Vought afterward, in pursuance of the fraudulent scheme, got possession of three of the orders and cashed them, and that Collins and McDonald never cashed any of the orders or received any money upon them, although they participated in the scheme up to the point of delivering the orders. There is no doubt that the evidence is sufficient to establish the corrupt scheme and the issuance and delivery of the orders in pursuance thereof, and that defendant Vought got a portion of the plunder by obtaining the money upon three of the orders. The jury doubtless found this in convicting defendant Vought. They doubtless also found upon all the evidence some ground for acquitting Collins and McDonald not inconsistent with the conviction of Vought, and whether the <sup>11</sup> grounds for the discharge of Collins and McDonald were sufficient it is unnecessary to consider, since the evidence was sufficient to convict defendant Vought. Upon the evidence produced we are very clear that the discharge of Collins and McDonald did not necessarily work a discharge of defendant Vought. Counsel is in error in his contention that the discharge of Collins and McDonald necessarily discharged defendant Vought. It is true that there are cases where the acquittal of one jointly indicted works a discharge of all. But such authorities are clearly distinguishable from the case before us, as will be seen by an examination of the cases cited by counsel for defendant and many others.

State *v.* Wilson, 3 McCord, 187, is where two persons were indicted together for stealing the same goods, and it was held that one could not be convicted of grand and the other of petit larceny. The court said that two persons equally concerned in stealing the same article could not be guilty of different offenses; that the jury could not value the property at one price in the hands of one man and at another in the hands of another, who were equally concerned in the same transaction, for the purpose of subjecting one to a greater punishment than the other. State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476, was where A and B were indicted for conspiracy. Both appeared and pleaded to the indictment. B was put upon trial and A used as a witness for the state. After the jury retired a nolle was entered as to A and a verdict of guilty rendered as to B. It was held that judgment



could not be pronounced on the verdict, since it would amount to convicting one of conspiracy, and a conspiracy implies a combination between two or more. *State v. Tom*, 13 N. C. (2 Dev. L.) 569, and *Rex v. Plummer*, [1902] 2 K. B. 339, are conspiracy cases. *Commonwealth v. Edwards*, 135 Pa. 474, 19 Atl. 1064, turned on the construction of a statute relating to costs. *Delany v. People*, 10 Mich. 241, was a case of lewd and lascivious cohabitation under a statute making <sup>12</sup> the offense the joint act of two, and hence an indictment charging one stated no offense under the statute. 2 Hawkins' *Pleas of the Crown*, chapter 29, section 40, relates to principal and accessory.

It will be seen that the foregoing cases cited by counsel for defendant Vought are not in point and do not help his contention. In case of adultery it has been held that one participant may be convicted and the other acquitted: *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207, citing 2 Wharton's *Criminal Law*, secs. 1724, 1730, and *State v. Caldwell*, 8 Baxt. 576. But we regard it unnecessary to prolong discussion upon this point. We think it entirely clear that the verdict of not guilty as to Collins and McDonald in no way interfered with the conviction of Vought.

2. It is further insisted that if Fishbach's story falls the whole case falls. In the first place, it is for the jury to say whether Fishbach's story falls. His story was in many respects corroborated. A record was made of the transactions and the signatures produced. A record of the orders made and signed was produced. There was also a stub-book showing receipts for the seven orders, and a record showing that the bank received three orders from Vought. Other evidence might be recited strongly corroborating Fishbach's evidence as to the board meeting. We cannot bring ourselves to the conclusion contended for by counsel that Fishbach's board-meeting story falls, but, on the contrary, think it is well supported by the evidence.

3. It is further insisted that the value of the property was not shown and that it had no value. The argument of counsel is that the seven orders being issued without authority were void and of no value. As we have before observed, the orders in question were regular upon their face. Not only were they regular upon their face and signed by the chairman and countersigned by the clerk, but all the proceedings back of the orders, as appears from the town records, were regular. The claims in favor of the persons named in the orders <sup>13</sup> as payees for labor were presented, filed, and allowed by

the board and placed upon the pay-roll and the orders in question drawn for the respective amounts. There was nothing upon the face of the orders or in the town records to cast any suspicion upon the validity of the orders at the time the three orders were cashed at the bank by Vought or at the time the seven orders in question were signed and delivered to Collins. Now, in order to successfully defend against these orders, it would be necessary to establish the facts contrary to the town records to the effect that the names of the payees were fictitious names and that no such claims in fact existed against the town. Until this was established the orders constituted valid obligations against the town, subject to be defeated upon proof of facts showing their invalidity and a determination of the fact of invalidity. It is said the orders were of no value. The three orders cashed by Vought proved to be of value to him, since he received more than \$100 for them at the bank. They accomplished the purpose for which they were issued, namely, to pass as valid obligations against the town, and it is safe to say that no diligence on the part of the bank would have discovered any infirmity in them. Section 4415, Statutes of 1898, provides: "Any person who shall commit the crime of larceny by stealing the property of another, any money, goods or chattels, or any bank note, bond, promissory note, bill of exchange, order, certificate, book of account, conveyance of real estate, bill of sale, mortgage, valuable contract, receipt, release, defeasance, railroad passenger ticket, ticket of admission to any place, any writ, process, public record, or any instrument in writing whereby any demand, right or obligation is created, increased, diminished or extinguished or any personal property whatever, if the value thereof shall exceed one hundred dollars, shall, unless it be otherwise provided in these statutes as to some particular offense, be punished by imprisonment in the state prison not more than five years nor less than one year."

<sup>14</sup> There can be no doubt under this statute that a town order is the subject of larceny: *Clawson v. State*, 129 Wis. 650, 116 Am. St. Rep. 972, 109 N. W. 578; *State v. White*, 66 Wis. 343, 28 N. W. 202. The only question is whether the alleged invalidity renders the orders of no value, and therefore not the subject of larceny. We think the case at bar is ruled by the doctrine laid down by this court in *State v. White*, and *Norton v. State*, 129 Wis. 659, 116 Am. St. Rep. 979, 109 N. W. 531. In *State v. White*, it was held that unissued negotiable bonds of a city in the custody of the city comptroller were property for the taking and conversion of

which he may be convicted of embezzlement, even though the city may not be liable on the bonds. The reasoning of the court is very much in point as bearing upon the instant case. At page 349 (28 N. W. 204) the court said: "The argument that the city of Milwaukee may not be liable to the holders of the bonds fraudulently converted by the defendant—an argument which may or may not be a sound one, and the determination of which, one way or the other, may depend very much upon the court in which the action to enforce the payment thereof may be brought—does not seem to us a sufficient reason for holding the defendant not guilty of a crime in converting them. To him the bonds were just as good as though they had been regularly issued. He received the same compensation that he would have received had they been regularly issued; and it would seem to be just that he should not now be heard to say they were merely waste paper. If the person who purchased them of him shall fail to recover on them against the city, certainly a great injustice has been done to that person; and, though the city may succeed in making a defense, it will be at considerable cost and expenditure, and so far it will be injured by the fraud of the defendant."

In *Norton v. State*, 129 Wis. 659, 116 Am. St. Rep. 979, 109 N. W. 531, it was held that a check falsely made with intent to defraud and apparently sufficient on its face is a forgery, even though other steps, such as indorsement by the payee, would be necessary, <sup>15</sup> if it were genuine, to perfect it in the hands of the accused. In *State v. Morgan*, 109 Tenn. 157, 69 S. W. 970, it was held that a county warrant obtained by fraud and void was the subject of larceny.

It is further insisted by counsel for defendant that the orders were not orders at all, but simply waste paper, and created no obligation against the town. They were valid on their face and upon the face of the town records, and valid until set aside or defeated by a judgment establishing their invalidity, which might or might not be accomplished, depending on the evidence produced and the result of a trial. We think under the rules laid down by this court in *State v. White*, 66 Wis. 343, 28 N. W. 202, and *Norton v. State*, 129 Wis. 659, 116 Am. St. Rep. 979, 109 N. W. 531, the orders were the subject of larceny and their value sufficiently established.

4. It is further insisted that the element of trespass or non-consent is wanting, and hence no larceny is proved. It is said the things claimed to have been stolen were lawfully in



possession of the town board as officers of the town, and if they carried them away there could be no trespass and no non-consent. But the property of the town was in possession of its officers for lawful, not for unlawful, purposes, and every unlawful diversion of funds of the town by its officers involves the element of nonconsent on the part of the town. Nor is it necessary that a trespass in the technical sense be committed in order to constitute larceny, where the property is taken by artifice, fraud, or false pretense: *People v. Hughes*, 91 Hun, 354, 36 N. Y. Supp. 493; *People v. Laurence*, 137 N. Y. 517, 33 N. E. 547; *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121; *Frazier v. State*, 85 Ala. 17, 7 Am. St. Rep. 21, 4 South. 740. Moreover, by section 4415, Statutes of 1898, embezzlement is made larceny, and counsel for defendant says if the state has proved an offense it is embezzlement.

5. It is further urged by counsel for defendant that Vought was not indicted by a lawful grand jury, on the ground that <sup>16</sup> chapter 90, Laws of 1903, is unconstitutional as being in contravention of the state and federal constitutions. We regard this question settled against the defendant's contention by former decisions of this court, notably *State v. Anson*, 132 Wis. 461, 112 N. W. 475. After a careful examination of the exhaustive argument of counsel upon this point we are unable to discover any reason for receding from our former decisions and must regard the question at rest.

Complaint is made by counsel of the "excessive zeal of state's attorney," but we find nothing under this head which could have worked any prejudice to the defendant.

Error is also assigned because of alleged erroneous admission of evidence. The most objectionable evidence came in inadvertently and was afterward stricken out and the jury instructed to disregard it. We find no prejudicial error under this head.

After a careful examination of the record we think no prejudicial error was committed, and therefore the judgment must be affirmed.

By the COURT. Judgment affirmed.

Judges Winslow and Marshall dissented, and contended that the town orders were void: *Hubbard v. Lyndon*, 28 Wis. 674; and that an instrument, in order to be the subject of larceny, must be valid and genuine: 2 Bishop's New Criminal Law, sec. 786; 18 Am. & Eng. Ency. of Law, 2d ed., 517; 1 Wharton's Criminal Law, secs. 878, 882b. They held that the rule that negotiable instruments may



be the subject of larceny (*Commonwealth v. Rand*, 7 Met. 475, 41 Am. Dec. 455; *Bork v. People*, 91 N. Y. 5; *State v. White*, 66 Wis. 343, 28 N. W. 202) did not here apply, because the town orders were non-negotiable even if they had been genuine.

*When Several Officials are Jointly Indicted for Bribery*, the innocence of one of them does not require the acquittal of others who are guilty: *State v. Lehman*, 182 Mo. 424, 103 Am. St. Rep. 670.

*The Crime of Larceny* is the subject of a note to *People v. Miller*, 88 Am. St. Rep. 559. At the common law a promissory note was not the subject of larceny, but it is made such by statute: *Calentine v. State*, 50 Tex. Cr. 154, 123 Am. St. Rep. 837. That a railroad ticket is a subject of theft, see *Patrick v. State*, 50 Tex. Cr. 496, 123 Am. St. Rep. 861. One who solicits and receives money at a public meeting in a church, with the intent to appropriate it to his own use, and falsely representing to the contributors that it is to be used for a certain benevolent purpose, is guilty of larceny: *Towns v. State*, 167 Ind. 315, 119 Am. St. Rep. 501.

## HOLMAN v. MINERAL POINT ZINC COMPANY.

[135 Wis. 132, 115 N. W. 327.]

**PRIVATE NUISANCE—Sulphuric Acid Plant.**—The erection and operation in close proximity to a dwelling-house, of a sulphuric acid plant which emits such fumes and substances as to render the dwelling unfit for occupancy, constitutes a private nuisance, although the business is not unlawful and the plant not per se a nuisance. (p. 1018.)

**PRIVATE NUISANCE.**—The Question of Nuisance in Maintaining Any Business depends not only upon the character thereof, but also upon its proximity to the dwellings, business, property, or occupancy of others. (p. 1018.)

**PRIVATE NUISANCE.—An Industry not a Nuisance Per Se** may be conducted in such a manner or in such a place as to be a nuisance. (p. 1019.)

**PRIVATE NUISANCE.**—Where the Nature and Location of a Business must be relied upon in determining whether a nuisance is created, it is not necessary to state the extrinsic circumstances relating to the method of operation. (p. 1019.)

**PRIVATE NUISANCE—Location of Business.**—When the basis of an action to abate a nuisance is the location of the business complained of, whether or not the location is convenient, under all the circumstances, is a question that may properly be raised by the answer. (p. 1019.)

**PRIVATE NUISANCE.—A Complaint is not Demurrable in an action to abate a nuisance and for damages, simply because the court on final hearing may not grant all the relief prayed for.** (p. 1020.)

Spensley & McIlhon and P. A. Orton, for the appellant.

Fisher & Oestreich, for the respondent.

133 BASHFORD, J. This is an appeal from an order overruling a demurrer to the complaint. The complaint, af-

ter stating the incorporation, location and business of the defendant and the ownership by the plaintiff of the land therein described and the dwelling situated thereon, alleges in substance: That for a great many years up to 1901 plaintiff had occupied said property as her dwelling, and that the same, but for facts subsequently alleged, is of the value of three thousand dollars; that the defendant owns and occupies land contiguous to and in the immediate vicinity of said property; that it had erected thereon, in close proximity to plaintiff's property, in 1901 a sulphuric acid plant; that it has operated the same since its erection for the manufacture of sulphuric acid, and has caused to be sent out from said acid plant large volumes of unwholesome and destructive smoke, fumes, vapors, and substances which penetrated plaintiff's dwelling-house and caused such annoyance and discomfort therein that plaintiff was thereby compelled to remove therefrom; that such destructive <sup>134</sup> substances are dangerous to her health as well as offensive, and pollute the water in the entire vicinity and particularly upon plaintiff's property, so as to render the same unsanitary and unfit for use and dangerous to the health of plaintiff and her family; that such obnoxious substances have rendered the atmosphere on plaintiff's property unhealthful, have caused plaintiff much suffering and sickness, destroyed all the vegetation upon her property as well as clothes hung out upon the same, and rendered her property uninhabitable; that such fumes and substances greatly impair the value of plaintiff's property and lessen the rental value thereof; that they and the plant from which they are emitted and sent out constitute and are a nuisance; and that the defendant still continues to maintain said sulphuric acid plant and to emit therefrom said deleterious substances, to her great damage. The prayer is for an abatement of the nuisance under the statute and for damages. The sufficiency of the facts stated in the complaint to constitute a cause of action is challenged by the demurrer.

This is a statutory action to abate a private nuisance and to recover damages for the injuries thereby occasioned. The gravamen of the complaint is that the defendant has erected a sulphuric acid plant, located in close proximity to plaintiff's property, which it operates, and that this plant, through its smokestacks and otherwise, emits deleterious acids, fumes, vapors, and substances injurious to the plaintiff, and which renders her dwelling-house, situated upon said property, uninhabitable. The dwelling-house had been occupied by the plaintiff and her deceased husband for many years prior to the

erection of the sulphuric acid plant in 1901. The question is, Does the erection and operation <sup>135</sup> of the plant, under the circumstances stated in the complaint, in close proximity to plaintiff's dwelling and rendering it unfit for occupancy, constitute a private nuisance? This question must be answered in the affirmative under the rule of this court as stated in *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609. In that case a tannery was sought to be abated as a nuisance by the owner of a sanitarium upon adjacent premises. After an exhaustive examination of the authorities, and upon full consideration, this court held that the question of nuisance in the maintenance of any business depends not only upon the character of such business, but also upon its proximity to the dwellings, business, property, or occupancy of others. And that any business, though in itself lawful, which necessarily and constantly impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter may become a nuisance to those occupying adjacent property in case it is so near, and the atmosphere is contaminated to such an extent, as to substantially impair the comfort or enjoyment of such adjacent occupants; that in such case it is no defense that the business was conducted in a reasonable and proper manner and with more than ordinary cleanliness, and that the odors sent over and upon the adjacent premises were only such as were incident to the business when properly conducted. It is said in the opinion: "The maintenance of life and business, especially in crowded cities, necessitates the imparting of a certain degree of impurity to the atmosphere. The law gives protection only against substantial injury. To be of legal cognizance the injury must be tangible, or the discomfort perceptible to the senses of ordinary people. Undoubtedly a party has the unlimited and unqualified right to use his property as he pleases, provided he does not so use it as to become a nuisance to others. Such rights, duties, and obligations between the respective owners of adjacent lands are necessarily reciprocal. . . . It is because a person maintains something <sup>136</sup> that annoys or incommodes another or his business—something noxious or offensive to another—that such right of action is given. The question of nuisance, therefore, depends not only upon the character of the business maintained, but its proximity to the dwellings, business, property, or occupancy of others."

It is urged on behalf of the appellant that the business is lawful and that the plant is not per se a nuisance. This con-

tention is also met by the decision in the Pennoyer case. It is said: "The business is lawful; but such interruption and destruction is an invasion of private rights, and to that extent unlawful. It is not so much the manner of doing as the proximity of such a business to the adjacent occupant which causes the annoyance."

An industry or trade which is not a nuisance per se may be conducted in such a manner or in such a place as to be a nuisance, as a planing-mill in the residence portion of a city: *Rogers v. John Week L. Co.*, 117 Wis. 5, 93 N. W. 821. The quotation made by the learned counsel for the appellant from 21 American and English Encyclopedia of Law, second edition, 692, recognizes the rule that the nature of the business and the location must be considered in determining whether or not a nuisance has been created. Where that is the ground of complaint it is not necessary to state extrinsic circumstances relating to the method of operation. Appellant's counsel places much reliance upon *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497, which was an action for damages sustained by the explosion of large quantities of gunpowder and dynamite stored in the city, and quotes the second sentence from the concluding paragraph of the opinion. The sentence which precedes is more directly applicable. The two sentences are as follows: "We are of opinion that a count prima facie sufficiently shows a want of due care which charges the storing of large quantities of gunpowder in a wooden building in a populous place in the city of Cullman. The demurrer was properly sustained to the count which merely charged the storing gunpowder and its explosion, without further averment showing that on account of location, quantity, and surrounding circumstances it was dangerous."

This complaint does state that the sulphuric acid plant is a nuisance by reason of its location in close proximity to the plaintiff's property on which her dwelling-house is situated.

Criticism of the complaint is made because the process of manufacturing the acid is not stated; but that is not material, for the foundation of the action is that the location of the plant is such as to cause material inconvenience and damage, irrespective of the manner in which it is operated. Whether that location is convenient or not, under all the circumstances, is a question that may properly be raised by the answer. Appellant relies with much confidence on *Mountain C. Co. v. United States*, 142 Fed. 625, a decision of the court of appeals, ninth circuit. That was a suit to enjoin the



operation of a copper smelter as a nuisance and for damages occasioned by the destruction of timber on near-by lands. It is there held that, where an owner of property cannot use the same at all without indirectly injuriously affecting the property of another, the sound discretion of a court of equity is invoked when it is appealed to and asked to abate such use as a nuisance, and in such case the court will consider the comparative injury which will result from the granting or refusing of an injunction, and that it will not be granted when it would cause a large loss to the defendant, while the injury to the plaintiff, if refused, will be comparatively slight and can be compensated by damages. That decision could only be applicable on the question of the abatement of the nuisance, as the right of the plaintiff to recover damages is distinctly recognized. As already stated, this is an action to abate the nuisance and for damages, and the complaint is not demurrable, if otherwise sufficient, simply because the <sup>138</sup> court on final hearing might not grant all the relief that is prayed for. Section 3181, Statutes of 1898, provides that if the plaintiff prevails he shall have judgment for damages and costs, and also for an abatement of the nuisance, unless the court shall certify that such abatement is unnecessary.

Whether the court may apply the doctrine of comparative injury to the respective parties in rendering the judgment is not before the court for decision on this appeal. The other grounds for demurrer were not urged upon the attention of the court and are treated as abandoned. We hold that the complaint states a cause of action, and that the demurrer was properly overruled.

By the COURT. The order appealed from is affirmed.

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*Manufacturing Plants Which Emit Offensive Gases, Odors and Substances*, as constituting a nuisance, are discussed in the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 240. As to whether the shops and yards of a railway company constitute a private nuisance to adjacent premises, see *Rainey v. Red River etc. Ry. Co.*, 99 Tex. 276, 122 Am. St. Rep. 622; *Taylor v. Seaboard Air Line Ry.*, 145 N. C. 400, 122 Am. St. Rep. 455.

MILLER v. CHICAGO, ST. PAUL, MINNEAPOLIS AND  
OMAHA RAILWAY COMPANY.

[135 Wis. 247, 115 N. W. 794.]

**CARRIER**—Passenger Riding on Platform.—A passenger who from choice, when there are seats inside, rides on the platform of a rapidly moving car as the train enters a washout in the night-time during or soon after a heavy rain, and is there fatally injured by the cars crushing together, while no one inside is killed, cannot be held, as a matter of law, not guilty of want of ordinary care contributing to his death. (p. 1024.)

Dunwiddie &amp; Wheeler, for the appellant.

James B. Sheean, Carl C. Pope and Thomas Wilson, for the respondent.

**247** MARSHALL, J. Action to recover compensation for the death of plaintiff's intestate. The issues are sufficiently indicated by the following: A jury was waived and the case submitted to the court on the evidence and agreed facts. These are such facts: September 12, 1903, plaintiff's intestate was a passenger on one of the defendant's passenger trains. It negligently ran such train into a washout caused by a severe rainstorm. Plaintiff's intestate, at that time, from his own choice was riding on one of the car platforms which was not vestibuled. There was ample opportunity for him to have occupied a seat in the car. The end of the car upon which he was riding and the adjoining end of the next car, because of the train going into the washout, were crushed together, imprisoning and injuring the intestate, in consequence of which he died shortly after being released. No one riding inside the car was killed.

**248** The deceased was a married man, forty-five years of age, and left a widow and several children, who were dependent upon him for support. If plaintiff is entitled to recover at all, damages should be assessed at five thousand dollars.

There was undisputed evidence of a notice being in the car in a conspicuous place warning passengers not to ride on the platform.

The court found in accordance with the foregoing, and found further, as a fact, that the deceased in standing upon the platform, as he did at the time of the accident, was guilty of negligence which contributed proximately to cause his death. It found as a conclusion of law that defendant was entitled to judgment dismissing the action with costs. Judgment was rendered accordingly.

There seems to be some misunderstanding on the part of counsel as to what was submitted to the trial court for adjudication. Appellant's counsel contend that the sole question submitted was whether, on the agreed facts, plaintiff was entitled to recover, depending on whether as matter of law the deceased was guilty of contributory negligence. They support the affirmative by authorities holding that it is not inconsistent with ordinary care for a person to ride upon the platform of a rapidly moving railroad car while he is with reasonable diligence in quest of an opportunity to occupy a seat inside (*Dewire v. Boston & M. R. Co.*, 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166), or where the car is so crowded that no such accommodation is readily obtainable (*Ward v. Chicago etc. R. Co.*, 102 Wis. 215, 78 N. W. 442), or <sup>249</sup> for one to leave the car and go upon the platform because of being sick (*Morgan v. Lake Shore etc. R. Co.*, 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609), or go, according to custom, to and from a smoking-car (*Costikyan v. Rome etc. R. Co.*, 58 Hun, 590, 12 N. Y. Supp. 683), none of which apply to a case of riding from mere choice in such a position under the peculiar facts of this case. For further support counsel refer to cases ruled by the doctrine of comparative negligence, overlooking, it seems, that the rule has long prevailed here in harmony with that of the supreme court of the United States and the judicial policy in most of the states, that if a person is injured, his own want of ordinary care contributing to any extent to produce it, he is remediless: *Bolin v. Chicago etc. R. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446.

In short, the support for counsel's position goes no further than that the question whether the deceased was guilty of contributory negligence on the occasion in question, had there been a jury, should have been submitted to it for solution, and otherwise should have been, as it was, passed upon by the court.

Counsel for respondent contend that the question of law and the one of fact above indicated were within the submission to the trial court, and in support of the affirmative as to the former refer to numerous cases holding that if a person unnecessarily and for his own pleasure rides in an exposed position, as the deceased did, and is injured because of his so riding, neither such person nor his personal representative can recover compensation therefor. The following are the authorities relied on and others of the same character: *Ward v. Chicago etc. R. Co.*, 102 Wis. 215, 78 N. W. 442; *Cincinnati etc. R. Co. v. Lohe*, 68 Ohio St. 101, 67 N. E. 161, 67

L. R. A. 637; Hickey v. Boston & L. R. Co., 14 Allen, 429; Gavett v. Manchester etc. R. Co., 16 Gray, 501, 77 Am. Dec. 422; Fletcher v. Boston & M. R. Co., 187 Mass. 463, 105 Am. St. Rep. 414, 73 N. E. 552; Pike v. Boston E. R. Co., 192 Mass. 426, 78 N. E. 497; Scheiber v. Chicago etc. R. Co., 61 Minn. 499, <sup>250</sup> 63 N. W. 1034; Thane v. Scranton T. Co., 191 Pa. 249, 71 Am. St. Rep. 167, 43 Atl. 136; Bumbear v. United T. Co., 198 Pa. 198, 47 Atl. 961; Woodroffe v. Roxborough R. Co., 201 Pa. 521, 88 Am. St. Rep. 327, 51 Atl. 324, 2 L. R. A., N. S., 1191; Burns v. Johnstown P. R. Co., 213 Pa. 143, 62 Atl. 564; McDade v. Philadelphia R. T. Co., 215 Pa. 105, 64 Atl. 327; State v. Western Md. R. Co., 105 Md. 30, 65 Atl. 635; L. R. & Ft. S. R. Co. v. Miles, 40 Ark. 298; Cleveland etc. R. Co. v. Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141; Worthington v. Central Vermont R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; Goodwin v. Boston & M. R. Co., 84 Me. 203, 24 Atl. 816.

These quotations indicate the trend of such cases and the distinction therein recognized between such a situation as the one in hand and those dealt with in the cases mainly referred to on behalf of appellant: "When a passenger rides on the side steps with the knowledge and consent of the conductor and from necessity from the want of room to sit or stand inside the car, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers. But a passenger who rides on a side step when it is reasonably practicable for him to sit or stand inside the car, takes upon himself the risk of his position from any cause": Woodroffe v. Roxborough etc. R. Co., 201 Pa. 521, 88 Am. St. Rep. 327, 51 Atl. 324.

"For an injury received by a passenger on a steam railroad by reason of a collision or derailment while standing upon the platform, in violation of the known rules of the company, there being vacant seats in the car, there can be no recovery against the railroad company": Cincinnati etc. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637.

"The injury he received . . . was the direct consequence of his position, and would not have been received had he been inside. Whether he would have received some other injury, equal or greater, is conjectural and irrelevant. If he is to recover at all it must be for the injuries received, not for what he might have received under different circumstances. . . . What the passenger took upon himself was the risk of <sup>251</sup> his position from any cause": Thane v. Scranton T. Co., 191 Pa. 249, 71 Am. St. Rep. 167, 43 Atl. 136.



“There is but one reasonable inference to be deduced from the facts relative to the act of appellee’s ward, . . . and that is to the effect that his own negligence contributed to said injuries. . . . While it is true that it was a duty incumbent upon the railroad company to furnish a seat within its car for each passenger taken aboard of its train, and not merely standing room in the aisle of the car, the mere fact, however, that he was compelled to accept standing room would not justify him to voluntarily leave a place of safety and go to one of peril”: *Cleveland etc. R. Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141.

Whether the principle thus declared necessarily rules this case, we do not need to and do not decide. The trial court adopted the view most favorable to appellant, to wit, that there was room in the conceded facts for conflicting reasonable inferences; that under all the circumstances, particularly that it was in the night-time, that a severe rainstorm was either in progress or had very recently occurred, that the train was running very fast, and that no one inside the car was killed, it could not be well held as matter of law that the deceased was not guilty of want of ordinary care contributing to his death. We concur in the view. The decision of the trial court on the question of fact, under a familiar rule, cannot be disturbed unless contrary to the clear preponderance of the evidence. It is considered that the question in that regard must be answered in respondent’s favor.

By the COURT. The judgment is affirmed.

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*For Authorities on the Questions Involved in the Principal Case, see McLean v. Atlantic etc. R. R. Co., 81 S. C. 100, ante, p. 892, and cases cited in the cross-reference note thereto.*

## LAING v. WILLIAMS.

[135 Wis. 253, 115 N. W. 821.]

**PARTITION OF PERSONALTY—Equity Jurisdiction.**—The circuit court has equity jurisdiction to entertain an action to partition personal property, and therein to appoint a receiver, order the property delivered to him, enter an interlocutory decree, and so modify its final decree as to cover and provide every possible form or kind of relief made necessary by the exigencies of the case or the contumacy of the parties in order to do final and complete justice. (p. 1027.)

**PARTITION OF PERSONALTY—Conclusiveness of Interlocutory Findings.**—The interlocutory decree in an action to partition personal property is appealable, and if there is no exception to the interlocutory findings and no bill of exceptions preserving the evidence resulting therein, they are conclusive upon appeal from the final judgment founded upon them. (p. 1027.)

**PARTITION OF PERSONALTY—Refusal to Comply with Decree.**—Where the defendant in an action to partition personal property refuses to comply with the interlocutory decree ordering delivery to the receiver therein appointed, the court in protecting the other party is not limited to contempt proceedings, and may in the final decree award damages. (pp. 1027, 1028.)

Williams & Williams, for the appellant.

Perry Niskern, for the respondent.

**254 TIMLIN, J.** March 9, 1903, the plaintiff began an action against the defendant for the partition of certain personal property, consisting of a set of abstract books which the parties owned in common. June 1, 1903, in an order to show cause why a receiver of the common property should not be appointed, etc., which order was returnable July 1, 1903, the plaintiff was temporarily appointed receiver and qualified. July 6, 1903, upon hearing on this order to show cause, one A. Ford was appointed receiver, and the plaintiff, the defendant, and the husband of defendant ordered to deliver all the abstract books to the receiver. December 8, 1903, the court after trial made findings of fact and conclusions of law, from which it appeared, among other things, that plaintiff had a two-thirds interest and defendant a one-third interest in said property; that at the time the action was commenced the abstract books were in the possession of the defendant, who wrongfully excluded the plaintiff from said property after demand; that she still does so, and that she refused after demand to turn some part of said property over to the receiver. The court then found that the property could not be divided without great injury to the interests of the parties, that the plaintiff had made demand upon the defendant to sell and divide

the property, and that the property should have been sold pursuant to the provisions of chapter 106a, Statutes of 1898, that the defendant should at once deliver to the receiver the books and records withheld by her, and that upon <sup>255</sup> the sale by the receiver he should report said sale to the court, but that if the defendant did not deliver to the receiver the property in her possession, the receiver should sell such part as he had in his possession and report this sale to the court, bringing the proceeds into court to abide the further order. The plaintiff was given judgment for costs. On the same day judgment on these findings was entered following the findings and interlocutory in form. January 28, 1904, service of notice of entry of this interlocutory judgment was given to the defendant. April 26, 1904, the receiver reported to the court that he took into his possession part of the abstract books specified, having received them from the plaintiff as receiver, and that he made ineffectual efforts to get the remainder of the books from defendant and the former receiver. Plaintiff also reported that he demanded of the defendant's husband and her representative in charge of the property the books and property in her possession and this was refused. The receiver also reported a sale pursuant to the interlocutory judgment for \$300 of that part of the property which had come into his possession, and that the defendant neglected and refused to deliver up to him the property in her possession. April 29, 1907, on notice of motion by the plaintiff to confirm the report of a referee therein and for judgment, and to assess the damages sustained by the plaintiff by reason of the failure of the defendant to deliver to the receiver the property in question, and on cross-notice by the defendant, the court made findings that there remained in the hands of the receiver, Ford, \$163.74, the net proceeds arising from the sale of the property which came to the possession of the receiver, \$54.58 of which belonged to the defendant and \$109.16 of which belonged to the plaintiff; that by reason of the wrongful acts of the defendant in retaining in her possession from the receiver part of said abstract books and records as theretofore found by the court the plaintiff was damaged in the sum <sup>256</sup> of \$700; that the reasonable cost of replacing the property so wrongfully retained by the defendant was \$2.100, one-third of which should be paid by the defendant to the plaintiff. The \$54.58 awarded to the defendant from the proceeds of the \$300 sale was offset against \$700, and judgment ordered for the plaintiff and against the defendant for \$645.42 and subsequent costs. Final judgment

was entered accordingly, and from that judgment this appeal is taken.

<sup>257</sup> The appellant's brief contains no assignments of error, is very discursive, and great difficulty is experienced in ascertaining what specific grievances she complains of. Upon the record as returned this appears to be an ordinary suit for the partition of personal property.

In such suits, as said by Pomeroy (4 Pomeroy's Equity Jurisprudence, 3d ed., sec. 1392): "Courts of equity, therefore, when partition of personalty is sought, have of necessity departed from the analogies of the law of real estate, and have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case."

The trial court had general equity jurisdiction to entertain the action, to appoint a receiver, to order the property delivered to the receiver, to enter an interlocutory decree, and to so mold its final decree as to cover and provide every possible form or kind of relief made necessary by the exigencies of the case or the contumacy of the parties in order to do final and complete justice. This is the distinctive power of all courts of equity in all cases in which such courts have jurisdiction, such as the action for partition of personal property: *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000, 93 N. W. 455. But it is contended, also, that the final decree is unjust and inequitable. This contention overlooks the following considerations: 1. The final decree is founded upon the interlocutory findings and decree. 2. The interlocutory decree is appealable subject to the same limitations as appeals from final judgments: Stats. 1898, sec. 3047. 3. There are no exceptions to the interlocutory findings, and no bill of exceptions preserving all the evidence offered at the trial, which resulted in such findings; hence the interlocutory findings are conclusive upon this appeal from the final judgment.

But it is argued that in that alternative the defendant upon such showing should have been punished for contempt <sup>258</sup> instead of having a money judgment awarded against her, and if she had been so proceeded against the proceedings must have failed because of noncompliance with the statute requirements relating to contempts. The weakness in this position is quite apparent, but we will only say that the circuit court as a court of equity was not limited to contempt proceedings in the enforcement of its interlocutory decree, but might in a final decree make such provision as would protect the party aggrieved from loss caused by the failure



of the other party to comply with the interlocutory decree. Nor is the appellant aggrieved by the failure of the respondent to resort to contempt proceedings in which, under section 3490, Statutes of 1898, she might have been required to pay \$1,400 instead of \$700, because it seems from the findings that this is the sum which plaintiff would be obliged to expend in order to make good his two-thirds part of the property, consequently the sum necessary to indemnify him. The property was peculiar, in that it was not of a kind purchasable in the market, and also because any separation or withholding of any part thereof diminished the selling value of the remainder by so much as it would cost to replace the part withheld. We therefore perceive no error in the way in which the circuit court arrived at the sum to be recovered from the defendant, which sum, to say the least, is not more than the findings warranted. No error is assigned in the brief of appellant as required by supreme court rule 10. Unaided by such assignment we are unable from a perusal of that brief to discover material or prejudicial error, and the judgment should be affirmed.

By the COURT. Judgment affirmed.

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*That a Receiver may be Appointed in Proceedings to Partition personal property, when the exigencies of the case require, see Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417; Thompson v. Silverthorne, 142 N. C. 12, 115 Am. St. Rep. 727; Jones v. Abbott, 228 Ill. 34, 119 Am. St. Rep. 412.*

*That Personal Property may be made the Subject of Partition, see Pickering v. Moore, 67 N. H. 533, 68 Am. St. Rep. 695; Reynolds v. Nielson, 116 Wis. 483, 96 Am. St. Rep. 1000.*

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## SLOCUM v. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

[135 Wis. 288, 115 N. W. 796.]

**LIFE INSURANCE—Right of Beneficiary to Recover Premiums.**—The beneficiary in a life insurance policy cannot recover premiums paid by the insured on a wrongful rescission of the policy by the insurer. The right of recovery is in the insured. (p. 1031.)

**LIFE INSURANCE—Right of Beneficiary to Damages for Rescission.**—The beneficiary in a life insurance policy cannot recover damages for a rescission by the insurer where the law gives the insured the right to dispose of the policy without the consent of the beneficiaries. (p. 1032.)

Jones & Schubring and J. T. Baxter, for the appellant.

Frank E. Parkinson, for the respondents.

<sup>288</sup> SIEBECKER, J. The Northwestern Mutual Relief Association, duly incorporated in 1882 under the general laws of the state of Wisconsin, was reorganized and re-incorporated on January 19, 1892, being authorized and empowered to insure and indemnify its members on the assessment plan of life insurance against accident, old age, and death, and against either of them. In 1899, under the law providing for the incorporation of life insurance companies or associations upon the stipulated premium plan, this association availed itself of the powers granted by the law, and in the same year changed its corporate name to the Northwestern National Life Insurance Company. This association acted under the laws of Wisconsin, and was located at Madison, Wisconsin, and will hereafter be called the "Madison company." On August 29, 1901, the Madison company and the defendant, a Minnesota corporation of the same name, were consolidated, and the defendant reinsured all of the members of the Madison company, including one James Slocum, then a member in good <sup>289</sup> standing of the Madison company. By this consolidation all of the assets and property of the Madison company were transferred to the defendant and the Madison company ceased to do business. In 1882, pursuant to his application, there was issued to James Slocum by the Madison company a certificate of membership and a life insurance benefit, not exceeding the sum of two thousand dollars. In March, 1901, James Slocum surrendered this certificate of membership to the Madison company and received therefor a policy of insurance. By the conditions of the policy the Madison company agreed to pay, within ninety days after the acceptance of satisfactory proof of the death of James Slocum, the sum of two thousand dollars to the beneficiary of the insured designated last on the back of the policy. This policy was granted in consideration of the payment of certain bi-monthly premiums. The beneficiaries last designated on the back of the policy are the plaintiffs Alva Slocum and Delia Mack, respectively a son and daughter of James Slocum, the insured.

The complaint alleges what amount was to be paid as a premium by the insured, and that, according to the terms and conditions of the policy, the insured paid or caused them to be paid to the Madison company and the defendant until February 10, 1903. It is alleged that on this date he was

ready, willing and able to pay the sum due according to the terms of the policy and other agreements and contracts relating to it, but that the defendant company, by a public declaration on or about the 13th of November, 1902, and by notification of James Slocum on January 10 and February 10, 1903, stated that it had abandoned, repudiated and rescinded the policy and contract of insurance. Under date of February 11, 1903, the defendant company informed Delia Mack, one of the plaintiffs and one of the beneficiaries last named on the back of the policy, that it would not carry out the policy unless the insured paid a larger premium, and that it would carry the insurance for only one year, that is, <sup>290</sup> during the current seventy-fifth year of James Slocum's life. It is alleged that Alva Slocum, last designated on the back of the policy as cobeneficiary with Delia Mack, and James Slocum, the insured, were informed of this notice and its contents. It is alleged that the articles of reorganization and reincorporation of the Madison company provide that the rights of membership shall be subject to the articles of incorporation, that the rights of members are fixed and determined thereby, that the amount of the benefit is not to be reduced, and that the rates of assessment are to be graded according to the ages of the members at the time of their joining the corporation.

In November, 1906, James Slocum notified the defendant that he had paid all premiums and charges due from him to the defendant; that he and the plaintiffs, the beneficiaries last designated on the back of the policy, were not willing to pay premiums and charges under the terms and conditions upon which, under its by-laws, the defendant has insisted since November 13, 1902; that James Slocum was willing and able to pay all premiums and charges due under the terms of the policy; that they considered that the defendant had abandoned, broken and rescinded the contract and policy of insurance; and that the plaintiffs in this action, therefore, demanded that the defendant pay them the damages accruing because of such abandonment and rescission. The damages demanded were seventeen hundred and ninety-three dollars and thirty cents. Defendant made no reply to this notice. Plaintiffs are the beneficiaries last designated on the back of the policy.

Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on the further ground that there was a defect of parties in that James Slocum had an interest in the cause of action

and was a necessary party to a complete determination of the questions involved.

This is an appeal from the order of the court overruling the <sup>291</sup> demurrer on the ground that the termination and rescission of the contract by the defendant had terminated the policy, and that this operated to secure to plaintiffs the right to recover damages for injuries resulting therefrom.

The allegations of the complaint are in effect that the defendant without good cause renounced and terminated the insurance contract held by James Slocum, that plaintiffs are the last-named beneficiaries in the policy, and that they as such beneficiaries have suffered damage by reason of such wrongful termination of the policy. The averments of the complaint do not clearly state whether plaintiffs treat the contract as rescinded and seek recovery upon such rescission of premiums paid and interest, as in *True v. Bankers' L. Assn.*, 78 Wis. 287, 47 N. W. 520, or whether they seek recovery of damages, on the repudiation of the contract, for its breach, as was done in *Merrick v. Northwestern Nat. L. Ins. Co.*, 124 Wis. 221, 109 Am. St. Rep. 931, 102 N. W. 593. This uncertainty of the allegations, however, becomes immaterial under the controlling question raised by the general demurrer to the complaint.

Plaintiffs sue as the beneficiaries under the policy, and the question is, Have they, under the law of this state, such an interest in the policy as entitles them to recover damages for breach of the contract or the premiums paid, if there was a rescission of it? It seems clear that plaintiffs have no interest whatever in the sums paid as premiums by the insured to secure a benefit to those entitled to the proceeds of the policy upon maturity. Upon rescission of the contract by the parties all rights to the premiums paid by the insured are clearly vested in him: *True v. Bankers' L. Assn.*, 78 Wis. 287, 47 N. W. 520; <sup>292</sup> *Supreme Council A. L. H. v. Black*, 123 Fed. 650, 59 C. C. A. 414; *Van Werden v. Equitable L. Assur. Soc.*, 99 Iowa, 621, 68 N. W. 892, and cases cited; *Lowell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. Rep. 390, 28 L. ed. 423; *Knights Templar & M. L. Ind. Co. v. Gravett*, 49 Ill. App. 252; *Am. L. Ins. Co. v. McAden*, 109 Pa. 399, 1 Atl. 256.

The further inquiry then is, Have plaintiffs as beneficiaries of the policy such an interest in it that they can be deemed to have suffered legal damages from the breach of it by the defendant? In determining this question we cannot be aided by authorities of other states, because the rights of benefi-



ciaries in an insurance policy under the law of this state differ materially from those in other states. In this state the right of the insured to dispose of the policy by assignment, will, or gift, without the consent of the beneficiaries, has been recognized from the time of the decision in *Clark v. Durand*, 12 Wis. 223, to the present day: *Rawson v. Milwaukee Mut. L. Ins. Co.*, 115 Wis. 641, 92 N. W. 378; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004, 95 N. W. 948, 62 L. R. A. 982, and cases cited. As stated in the *Rawson* case: "This rule places the rights of the beneficiary under such a policy (if not a married woman) on almost identically the same basis as the rights of a beneficiary under a mutual benefit certificate. . . . In neither case can the beneficiary do anything which will prevent the insured from cutting off his rights entirely."

While such a right is a vested one, it is in its nature a mere "expectancy," which is subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured. The uncertainty of the beneficiary's interests, growing out of the contingencies incident to the power of the insured to thus deal with the policy, renders the rights and interests of the beneficiaries too hypothetical to be made the ground for damages for a breach of the contract. It is a mere expectancy of an unascertainable <sup>293</sup> value, and hence cannot be made the basis of a claim for damages. Under the law of this state the rights of the insured in such a contract are valuable property rights, and for a deprivation thereof the insured is entitled to recover the damages as for other wrongful deprivations of valuable property rights. In addition to cases cited above, the following authorities recognize this right and consequent remedy for the recovery of damages for a wrongful invasion of it: *Krebs v. Security T. & L. Ins. Co.*, 156 Fed. 294; *O'Neill v. Supreme Council A. L. H.*, 70 N. J. L. 410, 57 Atl. 463; *Price v. Mutual R. L. Ins. Co.*, 102 Md. 683, 62 Atl. 1040, 4 L. R. A., N. S., 1070; *Bower v. State*, 134 N. Y. 429, 31 N. E. 894.

Upon these considerations it must be held that the plaintiffs, as beneficiaries of the policy, suffered no legal damages by the alleged wrongful termination of it by the defendant, and the demurrer to the complaint should have been sustained.

By the COURT. The order appealed from is reversed, and the cause remanded, with directions to the lower court to enter an order sustaining the demurrer to the complaint, and for further proceedings according to law.

*The Premiums Paid upon a Life Insurance Policy* may be recovered by the insured in case of a wrongful rescission by the insurance company: *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 109 Am. St. Rep. 992; *Hogben v. Metropolitan Life Ins. Co.*, 69 Conn. 503, 61 Am. St. Rep. 53; *Mailhoit v. Metropolitan Life Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336. But it seems that the beneficiary has no such right of recovery: *McDonald v. Metropolitan Life Ins. Co.*, 68 N. H. 4, 73 Am. St. Rep. 548; *Sullivan v. Metropolitan Life Ins. Co.*, 174 Mass. 467, 75 Am. St. Rep. 365.

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## WILL OF DARDIS.

[135 Wis. 457, 115 N. W. 332.]

**WILLS—Nature of Proceeding to Probate.**—The proceeding to probate a will is a proceeding in rem, which binds all the world and in which public welfare and policy are involved. (p. 1036.)

**WILLS.—The Public Interest in Probate Proceedings** requires that a valid will shall be established, independently of the wish of those specifically named therein. (pp. 1036, 1037.)

**WILLS—Stipulation by Beneficiaries to Defeat.**—A stipulation by the heirs and beneficiaries in the will of a decedent that he was of unsound mind and under undue influence, and that the probate of the will shall be denied, does not relieve the court in which the probate of the will is pending from the duty of establishing the status of the instrument. (p. 1038.)

Simmons, Nelson & Walker, for the appellants.

H. G. Smieding, Churchill, Bennett & Churchill and Waller & Gittings, for the respondents.

458 **HODGE, J.** The will of James M. Dardis, of Racine county, Wisconsin, was presented for probate by John T. Lee, the executor therein named, and notice duly given. The will was made in November, 1904; devised a house and lot to one daughter, and the rest of the property, real and personal, to seven named sons and daughters in equal shares, save that one of them was to have twice as much as each of the others. This bequest omitted three sons, and by another paragraph the testator expressly declared his will that those three sons should take nothing. The will nominated an executor, the proponent, and by the sixth paragraph directed and empowered such executor to sell, and by proper instruments of conveyance to convey, the real estate, other than the house and lot devised to the daughter Susie, at such price or prices as might be reasonable in his judgment. Objections were interposed to the probate by seven of the children, including some of the beneficiaries and one at least of the disinherited

sons, asserting mental incompetency and undue influence by one Thayer, the husband of the daughter to whom the house and lot was devised. Said objections were filed February 7, 1905. On January 26, 1905, all of the children named in the will, except the son Henry Dardis, who had predeceased his father, unmarried, entered into a stipulation to the following effect:

"We, the undersigned, being all the heirs at law and next of kin of the above-named James M. Dardis, deceased, and all being of full age and under no legal disability, having learned that said Dardis having in his lifetime made a last will and testament bearing date November 21, 1904, and having further learned that said last will has been presented and filed with the county judge of Racine county, Wisconsin, for probate, the hearing of which is set for February 7th inst., do hereby consent, stipulate, and agree that at the time of the making of the said last will and testament the  
459 said James M. Dardis, deceased, was not mentally competent to make the same, being an old man, and for several years prior to the making of said will his mental faculties had become impaired, and in justice to the court and to ourselves we make this stipulation and statement. And we further stipulate and agree that in case the probate of said will is refused, either by virtue of this stipulation or otherwise, letters of administration upon the estate of the said James M. Dardis, deceased, may by the county court for Racine county be issued to John T. Lee, of Corliss, Racine county, Wisconsin, being the same person named as executor of the said will, hereby releasing and renouncing our and each of our rights to said administration, hereby waiving the publication of any notice therefor, or the running of any time thereon as required by law and the rules and practice of this court, to the end that, when said administration is granted as aforesaid, it shall have the same force and effect as if done after full publication had been made therefor and the time had run thereon as required by law and the rules and practice of this court. It is stipulated and agreed by and between the heirs of the said James M. Dardis, deceased, as aforesaid, that after all the debts and obligations against said estate are fully satisfied, that any advancement made to any child or children of said deceased shall be deducted and taken from their distributive share of said estate. And it is further stipulated and agreed that Susie Thayer, one of the children of the said James M. Dardis, deceased, shall have

and receive from said estate, in addition to her distributive share, the sum of fifty dollars, being an advancement made to her father during his lifetime, and also shall have and receive, in addition to her distributive share, the sum of six dollars per week during the weeks she cared for her said father during his last sickness. This stipulation and agreement is made by all the heirs of the said James M. Dardis, deceased, with full power and knowledge of its contents and with the intention and desire to settle said estate quickly and amicably and to avoid litigation, trouble, and expense."

On February 7, 1905, they followed this by another stipulation containing many of the provisions of the former, but also stipulating and agreeing that said instrument be disallowed <sup>460</sup> and the probate thereof by said county court be denied, but giving no reason therefor. This second stipulation had appended to it the following consent by Lee, the proponent:

"I, John T. Lee, proponent of the instrument mentioned in the foregoing stipulation and agreement and the person named therein as executor, do hereby consent to all and singular the terms of said stipulation, and do consent and agree that said instrument may be disallowed and the probate thereof denied by said county court."

Upon the return day of the notice the subscribing witnesses attended and testified to the making of the will, the obvious sanity of the testator, and his apparent freedom from influence. The county court thereupon admitted the will to probate, adjudged it to be the valid will of the deceased, and appointed Lee executor. From that order, or rather the part thereof admitting the will to probate, the daughter Mary Esmond appealed to the circuit court. When the case was reached in the circuit court Mary Esmond had died, leaving minor heirs succeeding her. The circuit court tried the subject *de novo*, no evidence to attack the validity of the will being introduced, except said stipulations in circuit court, finding testator sane and free from undue influence and the formal execution of the will to be in accordance with law, and affirmed the judgment of the county court. From said judgment of affirmance six of the sons and daughters appeal.

<sup>461</sup> The very earnest contention of appellants that, when all parties to a litigation stipulate or consent to certain action by the court, such stipulation should be carried into effect is undoubtedly correct as a general proposition, though obviously with some limitations. For example, a court could



not be compelled to stultify itself by solemnly adjudging an absurdity or a falsehood because parties stipulated for such act. Independently, however, of whether a court must always solemnly adjudicate a fact agreed on by all parties in interest, doubtless it should give effect to a stipulation so far as it affects the individual rights of the parties thereto. It is also doubtless true that parties to any proceeding, although not all the parties, may by their stipulation or consent preclude themselves individually from setting up any rights in opposition to such stipulation. The trouble, however, with appellants' position in this case is that no stipulation was presented to the court signed by all parties in interest. The probate of a will is a proceeding in rem, to which all the world are in some sense parties. Of course, like any other such proceeding, it also affects specific individuals, and therefore is inter partes as to such individuals. But in addition to its effect upon the rights either of the heirs of the alleged testator or of the legatees, the adjudication of the question whether a given script is or is not the will of the decedent may affect many other rights and interests which cannot be ascertained in advance of such adjudication. Thus, for example, any will devising real estate takes effect at the death of the testator, and may, at the moment of such death, create actual vested rights or liens in judgment creditors of the devisee: *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *In re Will of Langevin*, 45 Minn. 429, 47 N. W. 1133. Upon probate of the will there is no opportunity to ascertain whether such rights exist, but <sup>462</sup> the holders of them are parties to the proceeding in the sense that they are bound by the adjudication by virtue of the general publication of notice. Indeed, even more remote rights may exist. General creditors of legatees may have a right to question the bona fides by which such legatees surrender any portion of their property after the right to it becomes vested, and no court in which a litigation to that end might be instituted has any power to pass on the existence and validity of an alleged will; especially would it not have such right after such will had been adjudged no testament by the probate court having that jurisdiction, although proceeding upon a stipulation of certain parties in interest. It is for reasons like these that the courts have uniformly held that the proceeding to probate a will is a proceeding in rem, binding all the world, and in which even public welfare and policy is involved. The view that public interest requires that a valid will be established, independently of the wish of those

parties specifically named therein, is evinced by various statutes in this state. By section 4505, Statutes of 1898, it is made a crime to conceal or suppress a will by any person, whether with or without the consent of parties therein named. By sections 3784, 3785, and 3786, Statutes of 1898, a positive duty is imposed both upon the county judge as a public officer, upon the person named as executor in any writing purporting to be a will, and, indeed, on any person having custody of such will, to take steps to bring the question of its validity before the proper probate court; and by section 2296, Statutes of 1898, the absolute requirement is made that every will of real estate admitted to probate shall, with evidence thereof, be spread upon the public records. All these steps are imposed by law wholly independent of the control of those privately interested. They evince a clear recognition and declaration of the legislature that there is a public policy involved in the establishment of every legally executed will.

463 Apart from the interest of the public there is also recognized by the courts an interest and right of the testator to have the directions of his will carried into effect, at least upon some subjects. His right is recognized to direct at least the method of management and disposal of his property after his decease, which courts cannot be compelled to disregard to accommodate the wishes of some or even all parties having pecuniary interest in the property: *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Bussell v. Wright*, 133 Wis. 445, 113 N. W. 644. Whether a will contains any directions of the sort thus protected against modifications by the beneficiaries is a question which can only arise after the probate proceeding is complete and the existence of the will has been established, but, apparently, this will commands a method of sale of the real estate which can be given effect only by its probate.

Counsel for appellants cites us to two decisions apparently holding that a probate court should regard the stipulation of the nominal parties in interest in making its decision: *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871; *Lloyd's Estate*, 24 Pa. Co. Ct. Rep. 567. We cannot approve the reasoning of these cases. They are addressed both of them to consideration whether an individual who had stipulated could be heard in court in repudiation of his stipulation, and thus was obscured the considerations which we have above suggested of the possible interest of unknown parties and of the existence of a public policy to protect them. The Texas case is based upon a remark in *Phillips v. Phil-*

lips, 8 Watts, 195, to the effect that the parties in interest before probate might consent to the suppression or destruction of a will; the remark in the latter case being wholly obiter. Whether this might be so in Texas or in Pennsylvania, we think, as already stated, there are declared and obvious reasons of public policy in Wisconsin which preclude such a doctrine. This conclusion seems to be supported by <sup>464</sup> the great weight of authority: *Syme v. Broughton*, 85 N. C. 367; *Huston v. Sawyer*, 104 N. C. 1, 10 S. E. 85; *In re Will of Young*, 123 N. C. 358, 31 S. E. 626; *Allison v. Smith*, 16 Mich. 405; *People v. Wayne Circuit Judge*, 39 Mich. 198; *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12; 1 Woerner's American Law of Administration, sec. 228; Gary on Probate Law, 3d ed., sec. 194.

We conclude that the stipulation in this case could not control the duty which the probate court owed to the public, and perhaps to the testator, to adjudicate as to the legal existence of the propounded document as a will; to establish its status. Hence the judgment is proper in the absence of other grounds of attack.

By the COURT. Judgment affirmed.

A motion by the appellants for a rehearing was denied May 8, 1908, and the mandate was amended by adding thereto as follows: "The costs taxed against the appellants in this court to be paid out of the estate."

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*A Contract not to Contest a Will* is one that concerns private parties only. It is not against public policy, and will be enforced: *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134. But a contract whereby the executor and trustee in a will agree to contest the probate of the testament is void as a species of champerty or maintenance: *Cochran v. Zachery*, 137 Iowa, 585, 126 Am. St. Rep. 307, and see cases cited in the cross-reference note thereto.

JOHN SCHROEDER LUMBER COMPANY v. CHICAGO  
AND NORTHWESTERN RAILWAY COMPANY.

[135 Wis. 575, 116 N. W. 179.]

**CARRIER OF LIVESTOCK—Extent of Liability.**—A carrier who contracts to transport horses is an insurer against all loss or damage during transit, except such as arises from acts of God, public enemies, or acts of the owner himself, subject to some restrictions arising out of the habits, propensities, or locomotion of the animals. (p. 1041.)

**CARRIER OF LIVESTOCK—Duty to Furnish Suitable Car.**—A railroad company in carrying out its contract to transport horses is bound to furnish suitable cars therefor. (p. 1042.)

**CARRIER OF LIVESTOCK—Imperfectly Ventilated Car.**—To relieve a carrier from liability for injury from inadequate ventilation to horses which it contracts to transport, it must appear that the shipper contracted to accept the car with full knowledge that it was so imperfectly ventilated as to be likely to produce the injury complained of. If the evidence shows that he accepted the car with such knowledge, he has no right to action. (p. 1042.)

**CARRIER OF LIVESTOCK—Imperfectly Ventilated Car.**—In an action by a shipper of horses for injuries sustained through imperfect ventilation, a failure fairly and clearly to submit to the jury the real issue, namely, whether or not the plaintiff's employees knew the probable consequences of the defective ventilation, and, so knowing it, accepted or selected the car in question, calls for a reversal of the judgment and a new trial. (p. 1043.)

Edward M. Hyzer, for the appellant.

Lamoreux, Shea & Cate, for the respondent.

**575 KERWIN, J.** This action was brought by the plaintiff against defendant, a common carrier, to recover damages alleged to have been caused by the negligent transportation of horses and harnesses delivered to it for carriage, in consequence of which negligence some of the horses died and the harnesses were **576** damaged. The answer denied substantially the allegations of the complaint, and affirmatively alleged that the injury and damage were proximately caused by the agents and servants of the plaintiff. The jury returned the following verdict:

“(1) Did defendants negligently fail to provide a car suitably ventilated for the purpose of shipping plaintiff's horses and harnesses from Saxon to Ashland? A. Yes. (2) Did defendants negligently fail to provide a car of sufficient size for the purpose of shipping plaintiff's horses and harnesses from Saxon to Ashland? A. Yes. (3) If you answer question No. 1 or No. 2 or questions numbered 1 and 2 by ‘Yes.’ was said insufficiency of said car the proximate cause of the damage sustained by plaintiff to its said per-



sonal property? A. Yes. (4) If you answer question No. 1 or No. 2 by 'Yes,' did plaintiff's agents or servants know that the said insufficient condition of said car might be the proximate cause of an injury to plaintiff's said personal property? A. No. (5) If, from your answers to the foregoing questions, the court is of the opinion that plaintiff should have judgment against defendant, at what sum do you assess plaintiff's damages to his said horses, without interest? A. Twelve hundred and fifty dollars. (6) If, from your answer to the foregoing questions, the court is of the opinion that plaintiff should have judgment against defendant, at what sum do you assess plaintiff's damages to his said harnesses, without interest? A. Fifty dollars."

Judgment was entered upon the verdict. Defendant assigns several errors and appeals to this court from the judgment.

There is evidence tending to show that on Tuesday or Wednesday, March 13th or 14th, plaintiff's superintendent notified the station agent of defendant at Saxon that he wanted to ship some horses to Ashland and wanted a car placed at Saxon; that there were sixteen horses and he wanted a big car. About the 15th of March plaintiff's superintendent again called up Saxon and talked with the night operator, who told him the car was there to ship the horses <sup>577</sup> in. The following Friday morning, March 16th, Martin and Anthony McGinty took the horses to the station, but objected to the car because it was not large enough, and put the horses in the barn with the understanding that the agent was to provide a larger car for them. The horses were to be shipped about 9 A. M. Friday morning. Some talk was then had between the station agent, Sullivan, and the McGintys, the latter saying the car was too small, that it would not hold eight teams of horses, and the agent saying that it would. The talk was that the car was too small and too low; the agent, Sullivan, however, maintaining that he thought the car was all right, but said that he could probably get a larger car off a freight which was going through about 10:30. The McGintys then assented to this, and the horses were put in the barn to await the larger car. The freight mentioned went through about 12:30, but did not stop, Sullivan, the agent, saying the cars were all loaded and no empties on the train. Finally the agent again said that he knew the horses could be loaded into the car that was there. McGinty testified that he accepted the judgment of the defendant's agent and loaded the teams into the car; that it took a long time

because the car was too small. The side door was fastened open a little more than half way to furnish ventilation. The space was about four feet wide and half the height of the car, there being a grain door on the floor coming up about half way. The other side of the car was closed. The loading was finished about 3 o'clock on March 16th. The defendant's agent then asked McGinty if he was going to Ashland with the horses, and he said "No." Defendant's agent said it was not necessary that anyone go with the horses, only it would be a free ride if anybody wanted to go to Ashland. McGinty was asked whether there might not be enough air in the car, and he answered that he thought a little more air would not hurt them; that "the more air they got the better they are off." The car in which the horses were shipped had <sup>578</sup> no end doors. It was an ordinary box-car. Mr. Sullivan, defendant's agent, stated that he thought it would be all right to put the horses in the car. One of the McGintys also admitted on cross-examination that he thought the car was not fit because it had no end doors in it for ventilation, but said in the same connection that he did not really think there was not enough ventilation, but that he always saw horses shipped in cars with end doors, and that such doors were in for ventilation, he supposed. He further testified that it did not occur to him that there might not be enough air in the car. The horses arrived at Ashland Friday night. Part were dead, others down, and the harnesses were damaged. The dead and down horses were all in the front end of the car. This was caused by insufficient ventilation, the air going in through the side door to the back end of the car by the motion of the train.

1. The defendant is a common carrier and as such contracted with the plaintiff to transport the horses and other personal property in question from Saxon to Ashland for the usual consideration. Under this contract defendant was an insurer against all damage to or loss of the property intrusted to it during transit, except such loss or damage as might arise from the acts of God, public enemies, or the acts of the owner himself, and also "subject to some restrictions and liabilities arising out of the instincts, habits, propensities, wants, necessities, vices, or locomotion of the animals": *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817; *Klauber v. Am. Exp. Co.*, 21 Wis. 21, 91 Am. Dec. 452; *Ayres v. Chicago etc. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; *Abrams v. Milwaukee etc. R. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55,

58 N. W. 780. In carrying out its contract the defendant was bound to furnish suitable cars <sup>579</sup> for the transportation of the horses: *Ayres v. Chicago etc. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432. In the case before us the car furnished was insufficiently ventilated, in consequence of which some of the horses were suffocated and others thrown down and injured. So the question arises whether or not the defendant is liable for failure to furnish a suitable car. The liability, if any exists, rests upon the contract of carriage. It is claimed on behalf of the defendant that a verdict should have been directed, for the reason that the agents of the plaintiff contracted for the shipment of the horses and harnesses in the particular car in which they were shipped with full knowledge of the defects, and therefore it cannot recover in this action. We think sufficient of the testimony has been set out in the statement of facts to show that this position is not tenable, and that it cannot be said as matter of law that the defect in ventilation which was the proximate cause of the injury was so obvious and apparent that plaintiff must be charged with knowledge thereof. There is evidence that the agents of plaintiff first objected to the car furnished mainly because of its size, and put the horses in the barn to await the arrival of a larger car which defendant's agent expected on a freight train going through Saxon about noon; but a larger car was not furnished, and the principal talk was with reference to the ability of the plaintiff's agent to get the horses into the small car. True, there was some talk with reference to ventilation, but this was principally to the effect that it would be better for the horses and their condition during transit if the car were better ventilated by having openings at the ends. There is evidence tending to show that the agents of plaintiff were not aware that there was danger of suffocation on account of the imperfect ventilation. Besides, they acted at least to some extent upon the judgment of the defendant's agent. In order to relieve defendant from liability we must be able to say that plaintiff contracted to accept this car with full knowledge that it was so imperfectly <sup>580</sup> ventilated as to be likely to produce the injury complained of, and we are clearly of the opinion that the evidence does not warrant, as a matter of law, any such conclusion, but that the question was clearly one for the jury. Therefore there was no error in refusing to direct a verdict for defendant: *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817; *Nevius v. Chicago etc. R. Co.*, 124 Wis. 313, 109



Am. St. Rep. 935, 102 N. W. 489; Densmore C. Co. v. Duluth etc. R. Co., 101 Wis. 563, 77 N. W. 904; Clarke v. Rochester etc. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Harris v. Northern Indiana etc. R. Co., 20 N. Y. 232; Pratt v. Ogdensburg etc. R. Co., 102 Mass. 557.

2. The only other question necessary to consider upon this appeal is whether the case was properly submitted to the jury. Counsel for appellant asked that the following question be submitted to the jury as part of the special verdict: "Was such insufficiency known to the men in charge of said horses?" We think the vital question in the case was whether or not the car was sufficiently ventilated, and this question we think was properly for the jury, and should have been submitted without complicating it with the question respecting the size of the car. If the sufficiency of size of the car were the only question, this fact was known to plaintiff's agents and they contracted with full knowledge of it. But the important question is whether they knew the danger incident to insufficiency of ventilation. The first question of the special verdict presented to the jury the fact whether defendant failed to provide a car suitably ventilated, and the second question whether defendant failed to provide a car of sufficient size, while the fourth question requires them to answer whether, if the first or second question be answered "Yes," plaintiff's agents or servants knew that said insufficiency might be the proximate cause of an injury to plaintiff's property. Now, this condition of the verdict left the jury to answer the fourth question "No" if they should find either that the car was not suitably ventilated or <sup>581</sup> not of sufficient size. So we think under the verdict as presented the real issue in the case was not fairly and clearly submitted to the jury, namely, whether or not plaintiff's employes knew the probable consequences of the defective ventilation, and, so knowing it, accepted or selected the car in question. We think for failure to submit the question asked by counsel for appellant or some suitable question as above indicated the judgment must be reversed and a new trial granted. Other errors discussed need not be considered.

By the COURT. The judgment of the court below is reversed, and the cause remanded for a new trial.

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*The Respective Duties of Carriers and Shippers of Livestock* are discussed in the notes to Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 548; Clarke v. Rochester etc. R. R. Co., 67 Am. Dec. 208. Recent decisions on this question are Cleve v. Chicago etc. Ry. Co., 77 Neb. 166, 124 Am. St. Rep. 837; Chicago etc. Ry. Co. v. Slattery, 76 Neb.



721, 124 Am. St. Rep. 825; *Clark v. Ulster etc. R. R. Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848. A carrier of livestock is bound to furnish reasonably safe cars for the transportation of animals which it undertakes to carry, and cannot by stipulation relieve himself of this responsibility: *Nevins v. Chicago etc. Ry. Co.*, 124 Wis. 313, 109 Am. St. Rep. 935, and cases cited in the cross-reference note thereto.

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### HYMAN v. LANDRY.

[135 Wis. 598, 116 N. W. 236.]

**FRAUDULENT CONVEYANCE.**—The Word “Void” in section 2320, Statutes of 1898, relating to conveyances of property in fraud of creditors, means voidable. (p. 1046.)

**FRAUDULENT CONVEYANCE.**—If a Debtor, by Collusion with Another, Conveys his realty to such other in fraud of his creditors, notwithstanding section 2320, Statutes of 1898, the title to such realty thereby passes to such other, subject to such remedies as the law affords the creditors to reach the same for the satisfaction of their claims. (p. 1046.)

**FRAUDULENT CONVEYANCE.**—Lien of Subsequent Judgment.—In case of a conveyance of realty, falling under the condemnation of section 2320, Statutes of 1898, a judgment subsequently entered in favor of a creditor, intended to be defrauded, does not by such entry alone become a lien on such realty. (p. 1046.)

**FRAUDULENT CONVEYANCE.**—In Case of the Entry of a Judgment in the circumstances before stated, the judgment creditor may obtain a lien on the realty by an execution levy, and then maintain an action in equity to remove the cloud thereon consisting of the fraudulent transfer. (p. 1046.)

**FRAUDULENT CONVEYANCE.**—In Case of the Entry of a Judgment in the circumstances stated, the judgment creditor may, without first obtaining a specific lien on the realty, enforce his right thereto, conditioned upon his not having any remedy at law to collect his claim, by an action in equity to remove the fraudulent transfer, interfering with such judgment attaching to the property. (p. 1047.)

**EXECUTION.**—Real Estate is not Subject to an Execution Levy, in the sense of an actual seizure of the property, as in case of personality, but it may be constructively levied upon, a specific lien being thereby obtained. (p. 1047.)

**EXECUTION.**—Manner of Levying on Real Estate.—There is no way pointed out by statute for making a levy on real estate under an execution. (p. 1048.)

**EXECUTION.**—Levying on Real Estate.—Any Overt Act by an Officer holding an execution collectible out of realty, showing a formed purpose to appropriate such property to the satisfaction of the writ, such as an advertisement upon such writ of a levy upon the property, with the purpose of pursuing the same to effect, is an efficient levy thereon. (p. 1048.)

**FRAUDULENT CONVEYANCE.**—In an Action to Remove a Fraudulent Transfer of realty, interfering with an efficient sale thereof under an execution levy, the complaint sufficiently shows the acquirement of a specific lien by means of such levy, if it shows a legitimate basis for an execution and that before the commencement

of the action execution was duly issued upon the judgment and the property was thereunder duly levied upon. (p. 1049.)

**FRAUDULENT CONVEYANCE**—Setting Aside.—It is Sufficient in a Complaint for a legitimate basis for a valid execution against an alleged judgment creditor, to show that the judgment was "rendered and entered" in an appropriate jurisdiction. (p. 1049.)

(Syllabi by the court.)

G. M. Sheldon and Reid, Smart & Curtis, for the appellants.

John Van Hecke and John Barnes, for the respondent.

**599** **MARSHALL, J.** The complaint contained, in substance, this statement of facts: May 12, 1903, defendant John Landry was indebted to plaintiff and on that day he commenced an action in the circuit court for Lincoln county, Wisconsin, to recover the amount thereof. Such proceedings were duly had therein that November 22, 1905, judgment was rendered and entered in plaintiff's favor for twelve hundred and thirty-six dollars and twenty-four cents. No part of such judgment has been paid. When such action was commenced said Landry owned certain real estate in said county, describing the same, which was not exempt from seizure and sale on execution. For the purpose of defrauding plaintiff said Landry, July 21, 1905, without consideration, fraudulently, by deed so executed as to be entitled to be recorded, conveyed said real estate to defendant Roselia Landry and the deed was duly recorded. The grantee in such deed cooperated with the grantor to defraud the plaintiff. She is still the holder of the title to said land. Execution was duly issued on the judgment February 5, 1907, and delivered to the sheriff of said county, who, pursuant thereto, February 13, 1907, levied on said land. Plaintiff and the sheriff have been unable with due diligence to find any property belonging to said John Landry, other than the lands in question, subject to execution. The said conveyance is a cloud upon the title to said lands. The sheriff is about to advertise said lands for sale under said execution, but because of said cloud it will be impossible to realize anything on the sale.

**600** There is an appropriate prayer for relief.

The defendants demurred to the complaint as not stating facts sufficient to constitute a cause of action. The demurrer was overruled and the defendants appeal.

The supposed controlling reasons given by counsel for appellant why the complaint does not state facts sufficient to constitute a cause of action are: 1. It is not made to appear that a lien on the lands was acquired by an execution levy to enforce the judgment, before the action was commenced;

2. It does not appear that before such commencement plaintiff exhausted his remedy at law by the issuance of an execution to enforce the judgment and a return thereof unsatisfied.

The law applicable to the complaint is settled in *French L. Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910. There the previous decisions in relation to such matters were discussed and reconciled, as was and is supposed. The following rules were stated rendering future discussion of matters which had theretofore fallen into some confusion unnecessary:

1. A transfer of real estate in fraud of creditors is not wholly void under section 2320, Statutes of 1898. The word "void," as used therein, means voidable.

2. A deed of real estate under such circumstances as to fall within the condemnation of such section passes the title to the property so that a judgment subsequently entered against the fraudulent grantee in the office of the clerk of the circuit court of the county where the land is located does not become, by reason of such entry, a lien on such land.

<sup>601</sup> 3. The judgment creditor can, nevertheless, obtain a lien on such land by issuing an execution and causing a levy upon the land thereunder to be made, in which case equity jurisdiction may be used to remove the impediment, consisting of the fraudulent transfer, to an advantageous execution sale of the property.

4. In case the judgment creditor does not obtain a lien in the manner aforesaid which equity jurisdiction can recognize and clear of the cloud thereon created by the fraudulent deed, he has, nevertheless, a right to a lien which equity will enforce by removing such transfer so that the judgment may attach to the land under the statute, on condition of his showing he is remediless at law to collect the judgment.

5. In case of the existence of a fraudulent transfer of real estate interfering with the collection of a judgment against the fraudulent grantee, the judgment creditor has, as indicated, two methods of obtaining relief: (a) By obtaining a lien upon the lands by levy under an execution issued upon the judgment and then prosecuting an action in equity to remove the cloud upon such lien; (b) by exhausting the remedy at law to collect the judgment from leviable assets of the judgment debtor, if there be any, and then prosecuting an action in equity to annul the fraudulent transfer so far as to enable the judgment to attach to the land.

From the foregoing it must be apparent that if the complaint in this case, by appropriate allegations, shows that there was a levy on the real estate in question under a valid execution prior to the commencement of the action, then, since all other facts essential to its maintenance for the purpose of removing the interference with an advantageous sale of the property created by the alleged fraudulent deed are stated, the demurrer was properly overruled and we need not consider the questions discussed which apply only to a case where there is a right to a judgment lien on realty and no legal remedy to enforce it, and as a condition of the <sup>602</sup> exercise of equity jurisdiction in the matter it is essential to show that the debt is not collectible out of leviable assets of the judgment debtor.

It is suggested that the complaint is fatally defective in that it does not show that there was a valid execution because there is no allegation that the judgment was docketed. Section 2968, Statutes of 1898, provides that an execution may issue upon a judgment of the sort under consideration, when the judgment "shall have been perfected under the provisions of section 2894a, Statutes of 1898," and that section provides that "Whenever a finding shall be filed or a verdict rendered the successful party shall perfect the judgment and cause it to be entered." Note that the last step required to be done to perfect the right to an execution is the entry of the judgment. That act seems to be charged in the complaint in unmistakable language in these words: The "judgment was duly rendered and entered against the defendant, John Landry," etc. But it is said that the complaint does not show that a levy upon the real estate under the execution was made before suit brought. The claim in that regard is based on the theory that an advertisement of lands for sale to satisfy an execution is essential to a levy thereon. So notwithstanding the allegation in the complaint that the sheriff "levied on said lands" under the execution "on the thirteenth day of February, 1907," it is rendered inefficient by the further allegation that the "sheriff is about to proceed to advertise said lands for sale under said execution," etc.

There cannot be any manual taking of land under an execution and so no actual seizure thereof, but there may be a constructive seizure, and it is universally called a levy upon the property, as is amply shown in the French L. Co. case (107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910). There is language at one point in the opinion from



which a person might suppose that it is essential to such a levy that the property be advertised for sale under the execution. It is there said: <sup>603</sup> "Such creditor can only avoid the fraudulent transfer and obtain a specific lien upon the property covered by it by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property."

And again it is said, in discussing the case of *Gates v. Boomer*, 17 Wis. 455: "These circumstances were present: an execution on the judgment and proceedings thereon against the property by a levy under the execution by advertising the property for sale as provided by law."

It was not intended thereby to suggest that the only way a levy can be made upon real estate is by advertising the same for sale under the execution. By no means. It was only intended to say that a levy was thus effected in that case. In close connection with the discussion of *Gates v. Boomer*, 17 Wis. 455, *Cornell v. Radway*, 22 Wis. 260, is reviewed, in which the levy upon the property was spoken of as a circumstance which, in that instance, preceded the advertisement of the property for sale.

The statute does not provide any method for levying upon real estate under an execution. By a long line of authorities it is sufficient in making a levy on such property if the sheriff who holds the execution does any overt act by which he unequivocally shows a formed intent to appropriate the property, so far as necessary, to satisfy the writ. Advertisement for sale obviously is such an act, but not the only one. An entry properly dated and signed upon the execution of a levy, a mere paper levy so to speak, the intent being to thus set aside the property for satisfaction of the writ, is sufficient, as will be seen by reference to the following of many cases that might be cited where the subject has been considered: *Fenno v. Coulter*, 14 Ark. 38; *Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70; *Duncan v. Matney*, 29 Mo. <sup>604</sup> 368, 77 Am. Dec. 575; *Hall v. Crocker*, 3 Met. 245; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358; *Rodgers v. Bonner*, 55 Barb. 9.

The general trend of the above authorities is well illustrated by the decision in the last case cited, which is well stated in the syllabus in these words: "In regard to real estate, it is not necessary that an officer holding an execution . . . go upon the property; it is not necessary that it should

be even within his view. He must undoubtedly do some act, make some entry or memorandum indicative of his intention; but having done that, with such purpose in his mind, although he makes no vocal proclamation of the fact, he has made a legal levy."

In *Hamblen v. Hamblen*, 33 Miss. 455, 69 Am. Dec. 358, the court said: "As the sheriff, in virtue of the execution, cannot rightfully enter and take possession of the lands, the levy cannot divest the possession of the defendant in the execution. At most, therefore, he can only make known, by some overt act or declaration, his intention to levy or raise the money by a sale of the land. This might be done by giving notice to the defendant of such intention, or by entering on the execution a description of the land."

Thus it will be seen that the complaint satisfies all the calls of the rules laid down in *French L. Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910, for an action by a judgment creditor, who has obtained a lien under his judgment on land fraudulently conveyed by the judgment debtor before the rendition of the judgment, to cancel the conveyance. The conveyance of the land in fraud of creditors, the subsequent rendition of a judgment by plaintiff, one of such creditors, the issuance of a valid execution to enforce such judgment, and a levy upon the land thereunder are distinctly stated. Nothing further is required, so the order overruling the demurrer must be affirmed.

By the COURT. So ordered.

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*A Conveyance in Fraud of Creditors* is binding upon the parties when fully consummated: *Charles v. White*, 214 Mo. 187, 127 Am. St. Rep. 674, and cases cited in the cross-reference note thereto. The conveyance is sometimes said to be void as against the creditors of the grantor, but it is merely voidable at their opposition. Where the statute condemns such conveyances as void, the word "void" means voidable, for the conveyance vests title in the vendee subject only to the right of defrauded creditors to avoid it: *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

*In Levying an Execution* it is not indispensable that the officer should take manual possession of the property: *Nighbert v. Hornsby*, 100 Tenn. 82, 66 Am. St. Rep. 736; *Boslow v. Shenberger*, 52 Neb. 164, 66 Am. St. Rep. 487. To constitute a valid levy on land the sheriff need not go upon the premises if he is sufficiently informed to describe it properly: *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575. Levy on land is unnecessary when the judgment is a lien thereon: *Farrior v. Houston*, 100 N. C. 369, 6 Am. St. Rep. 597.

STATE v. DISTRICT BOARD OF SCHOOL DISTRICT  
No. 1.

[135 Wis. 619, 116 N. W. 232.]

**MANDAMUS—Waiver of Summary Method of Trial.**—Where the relator consents to a summary method of trial in mandamus proceedings, he cannot complain thereof on appeal, at least if the substantial ends of justice have been met. (p. 1052.)

**MANDAMUS.—An Appeal from a Judgment** for the respondent in mandamus proceedings does not permit a review of an order denying a motion, made after judgment, to amend the petition. (p. 1052.)

**SCHOOLS.—A School Board may Suspend a Pupil Although No Rule** has been prescribed relating to the misconduct for which suspension is made. (p. 1055.)

**SCHOOLS—Misconduct Out of School Hours.**—School authorities have the power to suspend a pupil for an offense committed out of school hours and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. (p. 1055.)

**SCHOOLS.—Pupils may be Suspended Until They Apologize** for causing the publication in a newspaper of a satirical poem reflecting on the rules of the school. (p. 1056.)

Frank B. Dorothy, for the appellant.

Clarence C. Coe and Arthur E. Coe, for the respondents.

**620 BASHFORD, J.** This is an action of mandamus commenced by the relator against the District Board and G. J. Baker, principal of the high school of St. Croix Falls, to compel the reinstatement of two of relator's children who had been suspended by the principal. The petition, after the formal averments, states, in substance, that relator's two minor children had been continuous in their attendance upon the high school up to and including October 16, 1906, on which date they were suspended by the principal; that said suspension was illegal, but had been ratified by the district board and still continued in force; that said children cannot be readmitted to said school "unless they should apologize with a falsehood"; that the alleged cause of suspension of said children was a harmless act <sup>621</sup> by them and three other pupils of the high school, which occurred after the schools had closed on October 10, 1906, and not during school hours, or in the building where the school was maintained, or while said children were under the control of said principal; that at the request of a member of the senior class, who had written a harmless poem, being a takeoff on the rules of the

school, the offending pupils, who were younger and less experienced, took the writing to the office of a weekly newspaper published in the same village and requested the publisher to print the same in his paper if there was nothing wrong in it; that the publisher, deeming the same harmless, published it in part of the next issue of the paper. The poem was printed as part of the petition, but it is here omitted. It is alleged that the deportment of the children in school had been good and they had never violated any of the rules prescribed for its management. An alternative writ was issued on November 7, 1906, based upon the petition, with supporting affidavits.

The defendants in the return to the writ state, in substance, their belief that the publication of the poem in question in a public newspaper was detrimental to the interests of the school; that it not only tended to hold up said school, its discipline, and its teachers to public contempt and ridicule, but it tended toward awakening in the minds of the pupils themselves a feeling of hostility toward the teachers and a defiance toward the proper control and management of the school; that after the offense had been committed the children were advised of the harmfulness of their conduct and required to apologize, and upon their refusal they were suspended; that their reinstatement without suitable apology would be detrimental to the interests of the school and subversive of proper discipline therein; wherefore they ask that the petition be denied.

The relator demurred to this return on November 14, 1906. Thereupon the court, as appears by recitals in the <sup>622</sup> subsequent findings, appointed a referee with the consent of the attorneys for the respective parties to take and report the evidence relating to the precise grounds of suspension of relator's daughters and the substance of what was said between the teachers and said pupils previous to and at the time of their suspension. The referee made his report on the thirtieth day of November, which contains the testimony of the principal and two of his associates and of three of the pupils, including the relator's children. The principal testified that after he learned that the relator's children had taken the poem to the printing office, "I then told them that their penalty is that you are suspended until you apologize and pay forty cents each." In the apology "they were simply to admit that they did a wrong thing, that they were sorry for it, and if they came back to school they should promise to be obedient students." The other witnesses gave



substantially the same testimony. Thereafter and on December 24, 1906, the court filed an opinion sustaining the action of the school authorities, and in conclusion overruled the relator's demurrer to the return and dismissed his motion for a peremptory writ of mandamus, with costs. There was no request made on behalf of the relator to withdraw the demurrer and to file an answer, and no formal application was made to amend the petition until after the entry of judgment. No further testimony was taken, and on December 28, 1906, the court made and filed its findings in favor of the defendants and directing the dismissal of the petition. From the judgment entered thereon, bearing the same date, this appeal is taken. Thereafter and at a special term of said court, and on the thirty-first day of January, 1907, a petition theretofore filed on behalf of the relator, based on the evidence taken before the referee, asking leave to amend the petition by adding the words "and pay forty cents each," in their proper place, relating to the penalty imposed at the time of the suspension, came on to be heard, and <sup>623</sup> was denied by the court. There was an exception to the order, but no appeal has been taken therefrom.

The procedure adopted in determining the issues presented by the pleadings in this action was informal and irregular and cannot be approved. The demurrer to the return raised an issue of law, which should first have been disposed of, and, if overruled, leave should have been given to the relator, if so desired, to withdraw the same and amend his petition, or to interpose an answer if an issue of fact was to be presented. The court and the attorneys for the respective parties evidently treated the demurrer as an answer to the return, as a consent order was entered referring the only controverted issue to a referee to report the testimony. There was no material conflict in the evidence, and upon the report of the referee the court filed an opinion determining the issues of law and fact in favor of the respondents, and overruling the relator's demurrer to the return and denying his motion for a peremptory writ of mandamus. Formal findings were made in accordance with the opinion, upon which the judgment was entered. This summary method of trial has in the opinion of the court met the substantial ends of justice, and the relator by consenting thereto is in no position to complain.

Error is assigned by the appellant upon the refusal of the court to permit an amendment to the petition setting up the requirement of the school authorities that the suspended pupils should pay a penalty of forty cents each as a condi-

tion of reinstatement. Formal application to amend was not made until after judgment, and there is no appeal from the order denying the same. The appeal being from the judgment, the subsequent order is not reviewable upon this <sup>624</sup> record: *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417. As there was no conflict in the testimony on this subject, the variance between the pleading and the proof was not material, and the court might have found the fact in accordance with the evidence, or have ordered an amendment to the petition: Stats. 1898, sec. 2670. The court did consider the proof with respect to this penalty and very properly suggested in the opinion that no such condition should be attached to the reinstatement of the pupils. It has been held that a school board has no power to make or enforce a rule requiring pupils under penalty of suspension to pay damages for school property accidentally or negligently injured or destroyed: *Perkins v. Board of Directors*, 56 Iowa, 476, 9 N. W. 356; *Hollman v. Trustees*, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

We are not called upon to approve the practical wisdom displayed by the school authorities in dealing with the hasty conduct of thoughtless school children, prompted by an older mate and abetted by the publisher of the paper, or to justify the strong resentment that must have prompted the relator in appealing to the courts for redress. The exercise of a little charity, forbearance, and good nature might have avoided the controversy, which must have been attended with more or less serious consequence to the suspended pupils as well as to the school and to the litigants here represented. But the cause is before us for decision and must be treated like any other lawsuit.

The remaining assignments of error relate to the power of the school authorities to suspend the offending pupils for the misconduct, which was established by the undisputed evidence. The authority to suspend the pupils from the privileges of the school is denied by the appellant, unless the offense was a violation of some rule prescribed by the board, or involved moral turpitude, or was committed during school hours in the schoolroom or in the presence of the master <sup>625</sup> and other pupils. In support of this proposition counsel refers to *Board of Education v. Purse*, 101 Ga. 422, 65 Am. St. Rep. 312, 28 S. E. 896, 41 L. R. A. 593, *Murphy v. Board of Directors*, 30 Iowa, 429, and *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343. The decision of the Georgia court has no direct application. It was there held that the school board

might suspend children who had not been guilty of any violation of the rules of the school, but whose mother, undertaking to call in question the discipline of the teacher over one of the children, entered the schoolroom during school hours, and in the presence of the pupils there assembled used offensive and insulting language to such teacher. *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343, is readily distinguishable. There the school board had made a rule that no pupil should during the school term attend a social party, and a pupil by the permission of his parents violated the rule and was expelled. The court held that in prescribing the foregoing rule the board had gone beyond its power and invaded the rights of the parents. *Murphy v. Board of Directors*, 30 Iowa, 429, is directly in point, and supports the proposition stated by the appellant, but the decision is made to turn upon the extent of the power conferred by statute on boards of school directors. The statute provided that the directors should have power to dismiss pupils from school for *gross immorality or for persistent violation of the regulations of the school*; and it was also made their duty to aid the teacher in establishing and enforcing rules for the government of the schools. The words italicized are so written in the opinion as manifesting the power which may be exercised by the board. The plaintiff in that case was not charged with immorality or the violation of any regulation of the school. It is said in the opinion: "The statute does not authorize the board of directors to *suspend* pupils for acts tending to destroy the peace and harmony of the school, or inciting insubordination in others, or for ridicule of the directors, in the absence of any regulation prohibiting such acts."

<sup>626</sup> Section 439, Statutes of 1898, confers broader power upon such boards; it authorizes them to make all rules needful for the government of the school and to suspend any pupil for noncompliance with the rules made by themselves or by the teacher with their consent. But it is urged that in the instant case no rule had been prescribed by the board or by the teacher relating to the misconduct complained of. But that contention is fairly met by the decision of this court in *State v. Burton*, 45 Wis. 150, 30 Am. Rep. 706.

The case last cited was an action of mandamus to compel the reinstatement of a pupil in the school who had been guilty of misconduct which was of itself not a violation of any rule prescribed by the board or by the principal. It is said in the opinion: "While the principal or teacher in charge of a public school is subordinate to the school board or board of edu-



cation of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed, it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly."

While the offense for which the pupil was suspended is not stated in the Burpee case (45 Wis. 150, 30 Am. Rep. 706), it was apparently committed <sup>627</sup> in the schoolroom and in the presence of the teacher, and hence it may be urged that the two cases are distinguishable. We have been referred to no decision directly holding that the school authorities can suspend a pupil for misconduct after school hours, unless the offense is a violation of established rules, or is committed in the schoolhouse or upon the school grounds, or in the presence of the master and other pupils. There is abundant authority, however, that the school board or the teacher may make rules to govern the conduct of the pupils after school hours and punish a violation thereof by suspension from attendance upon school: *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387; *Hutton v. State*, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122; *Wayland v. Hughes*, 43 Wash. 441, 86 Pac. 642, 7 L. R. A., N. S., 352; *Kinzer v. Directors*, 129 Iowa, 441, 105 N. W. 686, 3 L. R. A., N. S., 496; *Jones v. Cody*, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160.

It is clear, therefore, that a rule might have been adopted by the school authorities to meet the situation here presented. This court in the quotation already made from the opinion in the Burpee case (45 Wis. 150, 30 Am. Rep. 706) recognizes certain obligations on the part of the pupil which are inherent in any proper school system, and which constitute the



common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject.

This court therefore holds that the school authorities have the power to suspend a pupil for an offense committed outside of school hours and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. Such power is essential to the preservation of order, decency, decorum, and good government in the public schools.

628 The school authorities considered the misconduct for which the pupils were suspended such as to have a direct and injurious effect upon the good order and discipline of the school. The relator's children were instrumental in causing the publication of the poem in a newspaper, which, supposedly, found its way into the homes of many of the children attending the high school, and who would be as much influenced thereby as if the writing had been printed and posted in the schoolroom or there circulated and read. The teachers are especially familiar with the disposition and temper of the children under their charge, and the effect which such a publication would probably have upon the good order and discipline of the school. The school authorities must necessarily be invested with a broad discretion in the government and discipline of the pupils, and the courts should not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised. The trial court has found that the act complained of does not evince an abuse of discretion on the part of the teachers, but rather an earnest desire to counsel, admonish, and discipline the pupils for their own good as well as for the good of the school. That conclusion is supported by the testimony and is here approved. This court is not called upon to decide as to the wisdom of the action of the school authorities, but only as to their jurisdiction within proper limits.

By the COURT. The judgment of the court below is affirmed.

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*The Right of School Boards to Prescribe Rules for the conduct and discipline of pupils is discussed in State v. Burton, 45 Wis. 150, 30 Am. Rep. 706; Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256. It has been affirmed that a rule requir-*

ing pupils to pay for school property which they may wantonly and carelessly break or destroy is not reasonable, and teachers have no right to make such rule and enforce it by chastisement of the pupils: *State v. Vanderbilt*, 116 Ind. 11, 9 Am. St. Rep. 820.

*The Relation of Teacher and Pupil* may extend after school hours: *State v. Oakes*, 202 Mo. 86, 119 Am. St. Rep. 792. As to the authority of the teacher to enforce discipline, see the notes to *Drum v. Miller*, 102 Am. St. Rep. 537; *Lander v. Seaver*, 76 Am. Dec. 164.

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## GATZWEILER v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[136 Wis. 34, 116 N. W. 633.]

**ACCIDENT INSURANCE—Subrogation by Insurer.**—In the absence of a stipulation in the policy to that effect, an insurance company is not subrogated, on the payment of an accident policy, to the rights of the insured against the one who caused the injury, since accident insurance, unlike fire insurance, is not an indemnity contract, but an investment contract, in which the only parties concerned are the insurer and the insured or the beneficiary. (p. 1060.)

Clarke M. Rosencrantz, for the appellant.

Sheridan & Wollaeger and Webb & Webb, for the respondent.

35 MARSHALL, J. Action to recover for a personal injury claimed to have been produced by defendant's negligence. The complaint stated facts sufficient to constitute a cause of action. Defendant answered in abatement that plaintiff when he was injured was possessed of a policy of accident insurance or contract to indemnify him against such injuries as the one in question, and that pursuant thereto before the action was commenced he received from the insurance company two thousand five hundred dollars on account of his injury, and that by reason thereof said company became subrogated to plaintiff's right of action against the defendant to the extent of said two thousand five hundred dollars, and so interested on that account in the subject of the action that it cannot properly proceed without its presence as a party to the litigation.

Plaintiff demurred to the answer for insufficiency and the demurrer was sustained. Defendant appealed.

The appeal presents the question of whether the rule that when an insurance company has been compelled to pay or has

paid a loss covered by its policy, it is thereby subrogated to the rights of the insured to the extent of such payment against a third person who wrongfully caused the loss, applies to a payment made by an accident insurance company on its policy to a person wrongfully injured by another. The rule in case of fire insurance risks is well settled: *Swarthout v. Chicago etc. R. Co.*, 49 Wis. 625, 6 N. W. 314; *Hustisford F. Mut. Ins. Co. v. Chicago etc. R. Co.*, 66 Wis. 58, 28 N. W. 64; *Wunderlich v. Chicago etc. R. Co.*, 93 Wis. 132, 66 N. W. 1144. It must be conceded that if under such rule the insurance company in <sup>36</sup> question by equitable assignment succeeded to the right of the plaintiff against the defendant to the amount paid by it, it is a necessary party to the litigation and the demurrer should have been sustained: *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606; *Wunderlich v. Chicago etc. R. Co.*, 93 Wis. 132, 66 N. W. 1144; *Allen v. Chicago etc. R. Co.*, 94 Wis. 93, 68 N. W. 873; *Sims v. Mutual F. Ins. Co.*, 101 Wis. 586, 77 N. W. 908.

The general effect of the cases cited is that upon payment by an insurance company to another on its contract of fire insurance on account of a loss caused by a third person, in case of its only partially repairing the damage suffered by such other, it becomes by equitable assignment the owner pro tanto of the claim of such other against such person, and both parties interested are necessary to an action to enforce payment of compensation by such person, and in case the payment is a full legal equivalent for the injury, the entire claim of such other by such assignment passes to the insurance company, leaving the former no cause of action against such person.

The doctrine aforesaid is based on the theory that in a contract of fire insurance the company is a surety, and so upon the general equitable principles of subrogation when it, as indemnitor, pays a loss caused by the negligence of a third person, its relation with such person is that of surety and principal obligor. It has all the rights against the latter which the principal creditor, so to speak, formerly had. The insured has one claim which he can enforce against either party, but he can have but one satisfaction, and the party primarily liable is relievable only by assuming the burden.

The right of the insurance company in the circumstances suggested, as stated by text-writers, "is based upon the equitable doctrine that where one has been obliged to pay money to another by the nonfeasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying,

as by his direct obligation toward <sup>37</sup> the party suffering the loss he may be compelled to do, shall be allowed, indirectly and through the right which the injured party had, to compel the wrongdoer to bear the burden which was imposed by his fault; although between him and the wrongdoer there is no direct relation upon which to found a cause of action": 2 May on Insurance, 4th ed., sec. 454.

Counsel for appellant, though manifestly having made a careful study of the subject, has been unable to produce any authority for extending the principle stated to injuries to the person caused by wrongful conduct of another, where the person injured holds a policy of casualty insurance in whole or in part covering the loss.

The case seems to turn on whether a contract of casualty insurance is one of indemnity like that of fire insurance. While there is some conflict, by the great weight of authority a life insurance contract is not of that kind, but is strictly a valued policy; a stipulation to pay a sum certain upon the happening of a specified contingency: Bacon on Benefit Societies and Life Insurance, sec. 163; Joyce on Insurance, sec. 26; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; Emerick v. Coakley, 35 Md. 188. Under such a policy the amount payable has no necessary relation to damages actually suffered by the beneficiary. The insured buys and pays for the right to have from another a specified sum upon the happening of a specified event. Payment for the insurance is in the nature of an investment. The money value of the thing covered by the insurance does not enter into the transaction at all.

A policy of casualty insurance, ordinarily, has much the same features as one of life insurance, though, it is true, it more nearly than one of life insurance has the indemnity feature. The amount stipulated to be paid is a fixed sum as to each particular injury specified or is computable without any such definite data as in case of the loss of property.

Our attention has been called to cases where it has been held that though no actual loss is suffered, or the loss is partially <sup>38</sup> repaired by voluntary contributions of a friendly or charitable nature, as in *Globe Acc. Ins. Co. v. Helwig*, 13 Ind. App. 539, 55 Am. St. Rep. 247, 41 N. E. 976, *Hart v. Nat. M. Acc. Assn.*, 105 Iowa, 717, 75 N. W. 508, and *Evansville etc. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39, such reparation does not inure to the benefit of any party liable for the loss. The principle thereof does not seem to apply to a situation where the payment is by one liable for



the damage. In the latter case there is good reason for applying the doctrine of subrogation, while in the former there is none whatever. So such cases are not helpful in reaching a right conclusion as to the one in hand.

Counsel for appellant recognizes that in *Aetna L. Ins. Co. v. Parker & Co.*, 30 Tex. Civ. App. 521, 72 S. W. 621, the general question we have here was decided adversely to his contention, but argues that the logic of the opinion upon which the decision rests is unsound. Such decision was approved by the supreme court of Texas, as indicated by counsel for respondent: *Aetna L. Ins. Co. v. Parker*, 96 Tex. 287, 72 S. W. 168, 580, 621. The court reasoned that casualty insurance is more like life than like fire insurance, and that it should be classed with the former rather than with the latter as to the right of subrogation, because in case of casualty insurance the right of the assured is not determinable by any definite rule for computing the money equivalent for the damages, as in case of fire insurance; that the right to recover the stated or other sum is a property right bought and paid for by the assured as in case of life insurance, not a mere right to indemnity for a definitely ascertainable pecuniary loss. If it be true that in the absence of some stipulation to the contrary a contract of casualty insurance is not, for the reasons stated by the Texas court, one of indemnity giving rise in the circumstances of this case to the right of subrogation as against the party wrongfully causing the injury, and yet the parties might give it that character by a stipulation to that effect, so far as we can discover there was no such stipulation in the contract in question.<sup>39</sup> It is alleged in the answer that the respondent "at the time he was injured held a policy of insurance or contract of indemnity against personal bodily injury," etc., and "that he recovered two thousand five hundred dollars for the injury in question pursuant to such contract." though it is quite plain that what is pleaded as to the policy being a contract of indemnity is not based on any stipulation therein to that effect, but is the pleader's idea of the legal effect of a policy of casualty insurance. We are not inclined to adopt counsel's view, but rather to hold that such a policy is an investment contract giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy; that if such a company desires protection against loss caused by the wrongs of third persons who would ordinarily be liable, they must do so by the contracts they make; that in the absence of a feature

expressly making the policy of insurance an indemnity contract, it should not be regarded as such, but held to be an investment contract in which the only parties concerned are the insurer and the assured or the beneficiary. It follows that the order sustaining the demurrer must be affirmed.

By the COURT. So ordered.

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*An Accident Insurance Company has been Denied Subrogation to the Right of Action* which the assured has against a third person for negligently causing his injury. So has a life insurance company been denied the right to recover for the wrongful death of a person whom it has injured: See the note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 504.

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## BONNETT v. VALLIER.

[136 Wis. 193, 116 N. W. 883.]

**CONSTITUTIONALITY OF LAW—Who may Question.**—A person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof. (p. 1065.)

**UNCONSTITUTIONAL LAW—Enjoining State Officers from Enforcing.**—An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only. (p. 1078.)

**UNCONSTITUTIONAL LAW—Status and Effect.**—An unconstitutional legislative enactment, though law in form, is in fact not law at all. "It confers no rights; it imposes no duties; it affords no protection; . . . it is in legal contemplation as inoperative as though it had never been passed." (p. 1065.)

**UNCONSTITUTIONAL LAW—Duty of Court to Condemn.**—A court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate, and thus uphold the constitution as superior to legislative will. (p. 1065.)

**CONSTITUTIONAL LAW—Presumption in Favor of Act.**—In testing legislative enactment as regards its constitutionality all reasonable doubts must be resolved in favor of legislative power. (p. 1066.)

**CONSTITUTIONAL LAW—Limitations on Police Power.**—Legislative authority in the field of police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those "unalienable rights" with which all men are endowed and to secure which "governments are instituted among men." When it goes beyond that it enters the field of the destructive, and so offends against some constitutional limitation. (p. 1066.)

**CONSTITUTIONAL LAW—Police Power—Province of Courts and Legislature.**—What constitutes a proper subject for regulation under the police power is a judicial question. Matters of mere expediency in respect thereto are wholly for legislative cognizance. What is reasonable is primarily for legislative judgment, but in the ultimate it is a judicial question. There must be reasonable ground, having regard for the public welfare, for the interference, and the means adopted to accomplish the purpose in view must be reasonably necessary. (pp. 1066, 1067.)

**CONSTITUTIONAL LAW—Police Power—Province of Courts and Legislature.**—What is reasonable in any given case being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom, but where the interference is plainly excessive, the duty of the court to repel the encroachment is absolute. (p. 1067.)

**CONSTITUTIONAL LAW—Reasonableness of Police Regulation.**—What is reasonable is not necessarily what is best, but what is fairly appropriate to the purpose, under all the circumstances. The scope of the term "reasonable" as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution, adapting the same to modern conditions. (p. 1067.)

**CONSTITUTIONAL LAW—Reasonableness of Police Regulation.**—In determining what is reasonable the court must look to the language of the statute and the facts which appear because of judicial knowledge thereof or otherwise. (p. 1068.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—The construction and maintenance of tenement, lodging, and boarding houses is a proper subject for legislative regulation, but the degree of regulation permissible varies greatly according to circumstances. (p. 1068.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A police regulation in the field mentioned in the last foregoing paragraph which is not excessive as to a large city might be held unreasonable if applied to the state at large. (pp. 1068, 1069.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—Limitations in the field suggested impossible or impracticable to comply with, either because of absence of facilities necessary therefor, or expense so great as to render the regulation prohibitive in many situations, are unreasonable. (p. 1070.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A general police regulation down to minute particulars of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance, and containing no provision for such approval, is unreasonable. (p. 1070.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—Where the penal feature of police regulation is so severe, having regard to the nature of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging-house purposes and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws, rendering the act void irrespective of whether its provisions would otherwise be valid. (p. 1072.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—To penalize good faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point



of view. It denies the equal protection of the laws; it violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property, and violates every principle of civil liberty. (pp. 1074, 1075.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.—**

A law regarding the construction of tenement houses requiring street courts to be six feet in width between the lot line and the opposite wall of the building—that is, under all conditions and in all localities to be at least six feet wide—is an unreasonable interference. (p. 1070.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.—**

A police regulation making every habitation, regardless of locality, a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping-room in the house, and regulates the maintenance of the house as regards light, location of beds, equipment with water-closets, etc., is an unreasonable interference. (p. 1076.)

**CONSTITUTIONAL LAW—Regulation of Tenement Houses.—**

There is a wide interval between the ideal and the practical. The latter standard should prevail as to legislative regulations as to the construction and maintenance of tenement, lodging, and boarding houses. Common sense as to what is reasonable in such matters should prevail, not the extreme views of well-meaning persons, as to what is for the best. (p. 1077.)

**CONSTITUTIONAL LAW—Statute Void in Part.—**

Where parts of a law viewed by themselves are unconstitutional and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable; otherwise not. In case the act as a whole has one or more invalid features pervading the entire act, it must be regarded as an entirety and all be condemned as unconstitutional. (p. 1078.)

(Syllabi by the court.)

Frank L. Gilbert, attorney general, and A. C. Titus, first assistant attorney general, for the appellants.

Rose, Witte & Rose, for the respondent.

Edward W. Frost, on behalf of the Children's Betterment League of Milwaukee.

**195 MARSHALL, J.** Action by a property owner specially affected by chapter 269, Laws of 1907, against public officers required by the terms of such chapter to enforce its provisions, to restrain them from doing so, by interfering with the plaintiff in the construction of a building upon a lot owned by him in the city of Milwaukee.

**196** The complaint sets forth facts sufficient to entitle plaintiff to the relief prayed for if the law referred to is unconstitutional. Among others these things are substantially stated: Plaintiff entered into a contract in writing with a construction company for the building of a four-story flat building upon a lot owned by him in the city of Milwaukee, Wisconsin, having a frontage of fifty feet on one of the streets of said city and a depth of one hundred and fifty feet. The



plans for the building were duly approved by the building inspector of said city before the contract was let and they complied in all respects with chapter 269, Laws of 1907, except as to street courts. The plans call for a building forty-four feet wide, except the rear portion for a length of twenty-two and one-half feet, which is fifty feet wide. For a distance of seventy-two feet from the street on each side of the building there is to be an open space known as a street court three feet wide, open from the ground to the sky, whilst the law aforesaid required said courts to be six feet wide. The courts as planned satisfy all reasonable necessities. To require them to be six feet wide would be unreasonable, would render his plans for the building useless, his lot unsuitable for such a building, and irreparably damage him. Defendants, unless enjoined by the court, in case the construction company proceeds with the building as planned will cause plaintiff or his agents, or the officers, agents and employés of the company to be arrested, his permit to construct the building will be revoked, and he will be prevented from going on with the work as planned. Said law is so unreasonable as to be unconstitutional and void. It applies to all towns, cities and villages of the state, whereas it is impracticable to comply with it in the absence of a sewer system and system of water supply. There are many such cities, villages and towns where it would be impossible to equip a building as required by the law. Plaintiff and all those who may act in his behalf in the construction of a building upon <sup>197</sup> his lot as planned are menaced with arrest and prosecution under said law for each and every day they persist in the work. Plaintiff has no adequate remedy at law for the injuries to him threatened as aforesaid.

An interim injunction was granted restraining defendants from doing the things pending the action which the same was instituted to permanently restrain, a bond for two hundred and fifty dollars being given.

The defendants demurred to the complaint for insufficiency and the demurrer was overruled. Defendants appealed from the order generally. It covered the ruling as to the demurrer and the one regarding the temporary injunction.

The defendants entered a motion in this court to dismiss the action upon the ground of its being an action against the state and to dissolve the temporary injunction, and for a temporary injunction restraining the plaintiff and all persons

acting for him from proceeding with the construction of the building mentioned in the complaint pending the action.

<sup>199</sup> The complaint shows that respondent would be specially injuriously affected by enforcement of chapter 269, Laws of 1907. Therefore we will regard as the sole matter submitted for consideration that of whether such law is unconstitutional.

That it is competent under the police power by legislative enactments to regulate the construction and maintenance of tenement and lodging houses to some extent, and that legislative activity in that field within all proper limits is commendable, are not open to serious controversy. In some situations such regulations are imperative in the interest of public safety and public health. The court approaches the <sup>200</sup> consideration of the law in question fully appreciating, it is thought, the worthy motives of those within and those without the legislature to whose efforts the legislation is attributable. Good intentions in the passage of a law or a praiseworthy end sought to be attained thereby cannot save the enactment if it transcends, in the judgment of the court, the limitations which the constitution has placed upon legislative power. In such cases the law, so called, is not a law at all. As has been aptly said: "It confers no rights; it imposes no duties; it affords no protection; . . . it is, in legal contemplation, as inoperative as though it had never been passed": *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178.

The appeal is often made to courts directly or indirectly to look favorably upon a law because of the worthy purpose in the minds of the promoters in securing its place upon the statute books. That cannot go to the extent of causing hesitancy or failure to condemn a legislative act which clearly exceeds the law-making power. Courts have their duty to perform in a case like this, and, however unpleasant it may be, they cannot turn aside on any account whatever, even in the face of manifestly the very best of intentions upon the part of the lawmakers and promoters. The greatest constitutional lawyer of our country during its early history aptly said: "Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible

and patriotic in appearance, and which has the public good alone confessedly in view. Human beings, we may be assured, will generally exercise power when they get it, and they will exercise it most undoubtedly under a popular government <sup>201</sup> under the pretense of public safety or high public interest. . . . They think there need be little restraint upon themselves."

Again, they sometimes, it seems, lose sight of the fact that there are such restraints, and so it becomes necessary for the courts in the performance of their constitutional duty to call that to mind. The fathers foresaw that in writing into the constitution those significant words: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles": Wis. Const., sec. 22, art. 1.

The general principles by which the constitutionality of such a law as the one in question must be determined have been so often, so recently, and so fully discussed here that it is useless to go over the ground again at this time. It is sufficient to refer to the following: *State v. Kreutzberg*, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098, 58 L. R. A. 748; *State v. Froehlich*, 115 Wis. 32, 95 Am. St. Rep. 894, 91 N. W. 115, 58 L. R. A. 757; *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500, 3 L. R. A., N. S., 1115; *State v. Redmon*, 134 Wis. 89, 126 Am. St. Rep. 1003, 114 N. W. 137, 14 L. R. A., N. S., 229.

The general effects of the authorities are these: An act of the legislature is to be sustained unless it violates some constitutional limitation beyond reasonable question. Such limitations exist by implication as well as by express prohibition. A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those "unalienable rights" with which "all men are endowed" and to secure which "governments are instituted among men," and must not violate any express prohibition or requirement of the state or national constitution. When it goes beyond the scope indicated and enters into the dominion of the destructive, it is illegitimate and offends against some constitutional restraint, express or implied, and though law in form, it is, as before said, not <sup>202</sup> law at all, and whether an act purporting to be within the field of police power is reasonable or not, in the ultimate, is a judicial question. There must be reasonable ground for the police interference and also the means adopted must be

reasonably necessary for the accomplishment of the purpose in view. So in all cases where the interference affects property and goes beyond what is reasonable by way of interfering with private rights, it offends against the general equality clause of the constitution; it offends against the spirit of the whole instrument; it offends against the prohibitions against taking property without due process of law, and against taking private property for public use without first rendering just compensation therefor.

We pass over, as already indicated, as not open to fair controversy the question of whether the subject dealt with by the law before us is one proper for legislative interference under the police power. So we come at once to the secondary question of judicial cognizance of whether the manner of interference is reasonable.

"Small limitations," it is said, "of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil," while "larger ones could not be, except by the exercise of the right of eminent domain": *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27. Note the significant words "small limitations." What constitutes such limitations must necessarily be determined with reference to the exigencies of the particular situation. So actual destruction of private property under the police power in some cases is proper, while very little interference in others might be held improper: *State v. Redmon*, 134 Wis. 89, 126 Am. St. Rp. 1003, 114 N. W. 137, 14 L. R. A., N. S., 229. There is no certain test by which what is reasonable in any given case can be definitely measured. It is a matter resting in human judgment. So the line between what is reasonable and what is not, marking the boundary of constitutional authority of the <sup>203</sup> legislature, is one often difficult of ascertainment, rendering it very necessary, in all doubtful cases, for the judiciary to defer to the wisdom of the legislature. But when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the constitution is absolute. It has no discretion in the matter: *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

It is said "that an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space'": *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836. It is not synonymous with "expediency." Matters of that sort are wholly for legislative



cognizance. As applied to means to a legitimate end it suggests not necessarily the best or the only method, but one fairly appropriate at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions. Those principles have not changed in the years that have elapsed since the constitution was formed. They are unchangeable, and are of no less but rather of greater importance than they were when the framers of the constitution attempted so carefully to guard them.

"Reasonable," as applied to a law, is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what "from the calm sea level," so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their <sup>204</sup> common nature or otherwise: *People v. Durston*, 119 N. Y. 569, 16 Am. St. Rep. 859, 24 N. E. 6, 7 L. R. A. 715; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49.

It must be conceded that the degree of regulation of the construction, maintenance, and manner of occupancy of tenement houses and lodging-houses which is reasonable must vary greatly according to density of population and other circumstances. What would be reasonable in a very large city might be highly unreasonable in the country or in the small cities and villages of the state. Requirements as to large structures to be occupied by many persons might be very unreasonable as to the smaller class of the same general class of structures to be occupied by very few persons. Again, requirements as to water service and fire hazard, not difficult to comply with by moderate expense in cities where there is a water and sewer system which are essential to the equipment of buildings in those respects, might be plainly reasonable, while such requirements in country districts and the smaller cities and villages where there are no such facilities, might be just as plainly absurd. The character of the structure and its equipment, as regards the expense required to comply with the law in a large city, where the added cost

is warranted, not only by the degree of danger to be guarded against but by the returns a proprietor could reasonably expect to derive from his investment, might be within the boundaries of reason, while the same requirements as to sparsely settled districts and in small cities and villages, where the conditions as to such dangers and the expense that could prudently be incurred in erecting the structure are entirely different, might be plainly outside the boundaries of reason. In *Tenement House Dept. v. Moeschen*, 179 N. Y. 325, 335, 72 N. E. 231, the court observed that an act of the nature of the one under consideration "necessary for the city of New York might not have the slightest application to Albany or <sup>205</sup> Buffalo," and in *Health Dept. v. Rector etc.*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, that "no one would contend that the amount of the expenditure which an act of this kind may cause . . . is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges."

Turning to the law in question, in the light of the foregoing, the most striking general feature which challenges our attention is that it applies to every part of the state, country districts, small cities, and villages—every portion is subject to the same degree of regulation as the city of Milwaukee, notwithstanding the obvious fact, as suggested in effect in the New York case above cited, that the conditions calling for such interference are so widely different that it would seem need for classification would have occurred to the leg-

islative mind at once, in dealing with the matter, especially in view of the requirements which are entirely unsuitable to locations where water and sewer systems do not exist, and the calls for an expensive grade of buildings common to <sup>206</sup> large cities, but which no prudent man would seriously think of erecting in some situations unless he could afford and designed to devote his means to charitable uses.

We find the law framed after the manner of the one in New York, specially designed for the great city of New York and said by the New York court, as indicated, that it might be entirely unsuitable for even such cities as Albany and Buffalo, with many new features added to the model and many of those presented in such model much more severe, and then the whole applied to every part of the state.

To illustrate what has been said we will refer to a few of the most prominent features of the law.

Subdivision 2, section 1636—162, Statutes (Laws 1907, c. 269), containing the requirement specially complained of, calls for lot-line courts reaching from the street, when permissible at all, to be at least six feet wide for all buildings four stories or less in height. So even for a small two-story structure to be occupied by two families, anywhere in the state, it must not be so placed that in case of a street court the width will be less than six feet. No such severe provision is found in any law of the kind anywhere else, even in the case where it is restrained in its effect to the largest city in the United States. We have no hesitancy in saying that the interference as to this matter, considering its general nature, is unreasonable. Whether it would in all respects bear the constitutional test, even as to large cities, as regards small two-story structures to be occupied by two families only, and a large class of houses that fall under the designation of lodging or boarding houses, especially in the outskirts of such cities, is not entirely free from doubt. We might well add, it is clearly on the border line, if not across it, of what is reasonable. We do not need to go further at this point and will not do so, but leave the matter for legislative consideration in the future with such caution as what has been said may afford.

<sup>207</sup> Section 1636—169 requires every tenement house down to the most insignificant of such structures anywhere in the state to be equipped with substantially all the ordinary modern conveniences as to water supply common to cities where there is a public sewer system and public water system. That, it seems, no one taking a common sense view of the



matter can considerably claim is reasonable. It is impracticable in the extreme—impossible would probably not be too strong a term to use—to comply with such requirements in many, even most, portions of the state. The result is that, except within a very limited area, the construction and enjoyment of even the most insignificant kind of tenement houses is, in effect, prohibited by the law. It is not likely that the promoters of the legislation, or the legislature, deliberately intended any such result. Presumably their minds were so engrossed with the importance of such regulations as to large cities, and possibly only to the largest city of this state, that the effect of the law upon the rest of the state was overlooked. Manifestly, the provision is highly unreasonable in the general sense, and whether in some of the particulars it does not go too far even for special localities is not entirely free from doubt.

The law contains specific requirements down to the minutest details as to the construction of stair halls and their accessories and fire-escapes, and, not content with the result of following such minute specifications, the legislature added a requirement that the stairs must have at least a carrying capacity, with a factor of safety of four, of seventy-five pounds per square foot when loaded over the entire area: Sec. 1636—153. That is to say, by the terms of the law, though a person constructs his stairs in all respects according to the precise specifications thereof, regardless of the size of the building or its location, if they do not possess the required carrying capacity, he and all concerned with him are subject <sup>208</sup> to be treated as criminals and to suffer the severe penalties prescribed.

There are particular requirements as to the method of construction to be followed too numerous to mention—in the whole, such as to enhance the probable expense of building a tenement house to such an extent as to practically prohibit the construction of any outside of cities of the first or second importance. It is to be noted that in the New York model, which was apparently the guide and which applies, as indicated, only to the city of New York, a special exception from many provisions of the law was made for wooden tenement houses, not exceeding two stories in height, to be occupied by not more than four families and erected outside of prescribed fire limits. The act in question contains no saving clause at all for the protection of parties desiring to erect modest two-story tenement houses anywhere in the state. In that respect the act must be regarded, as to some situations



at least, as practically taking property without due process of law, and taking it for public use without rendering just compensation therefor, in violation of the constitutional provisions on those subjects, and violative of other constitutional restraints not necessary to mention. Whether these regulations are not, in many features, too severe even for the larger cities may well be the subject for study in case of a further effort to legislate in respect to the matter.

A further general feature of the law which arrests our attention is this: It is so particular and technical in its requirements that an ordinary person would not be reasonably safe in entering upon the work of constructing such a building as it deals with without the assistance of an expert architect to make the plans and specifications and even details, expert mechanics to execute the scheme, with the architect to supervise such execution, and, perhaps, a competent adviser as to the legal aspects of the matter, and, even then, the builder and all concerned with him in the matter, however <sup>209</sup> innocent so far as bad intent is concerned they might be, would be in considerable danger of many criminal prosecutions for as many separate violations of law, and being penalized in large sums of money and cast into and confined in jail besides, and yet there is no provision in the act to enable the builder before entering upon the work to obtain a certificate of sufficiency of his plans from some official source, which will protect him in case of a good faith execution of the scheme. It is a very serious question as to whether that does not render the law unreasonable in the whole, especially since it reaches every part of the state, preventing anyone from enjoying the ordinary privilege as heretofore of building a simple inconsequential two-story house for two families, which is commonly erected by the proprietor himself or by the use of ordinary mechanics and without the use of a skilled or perhaps any architect. Absence of such a provision from the act is peculiar to the one in question. There is much reason to suppose it was omitted by oversight. We cannot think it was omitted by design. The New York model covers the subject in a most particular way: Secs. 121, 122 of the Tenement House Act, 3 Birdseye, Rev. Stats., Codes & Gen. Laws of New York, p. 3638. The same is true of the New Jersey law (Laws 1904, c. 61, sec. 182), and likewise of the law of Connecticut (Laws 1905, c. 178, sec. 25).

There is another general feature of the act which arrests our attention, and that is the penal clause, particularly in

view of the recent decision of the federal supreme court, that where a police regulation is sought to be made effective by danger of such punishment for violations thereof and such burdens upon unsuccessful efforts even to test its validity as to intimidate parties affected thereby from resorting to the courts in the matter, as to practically prohibit them from seeking any judicial remedy for supposed wrongs inflicted upon them, it denies to them equal protection of the laws <sup>210</sup> and renders the whole act void irrespective of whether its provisions would otherwise be valid.

We must view the penal provision in the light of the situation before adverted to, that the act is replete with requirements down to minor details and of a technical character in some respects, relative to buildings of the character dealt with, regardless of locality and in many respects regardless of the character of the structure other than the characteristics of two stories and designed occupancy or occupancy by two or more families, in the whole, as before indicated, not practicable for one to follow without expert advice in preparation and execution, and not practicable to follow safely in all respects under those circumstances, and yet there is no provision for official approval of plans and specifications in advance of execution, so the builder and all concerned with him must proceed, if at all, wholly at their peril of having many violations of as many requirements discovered to have occurred, without any bad intent, and after it is too late to remedy the difficulty without serious and perhaps ruinous loss and too late to avoid in any way the severe punishments prescribed.

The penal clause is as follows:

"Sec. 1636—176. Every person who shall violate or assist in violating or who shall fail to comply with any of the provisions of this act or who shall resist the enforcement of any provision of this act shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in the county jail not less than fifteen days nor more than sixty days or by both such fine and imprisonment in the discretion of the court, and for each and every day after the first that such violation shall continue such person shall be subject to a fine of ten dollars in the discretion of the court in addition to that hereinbefore provided."

It will be noted that a person may unintentionally violate some one or any number of provisions, and upon demand be-

ing <sup>211</sup> made upon him by the authority charged with the duty of enforcing the law, however much he may think he is not at fault as to any particular matter, he is made guilty of a second offense if he fails to comply, and in case of a prosecution being commenced against him as to any such violation—and, we repeat, there may be many—and there be an entire absence of any bad intent, he will become guilty of a third offense, if he resists prosecution by standing trial, and the situation as to him will apply to all concerned with him, regardless of any intent to disobey the law or to unreasonably resist its enforcement. Further, upon its being determined judicially that any violation has occurred—and we again repeat there might be many—and without bad intent, no time is given to remedy the departure from the law; every day of the continuance will be counted, and penalty upon penalty may be imposed till the violation shall be effaced, regardless of the diligence of the guilty person to remedy the wrong, and even regardless, as to many persons that might be guilty, of the possibility of their being competent to remedy the wrong at all. It is thus not difficult to see how under the law a person of moderate means, though acting in the best of good faith and with diligence, might, in the construction of a single building of moderate dimensions, have penalties accumulated against him to an enormous amount, and be so menaced by the fact that every failure to comply with the law would add to the load, and every instance of an application to the courts by way of attack or defense, regardless of good faith in the matter, would further add thereto, that no one but a man of courage would take the chances of building a structure affected by the act, especially in portions of the state where expert assistance in the matter is either not obtainable at all or obtainable without such expense as to render the act prohibitory.

Except as to the element making mere resistance to the enforcement of the act a separate offense, the penal provision <sup>212</sup> would look somewhat different if a way were provided for official approval of plans and specifications at the outset, affording a reasonable basis for holding the builder guilty at least of negligence, constructive or actual, in case of his failing in execution, though even with the exception and the additional provision the penal feature would not be entirely free from difficulty. As it stands, the feature penalizing mere resistance to the law is clearly unreasonable and indefensible from any point of view. The effect of it would be to take property without due process of law, to violate section



9, article 1, of the state constitution guaranteeing to every person a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character, and to violate every principle of civil liberty entrenched in the constitution.

We have read and reread the act without success to see if the particular matter under consideration can be reasonably seen to refer to resistance to its enforcement in any other sense than defending against a prosecution commenced under it. If this were the only difficulty with the penal clause, it might be condemned without affecting the rest, but, taking the clause as a whole, in view of the general character of the act, combined with the significant absence of any facility for a prospective builder to reasonably protect himself by obtaining in advance of commencing his work an official approval of his plans, it seems that the dangers are so many and so great that an ordinary person would be quite liable to be intimidated into surrendering his right to use his real estate for tenement house or lodging-house purposes rather than take the chances, or, if he did not make such surrender and proceeded to enjoy such right as circumspectly as practicable, be intimidated into submitting to the demands of those charged with the enforcement of the law and to prosecutions under it, regardless of whether he thought himself innocent or not. This feature of the act pervades and condemns <sup>213</sup> the whole under the doctrine of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. ed. 714, 13 L. R. A., N. S., 932.

There are other features of the law which arrest our attention, but whether they are excessive interferences or not need not necessarily be decided, though we feel warranted in saying that if it were required to pass upon them, the questions involved would be extremely difficult to solve in favor of the act. We will refer to a few of such features. There is a provision preventing the owner of a corner lot from using for his building more than eighty per cent of the area, and of any other lot from using over sixty-five per cent; a provision prohibiting transoms or movable sash, and requiring in nonfireproof buildings in the stair halls fireproof self-closing doors and fixed iron sash filled with wire glass; a provision requiring, in the absence of a special permit to the contrary, all rooms to be whitewashed at least twice every year in particularly specified months; a provision prohibiting a person from permitting another not a member of his family to have the use of a room in his house for sleeping



purposes without such house being classed as a lodging-house and subjected to numerous and somewhat petty requirements as to such places, including the keeping of "a proper light" burning in the common hallway near the stairs upon the first and the second floors from sunset to sunrise every night throughout the year and upon all other floors until 10 o'clock in the evening unless officially otherwise directed. The extreme nature of that interference can only be appreciated by keeping in mind that it applies to every portion of the state and to every habitation where the proprietor allows even one person, not a member of his family, to have a sleeping apartment therein. Further, in this connection, it should be noted that every lodging-house is required to have at least one water-closet. That, of course, means a water-closet such as is commonly constructed in dwelling-houses in localities where there are water and sewer facilities rendering it practicable. <sup>214</sup> So a person in any part of the state is prohibited from allowing another not a member of his family to have a sleeping apartment in his house unless the habitation is equipped with a water-closet. Further, there is an arbitrary requirement for rooms generally to be at least nine feet high in the clear—that to apply, of course, to lodging-houses as well as tenement houses; and the unusual height of rooms, as will be seen, is not to be restricted to the extent of the ordinary finish in such unpretentious buildings as are commonly constructed in the country and small communities. We note in this connection that the law the act was modeled after does not contain such severe provisions. The further provision should not be overlooked (section 1636—173), prescribing particularly how beds shall be located in a bedroom, and requiring, generally, under all conditions, a person having a tenement or lodging house to consult and conform to such a petty requirement as that in case of his allowing two beds in a room they shall be so located as to have at least two feet on each side and receive direct light from windows unobstructed, such requirement to extend to any case where a person allows another not a member of his family to have a sleeping apartment in his house. How anyone could expect that such a petty interference with individual rights could be squared with common sense in the light of a rational idea of the principles of civil liberty is not perceived. What good reason is there in classing every habitation regardless of character or locality, if at all, as a lodging or boarding house, and to minutely, if at all, regulate its use, merely because of the proprietor or lessee permitting a person not a

member of his family to have a sleeping apartment therein? We cannot imagine any.

There are other provisions that might be referred to which are worthy of some attention, especially in view of the general character of the act. Sufficient, however, has been said to indicate that it cannot stand, and that in case of a further <sup>215</sup> effort to legislate in the same field the particular features condemned should be avoided and others should be studied with care; appreciating that law-making power is quite closely fenced about by wise limitations and must proceed, in the field of police regulation, reasonably at every step. Common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations. An eminent author aptly said: "There is a wide interval between the ideal and the practical." If what is here said were not so, individual rights as to persons and property would be only such as sovereign power, acting through the legislature, might see fit to recognize, the inalienable rights commonly supposed to be sacred and inviolable would be changed into mere uncertain privileges, and regulation, so called, might easily become destructive of that which we have been wont to believe was essential to life, liberty and the pursuit of happiness. It must be appreciated that "small limitations" as to the enjoyment of property, having regard to the nature of the case, measures the scope of police interference. Beyond that lies the broad field where the individual is sovereign, so that it cannot be entered at all for private purposes, and as said in *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81, not for public purposes except by the power of eminent domain.

We may well point the last foregoing by quoting from *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 864, this language: "The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. . . . We give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible <sup>216</sup> judgment, not as a child in his nonage, and is left free to work out his destiny. . . . So while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate ex-

ercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant. . . . It is sought to uphold the law because 'it is a police regulation.' It is argued that 'the people have passed the law; let not the courts interfere with it. If the people are dissatisfied they may amend or repeal it.' "

We were favored with a similar argument in this case, but such arguments, of course, are of no avail.

In closing we should say we have examined with care all authorities and laws of a somewhat similar character to the one under consideration cited to our attention, and extended our researches much further. It does not seem necessary to refer to such laws and authorities in detail. We have found nothing elsewhere out of harmony with the principles laid down in this opinion, and if it were otherwise it would not necessarily change the situation. No law similar to the one here, in many of the features, has been passed upon in the whole by any court, as regards its constitutionality. Particular features as to particular situations have been upheld in accord with principles here recognized, though expressions are found in some legal opinions not really necessary to the decisions reached rather more extreme than could meet with our unqualified approval.

From what has been said, the rule as to preserving parts of a law and condemning other parts where the latter are unconstitutional and are separable from the former does not apply to this case. There are several invalid features of the act, each of which pervades the whole, and, therefore, lamentable though it is that a manifestly laudable legislative purpose to promote the public welfare should wholly fail, all <sup>217</sup> portions of the act must be regarded as an entirety, and share a common fate of being condemned as unconstitutional.

What has been said renders it unnecessary to discuss the motion made on behalf of appellants to dissolve the injunction granted by the circuit court and for an injunction and for a dismissal of the appeal. The act the appellants, representing the state, were enjoined temporarily and sought to be enjoined permanently from enforcing, being unconstitutional, the action must be regarded as against them in their individual capacities and not against the state: *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. ed. 714, 13 L. R. A., N. S., 932. The motion, therefore, in all respects

must fail for that reason and others indicated in the opinion.

By the COURT. The motion above referred to is in all respects denied, with ten dollars costs. The order overruling the demurrer to the complaint and restraining the defendants pending the action is in all respects affirmed.

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*The Constitutionality of Building Regulations* designed to promote the health and welfare of the public is considered in the note to *Bostick v. Sams*, 93 Am. St. Rep. 409.

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### FRANZEN *v.* HAMMOND.

[136 Wis. 239, 116 N. W. 169.]

**USURY—Agent Exacting Bonus from Borrower.**—The fact that a son, in loaning money for his mother, asks her no compensation, does not raise a conclusive presumption of knowledge on her part that he exacts a commission from the borrower in addition to lawful interest. (p. 1080.)

**USURY—Agent Exacting Bonus from Borrower.**—Where an agent, intrusted with money to loan, without the direction or knowledge of his principal, exacts from the borrower a sum in addition to legal interest as compensation for his services, this does not taint the contract with usury. (p. 1081.)

**USURY—Agent Exacting Bonus from Borrower.**—The fact that a principal accepts securities from his agent covering the exact amount of money loaned by the latter and showing on their face that the loan is legitimate, and insists upon enforcing the same after obtaining knowledge that the agent has exacted solely for his compensation a sum from the borrower in excess of lawful interest, does not make the loan usurious. (pp. 1082, 1083.)

O. G. Erickson and Max H. Strehlow, for the appellants.

Orlando E. Clark, for the respondent.

**239** MARSHALL, J. Action to set aside and cancel a mortgage on the ground that the same was tainted with usury, and before the commencement of the action plaintiffs duly tendered to the defendant **240** the entire sum to which she was entitled. The issues were decided thus: April 14, 1905, plaintiffs gave defendant their note secured by mortgage for seven thousand and ninety dollars, due one year from date with eight per cent interest per annum. April 30, 1906, plaintiffs duly tendered in payment of said note seven hun-



dred and fifty dollars and demanded a satisfaction of the mortgage. The loan was made through a son of defendant who had authority to make loans for her and draw checks therefor on her bank account. He received no compensation from her for his services and was responsible for all loans he made. He took from plaintiffs the note and mortgage in question for the defendant, giving two checks on her account signed by him as agent, one for seven hundred and fifty dollars and one for forty dollars, the last of which was duly indorsed and given back to the agent. She had no further knowledge of the transaction than that her son accounted to her for seven hundred and ninety dollars drawn from her bank account, by delivering the note and mortgage. She did not make or authorize a usurious contract.

Upon such facts the conclusion was reached that plaintiffs were not entitled to recover. Judgment was entered accordingly in defendant's favor.

We are unable to discover any warrant for disturbing the findings of fact. The only question raised in regard thereto is whether respondent knew her son exacted from the borrower a sum of money in addition to lawful interest for the loan and retained the same as compensation for his services. The direct evidence is to the effect that she had no such knowledge, but the claim is made that from the circumstance of the agent not receiving compensation from <sup>241</sup> the lender, a presumption arises that she knew he received such from the borrower, and many authorities are cited to that effect. None of them hold that such circumstance is more than evidentiary. Where it is of such probative character as to create a presumption of knowledge, it is subject to be rebutted, as it was sufficiently in this case to warrant the finding. Because of the relationship existing between respondent and her agent, he being her son, it was most natural that she did not expect to pay him any pecuniary consideration for his services nor suspect that he would receive any secret benefit from handling her money; that she trusted him to conduct her business in consideration of their relationship.

Rogers v. Buckingham, 33 Conn. 81, is a good illustration of many cases that might be cited supporting the suggestion that the presumption referred to, when it arises, is merely one of fact which yields readily to evidence showing the contrary. The court said: "It may be presumed where the agency is general, and embraces the business of making, managing and collecting the loans of a moneyed man," and he

makes a usurious loan, that it was authorized by the lender. "But it is a presumption of fact and may be rebutted."

The presumption did arise in that case, but it was held rebutted by circumstances authorizing a finding that the action of the agent was unauthorized, and that the exaction of the excessive amount for the use of the money was for his benefit only and must have been so understood by the borrower.

It is useless to review the many cases cited where it has been held that the exaction of a bonus by the agent of the lender which, with the interest charged, exceeded the lawful rate of interest, rendered the transaction usurious. None of them involved exactly such circumstances as characterized this case. In substance, all of the excessive exactions, though ostensibly as commissions, were in fact cloaks for the real purpose of obtaining more than legal interest for the money.

<sup>242</sup> The proposition submitted here is this: If a person intrusts another with money to loan and such other lends the same, charging and receiving from the borrower a sum of money in addition to legal interest as compensation for his services, but without any direction by or knowledge of the lender, is the contract between the lender and borrower tainted with usury?

The cases cited to our attention to support the affirmative do not seem to be in point. In *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. 327, the lender actually participated in the transaction. In *Avery v. Creigh*, 35 Minn. 456, 29 N. W. 154, the agent was expressly authorized to make all he could for himself out of the borrower, and pursuant thereto he charged and received a sum in excess of a reasonable commission. In *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214, the agent and the lender shared in the exaction which in the whole, added to the interest agreed upon in the note, was excessive. In *Stephens v. Olson*, 62 Minn. 295, 64 N. W. 898, the principal had the benefit, though without his knowledge, of the excessive charge. It was included in the note, and the lender, after learning of the fact, ratified the agent's act by insisting upon payment of the note as written. In *Meers v. Stevens*, 106 Ill. 549, it was found as a fact that the transactions of the agent were resorted to for the very purpose of circumventing the usury law.

All the other cases referred to by appellants' counsel outside of this state are similar to those we have mentioned, except *Austin v. Harrington*, 28 Vt. 130, and one or two others of that class, holding that where one makes another a general agent for the loaning of money he is bound by all such other

does within the apparent scope of the agency, though he has no knowledge thereof, and that such apparent scope includes the charging of a commission so large as to render the contract usurious. There are two lines of cases on the subject, one holding that the making of usurious loans is not within <sup>243</sup> the apparent scope of a general agency to loan money, and it seems that such is the better rule. The following belong to such class: *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Estevez v. Purdy*, 66 N. Y. 446; *Rogers v. Buckingham*, 33 Conn. 81; *Gokey v. Knapp*, 44 Iowa, 32; *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Manning v. Young*, 28 N. J. Eq. 568; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379; *Baldwin v. Doying*, 114 N. Y. 452, 21 N. E. 1007.

The rule laid down in *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, is followed in all of the cases cited, and with few exceptions has been adopted by the courts of this country. It is stated thus: If "an agent intrusted with money to invest at legal interest" exacts "a bonus for himself as the condition of making a loan, without the knowledge or authority of his principal," such circumstance does "not constitute usury in the principal nor affect the security in his hands."

The court said, in effect, that it is only where the agent of the lender takes a sum in excess of legal interest under such circumstances that the sum so taken can be considered as obtained in whole or in part for the lender that the contract is tainted with usury, and even in that case it is not so tainted unless the lender knows of the taking and ratifies it; that when the sum taken is for the agent exclusively and so understood by the borrower, there is no taint of usury; that acceptance of the note by the lender and assertion of a right to recover thereon according to its terms only ratifies the contract as expressed in the paper.

The doctrine above stated seems to be sound. It is not within the apparent scope of a legitimate business agency to violate the law. So where an agent loans money, exacting a bonus for himself, the presumption is rather that it is without the knowledge of the principal than with such knowledge. It logically follows that the circumstance of a principal accepting securities from his agent covering the exact amount <sup>244</sup> of money loaned and showing on their face that the loan was legitimate, and insisting upon enforcing the same after obtaining knowledge of the excess the agent charged solely for his own benefit, does not make the transaction as to the



lender usurious. A very large array of authority to that effect is found cited to the text of Webb on Usury, at section 93, and Tyler on Usury, at page 170.

The latter author, after reviewing the authorities and particularly *Austin v. Harrington*, 28 Vt. 130—one of the few cases out of harmony with the foregoing—said: “The doctrine is well settled, and universally recognized, that an agent may lawfully take a reasonable commission or bonus from the borrower for his expenses and services in effecting a loan; and whenever the lender is not a privy to the arrangement between the borrower and the agent, or in no way participates in the commission or bonus, the transaction will be regarded as free from the taint of usury. . . . If an agent, in making a loan of money, accepts from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal and was not received by him.”

That is stated as the law declared in New Jersey, New York, and elsewhere.

The same subject was treated in *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734, the court holding under circumstances similar to those here that the contract was not tainted with usury, and that in such a case the exaction of the bonus and receipt of the same was not within the apparent scope of the agency contract, and so not ratified by the lender's insisting upon the validity of the securities according to their tenor after obtaining knowledge of the fact.

But counsel for appellants contend that this court is committed to the very limited line of authorities not in harmony with what has been said, of which *Austin v. Harrington*, 245 28 Vt. 130, is a good sample. Such is not the opinion of the court.

In *McFarland v. Carr*, 16 Wis. 259, the agent made the loan under directions of the lender and received the bonus, not as his own, but as the money of his principal. The court distinctly held that in such circumstances as we have here the contract would not be tainted with usury. The case was distinguished from those we have cited, particularly *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137. The ground of the decision is stated in these words: “We must assume that Warden, in making the loan and exacting the payment of the fifty dollars, acted as agent of *McFarland*” (the lender). If that were so no one will contend that the contract was not usurious. In this case it must be kept in



mind, though respondent's son acted as her agent, he did not as such agent exact the bonus. He exacted it independently of his agency. He demanded it not for his principal, but for himself, as the court found.

In *Ottillie v. Waechter*, 33 Wis. 252, the agent acted solely for the borrower, and it was held that in such a case the exaction by the agent from his principal, with knowledge of the lender, of a bonus does not constitute usury. *McFarland v. Carr*, 16 Wis. 259, was referred to inadvertently, in a way to indicate that its scope is other than that which we have stated as to the circumstance being that the exaction was with the knowledge and by the direction of the principal. *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, was referred to and the rule thereof stated without approval or disapproval.

It is the opinion of the court that *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, states the true rule, so far as it holds that the exaction by the agent of a lender, without his knowledge or participation, of the borrower of a sum as commission for doing the business, such exaction being a private matter between the agent and the borrower, does not make the loan contract as to the lender usurious; that it is not within the apparent scope of such an agency to violate the law, and that the receipt by the lender <sup>246</sup> of the security, regular upon its face, and assertion of a right to enforce it according to its tenor, does not constitute ratification of any act of the agent in violation of law. The result is that the judgment must be affirmed.

By the COURT. So ordered.

A motion for a rehearing was denied September 29, 1908.

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*The Question Whether a Loan is Rendered Usurious* where an agent in negotiating it exacts a bonus from the borrower in addition to lawful interest is discussed in the note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 198. Subsequent decisions on this subject are *Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541; *McNeely v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195; *Pottle v. Lowe*, 99 Ga. 576, 59 Am. St. Rep. 246; *Hall v. Maudlin*, 58 Minn. 137, 49 Am. St. Rep. 492; *Richards v. Purdy*, 90 Iowa, 502, 48 Am. St. Rep. 458; *West v. Equitable Mortgage Co.*, 112 Ga. 377, 81 Am. St. Rep. 59.

## LANHAM v. LANHAM.

[136 Wis. 360, 117 N. W. 787.]

**MARRIAGE—What Law Governs Validity.—To the General Rule** that a marriage valid where celebrated is valid everywhere are two exceptions, namely, marriages which are deemed contrary to the law of nature as generally recognized in Christian civilized states, and marriages which the law-making power of the forum has declared shall not be allowed validity on the grounds of public policy. (p. 1086.)

**MARRIAGE—Validity When Contracted Out of State.—**The legislature has power to declare that marriages between citizens of the state contrary to its established public policy shall have no validity in its courts, even though they are celebrated in other states under whose laws they would ordinarily be valid. (pp. 1086, 1087.)

**MARRIAGE—Celebration in Another State.—**A statute declaring that it shall not be lawful for any person to marry within one year after his divorce, and that a marriage so attempted shall be void, is intended to control the conduct of the residents of the state, whether they are within or outside its boundaries. (p. 1088.)

**MARRIAGE Contracted Without the State, in Violation of Its Laws.—**A statute declaring marriages void if contracted within a year after divorce applies to persons who, to evade the law, leave the state and celebrate marriage outside its boundaries, and then return to take up their residence. (p. 1088.)

**COMMON-LAW MARRIAGE—Cohabitation After Removal of Impediment.—**Where persons marry in violation of a statute forbidding marriage within one year after divorce, their continued cohabitation after the expiration of the year does not of itself establish a common-law marriage. (p. 1089.)

Higbee & Higbee, for the appellants.

Masters, Graves & Masters, for the respondent.

**361 WINSLOW, C. J.** The plaintiff applied to the county court of Monroe county for an allowance for her support out of the estate of James W. Lanham, deceased, claiming that she was the widow of said deceased. The application was contested and denied in the county court, but on appeal that judgment was reversed and an allowance granted, and from this judgment the heirs of Lanham appeal.

The facts were few and simple. On and prior to the fifteenth day of September, 1905, the plaintiff was a resident of this state and was the wife of one J. R. Sherman. On the day named she obtained a judgment of divorce from Mr. Sherman for the purpose of marrying the deceased, who was then a resident of Wisconsin and a man eighty-four years of age. After the divorce both parties learned that the law of Wisconsin prohibited the plaintiff from marrying again until the expiration of one year from the divorce. For the purpose of avoid-

ing the effect of the law they went to Menominee, Michigan, October 10, 1905, and were there married by a justice of the peace, and returned to Wisconsin on the following day. They immediately assumed the relations of husband and wife and lived and cohabited together in Monroe county until Lanham's death March 13, 1907. On March 8, 1907, the plaintiff made application to the county judge of Monroe county for a permit to marry Lanham, <sup>362</sup> but he was then very ill and no ceremony was ever performed.

The circuit court concluded that there was a valid common-law marriage between the parties, resulting from their living and cohabiting together as man and wife after the expiration of one year from the date of the decree of divorce, and held that the plaintiff was the lawful widow of the deceased and entitled to an allowance as such.

<sup>365</sup> Section 2330, Statutes of 1898, as amended by chapter 456, Laws of 1905, provides, among other things, that "it shall not be lawful for any person divorced from the bonds of matrimony by any court of this state to marry again within one year from the date of the entry of such judgment or decree, and the marriage of any divorced person solemnized within one year from the date of the entry of any such judgment or decree of divorce shall be null and void." A proviso to the section authorizes the circuit judge to grant permission to the divorced parties to remarry within the year, but this is of no moment here. The first question is whether the Michigan marriage was valid notwithstanding the provisions of this law.

The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere. To this rule, however, there are two general exceptions which are equally well recognized, namely: (1) Marriages which are deemed contrary to the law of nature as generally recognized by Christian civilized states; and (2) marriages which the law making power of the forum has declared shall not be allowed validity on the grounds of public policy. An exhaustive review of the many and somewhat conflicting authorities upon this general subject will be found in a note to *Hills v. State*, in 57 L. R. A. at p. 155 (61 Neb. 589, 85 N. W. 836). The first of these exceptions covers polygamous and incestuous marriages, and has no application here, and the question presented is whether the case comes within the second exception.

A state undoubtedly has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts, and it also has the power to declare that marriages between its own citizens contrary to its established pub-

lie policy shall have no validity in its courts, even though they be celebrated in other states under whose laws they would ordinarily be valid. In this sense, at least, it has <sup>366</sup> power to give extraterritorial effect to its laws. The intention to give such effect must, however, be quite clear. So the question must be, in the present case, whether our legislature by the act quoted declared a public policy and clearly indicated the intention that the law was to apply to its citizens wherever they may be at the time of their marriage. To our minds there can be no doubt that the law was intended to express a public policy. There have been many laws in other states providing that the guilty party in divorce action shall not remarry for a term of years, or for life, and these laws have generally been regarded merely as intended to regulate the conduct of the divorced party within the state and not as intended to follow him to another jurisdiction and prevent a marriage which would be lawful there; in other words, they impose a penalty local only in its effect. Under this construction the remarriage of such guilty party in another state has generally been held valid notwithstanding the prohibition of the local statute. Of this class are the cases of *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, and *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81, 40 L. R. A. 428, and others which might be cited.

It is very clear, however, that the statute under consideration is in no sense a penal law. It imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained except upon the ground that the legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions <sup>367</sup> is the desire on the part of one of the parties to marry another; that if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union under the forms of law for the purpose of experimenting with another partner, and



perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy or it means nothing. It means that the legislature regarded frequent and easy divorce as against good morals, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce.

To say that the legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent, and ascribe practical imbecility to the law-making power. A construction which produces such an effect should not be given it unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping. They declare not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be null and void. There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that when persons domiciled in this state and who are subject to the provisions <sup>368</sup> of the law leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of law and will not be recognized by the courts of this state. Further than this we are not required to go. This view is sustained by the following cases: *Brook v. Brook*, 9 H. L. Cas. 193; *Sussex Peerage Case*, 11 Clark & F. 85; *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. 305, 2 L. R. A. 703; *McLennan v. McLennan*, 31 Or. 480, 65 Am. St. Rep. 835, 50 Pac. 802, 38 L. R. A. 863; *Estate of Stull*, 183 Pa. 625, 63 Am. St. Rep. 776, 39 Atl. 16, 39 L. R. A. 542; *Kruger v. Kruger* (Super. Ct. Ill.), 36 Nat. Corp. Rep. 442.

Another view of the question, leading to the same result, has been suggested to our minds, which will be stated. The statute cited is an integral part of the divorce law of this

state, and in legal effect enters into every judgment of divorce. This being so, must not any judgment of divorce be construed as containing an inhibition upon the parties, rendering them incapable of legal marriage within a year, which must be given "full faith and credit" in all other states, under section 1, article 4, of the constitution of the United States? And if it be entitled to receive such faith and credit, how can a marriage within another state be considered valid anywhere? Are not the parties incapable of contracting such a marriage anywhere, for the reason that they have not yet been relieved of their incapacity to marry another, resulting from their former marriage, or, in other words, for the reason that their divorce is not complete until the expiration of the year? We suggest these questions without definitely expressing an opinion upon them or making them a ground of decision.

The Michigan marriage being held void, the question recurs whether the finding that there was a common-law marriage, resulting from the fact that the parties lived and cohabited <sup>369</sup> together as man and wife for about six months, can be sustained. This must be answered in the negative. This court has held that, where cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed: *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Spencer v. Pollock*, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; *Thompson v. Nims*, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 547. There was no such evidence here. At most, the evidence only shows that the parties continued to live together after the expiration of the year in the manner of husband and wife, and talked about a remarriage, which never took place on account of the husband's illness and death. The evidence, in fact, rebuts any inference of remarriage rather than supports it.

By the COURT. Judgment reversed, and action remanded to the circuit court with directions to affirm the judgment of the county court.

Siebecker, J., dissents.

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*A Statute Merely Prohibiting the Remarriage of Either Party within a certain time after a decree of divorce is rendered ordinarily has no extraterritorial effect; and it has been decided that if one of the parties marries in another state within the prohibited period, and such*  
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marriage is valid under the laws of that state, it must be held valid in the state where the divorce was granted: *Wiley v. Wiley*, 22 Wash. 115, 79 Am. St. Rep. 923. See, also, *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936; *Succession of Gabisso*, 119 La. 704, 121 Am. St. Rep. 529; note to *State v. Shattuck*, 60 Am. St. Rep. 941. As to what marriages are void in general, see the note to *State v. Lowell*, 79 Am. St. Rep. 361.

*Common-law Marriages* are discussed at length in the note to *Klipfel v. Klipfel*, 124 Am. St. Rep. 104.

## SWEDISH-AMERICAN NATIONAL BANK v. KOEBERNICK.

[136 Wis. 473, 117 N. W. 1020.]

**BILLS AND NOTES—Indorsement of Non-negotiable Paper.**—An indorsement by the payee of his name on the back of a non-negotiable promise to pay, accompanied by a delivery of the instrument, constitutes prima facie a valid transfer of the chose and the debt represented by it, and the purchaser may maintain an action thereon. (p. 1092.)

**CORPORATION—Authority of Secretary to Assign Note.**—In an action on a note assigned by the secretary of a business corporation, the assignor need not prove the authority of the secretary to make the assignment, such authority being presumed in the absence of notice to the person receiving the paper. (p. 1092.)

**BILLS AND NOTES—Waiver on Renewal of Paper.**—The substitution of new notes for those originally given for machinery, under an agreement at the time of a return of part of the machinery to the seller, may be waived by the conduct of the makers. (p. 1094.)

**WAIVER—Definition.**—A Waiver is the Intentional relinquishment of a known right. (p. 1095.)

**WAIVER.**—A Waiver may be Shown by a Course of Conduct Signifying a purpose not to stand on a right, and leading by reasonable inference to the conclusion that the right in question will not be insisted upon. (p. 1095.)

**WAIVER—When Established by Conduct.**—A Person Who does Some Positive Act, which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that the right has been dispensed with, will be deemed to have waived it. (p. 1095.)

**WAIVER—When a Question of Law.**—Where the Facts and Circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law. (p. 1095.)

John Lind, A. Ueland and Varnum & Anderson, for the appellant.

Baker & Haven, for the respondents.

474 BARNES, J. This action is brought on two promissory notes executed by the defendants to the Kenyon-Rosing Ma-

chinery Company, a corporation, hereinafter called "machinery company," which notes were deposited with the plaintiff as collateral security for the indebtedness due it from such corporation. In August, 1904, the defendants, or some of them, purchased from the said machinery company a separator, stacker, and engine, for which they agreed to pay \$3,200. Notes for the entire purchase price were signed by all of the defendants and delivered to said machinery company, two of said notes being drawn for \$125 each, two for \$738 each, and two for \$737 each, such notes falling due at different dates. One of the notes for \$738 and another for \$737 were delivered to the plaintiff, as above stated. Early in September, by agreement of the parties, the engine which was delivered was returned to the machinery company because it did not comply with the contract of sale, in that it was a coal-burner instead of a wood and straw burner, and another engine was delivered in its stead which used wood and straw for fuel. There was testimony tending to show that, at the time the exchange of engines was agreed on, some fault was found with the separator, and that the agent of the machinery company stated that, if it did not work satisfactorily after the new engine was put in use, it would be taken back, and that the notes given for the outfit would be surrendered. Some time after the engine was delivered fault was found with the separator, and the defendants refused to <sup>475</sup> continue using it, claiming that it did not fulfill the terms of the contract under which it was purchased. This claim on the part of the defendants led to other negotiations, which resulted in a new agreement being made between the parties on December 6, 1904, to the effect that the separator and stacker might be returned to the machinery company.

There was some dispute in the testimony as to the amount of credit to which defendants should be entitled on account of the return of this part of the outfit. It was claimed on the part of the defendants that at the time the agreement for the return of the separator and stacker was made the machinery company, through its agent, agreed to surrender up and cancel the notes that were then outstanding, and that new notes should be executed in lieu thereof for the purchase price of the engine. The plaintiff contended that the agreement between the parties was to the effect that the two notes aggregating \$250 should be surrendered, and that proportionate indorsements should be made on the remaining notes for the balance of the credit to which the defendants were entitled on account of the return of the property as stated. The notes



in question were delivered to the plaintiff before the agreement in reference to the exchange of engines or the agreement in reference to the taking back of the separator and stacker was made. The defendants had no notice of the alleged transfer of the notes, but such notes are admittedly non-negotiable.

The jury found that the machinery company promised to surrender and cancel the notes originally given, and on the verdict so rendered the court entered judgment dismissing the complaint. Errors are assigned because of the failure of the court to direct a verdict for the plaintiff; because of the refusal of the court to change the answers to certain questions in the special verdict; because of the refusal of the court to render judgment for the plaintiff notwithstanding the verdict; and because of rulings on evidence.

<sup>476</sup> We are met at the threshold of this case with the contention on the part of the defendants that no such transfer of the instruments sued on was made as would entitle the plaintiff to maintain an action thereon, and that therefore the judgment must be affirmed regardless of any errors committed in the trial of the cause. In support of such contention it is urged (1) that an indorsement in blank by the payee of a non-negotiable note, accompanied by delivery, does not transfer title to the note nor to the debt evidenced by it; (2) that the indorsement on the back of the notes, "Kenyon-Rosing Machinery Company by O. G. Rosing, Secretary," was not shown to be the act of the corporation, no proof or authority to make the indorsement on the part of the secretary having been offered.

An indorsement by the payee of his name on the back of a non-negotiable promise to pay, accompanied by delivery of the instrument, constitutes *prima facie* a valid transfer of the chose in action and the debt represented by it, and the purchaser may maintain action thereon: *Alexander v. Oneida Co.*, 76 Wis. 56, 45 N. W. 21. Neither was it incumbent upon the plaintiff to prove that the secretary of the machinery company was authorized by the corporation to assign the notes. In *Milwaukee T. Co. v. Van Valkenburg*, 132 Wis. 638, 112 N. W. 1083, this court held that the president of a business corporation "is a usual officer as managing agent to execute such a paper as the one in question [an assignment of the note and mortgage], and it is implied, in case of a transfer so signified, that the officer had authority to act in the matter in the absence of proof to the contrary and notice to the person receiving the paper." What is <sup>477</sup> there said is just as applicable to the secretary of a business corporation as it is

to its president. Both are general officers of such corporations, who often perform interchangeably a wide range of duties. Indeed, it is a matter of common knowledge that the presidents and secretaries of ordinary private corporations perform much the same functions in the conduct of the corporate business enterprises that are performed by general partners in a copartnership business. It follows that the trial court was right in holding that plaintiff had sufficient title to the notes in suit to enable it to sue and recover thereon.

There is one question involved in this case that seems to be so decisive of it as to render unnecessary the consideration in detail of the various errors relied on for reversal. The notes given by the defendants were evidence of the debt owed by them to plaintiff for the outfit originally furnished, and also for the outfit as it stood after the second engine was substituted for the one first delivered. This situation continued down to September 6, 1904, when a new agreement was reached, by which a part of the outfit was taken back and credit on account thereof was to be given to the defendants. The amount of this credit extinguished a part of the indebtedness represented by the notes. The portion of the indebtedness incurred on account of the engine which was represented therein was not canceled or wiped out in any way. It would seem to be immaterial, as far as the parties are concerned, whether proper credit should be indorsed on the old notes or they should be surrendered and new ones given for the balance due or to become due. The facts testified to in reference to the substitution of new notes for the old ones are very unsatisfactory, uncertain and indefinite, and it is difficult to spell any contract out of them; but if any could be spelled out, which we do not decide, it must be by assuming that the parties, by implication, agreed that new notes signed by all the defendants should be given for the <sup>478</sup> reduced amount, such notes to fall due at the same time and draw the same rate of interest provided in the notes first given. The testimony showed that, after making this alleged agreement to exchange new notes for the old ones, the defendants never made any demand for the return of the old notes, and never made any offer or tender of new notes in their stead. About three weeks after the alleged agreement was arrived at a payment of \$15 was made by defendants and applied on one of the old notes. About a week later another payment of \$60 was made and applied in the same way. Another payment of \$25 was made on May 1, 1905, and one of \$20 on September 28, 1905, and another of \$80 on November 27, 1905, and still

another payment of \$100 was made on January 10, 1906. All of these payments were applied on one of the original notes. Under date of November 15, 1905, one of the defendants wrote the machinery company that they would finish the season's run soon and would collect their threshing bills and settle with the machinery company for the season. On December 8, 1905, one of the defendants, replying to a letter asking for a payment so as to save the trouble and expense of sending an agent to see the defendants, answered that it was their aim to send what money they could so as to save expense to the machinery company, and that they would send \$50 the latter part of the following week. December 25, 1905, a letter was sent to the machinery company, which was signed "Emil Koebernick, by Carl Koebernick," which, among other things, stated: "What was due to pay on the engine on last year's note we will pay this fall as agreed with your Mr. Johnson. Please send the engine note of last year to Clear Lake, and I will call there and settle for it."

On December 27, 1905, a letter was written to the defendant Emil by the Aultman Engine and Thresher Company, the holder of one of the original notes, stating definitely and explicitly <sup>479</sup> the terms of the agreement of December 6, 1904, as claimed by the agent of the machinery company. It is true this letter was excluded from evidence, but it is none the less true that it was entirely competent in view of what subsequently took place. Within less than two weeks after this letter would be received in the ordinary course of mail, fully advising the defendants as to the amount claimed to be due on their outstanding notes on account of the engine, the defendants made their last payment of \$100. In an action brought by the Aultman Engine and Transfer Company against the defendants on the notes upon which the foregoing payments were made, the defendants Carl and Augusta answered, setting up the fact that they signed the note merely as sureties and that they were discharged by reason of the time of payment of the note having been extended without their consent. No claim was asserted that liability on the note in suit was avoided by reason of an agreement to substitute another note in its stead.

When it is considered that the parties could not have attached much importance to the mere formal matter of the giving of new notes, rather than making indorsements on ones then in existence, so that the old ones stood for just what the new ones would represent, we cannot escape the conclusion that the defendants abandoned and waived the substitu-



tion of new notes for the old ones, assuming the agreement to have been as found by the jury.

A waiver is the intentional relinquishment of a known right: *Monroe W. W. Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685. A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed <sup>480</sup> with, will be deemed to have waived it: 29 Am. & Eng. Ency. of Law, 2d ed., 1103, and cases cited. And where the facts and circumstances relating to the subjects are admitted or clearly established, waiver becomes a question of law: *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 90 N. W. 476; *Fox v. Harding*, 7 Cush. 516.

From the conclusion reached it would logically follow that the judgment should be reversed and the cause remanded, with direction to enter judgment on the notes for a stated sum, were it not for an apparent dispute in testimony as to the amount of credit defendants should receive on account of the separator and stacker. The great preponderance of the testimony is to the effect that such allowance should be \$1,150, the price at which these articles were figured in the original purchase, and appellant's counsel seem to concede in their brief that credit to this amount should be given. The agent of the machinery company, however, testified that he did not agree to allow this amount, and as a matter of fact it was not allowed by way of payment of or indorsement on the notes. There is no dispute about two notes for \$125 each, dated August 24, 1904, having been surrendered and canceled at the time the agreement of December 6th was made. One of these notes fell due October 1, 1904, and the other would mature October 1, 1905. These notes apparently drew interest at seven per cent per annum until maturity and ten per cent thereafter, although this fact appears by inference rather than by any direct testimony bearing on the subject. The evidence as to the amount due on these notes December 6, 1904, is too unsatisfactory to warrant this court in endeavoring to compute the portion of the \$1,150 credit that was absorbed by them, even if it were apparent that the total credit should be that amount. One-half the balance of the credit left after paying the two \$125 notes should be applied upon the notes in suit as of December 6, 1904. If the sum of \$1,150



is the proper credit, it is a mere matter of <sup>481</sup> computation to make the proper indorsements on the notes in suit after the conditions as to interest on the two \$125 notes are ascertained.

By the COURT. Judgment reversed as to the defendants Emil Koebernick and Carl Koebernick, and the cause is remanded for a new trial upon the question of the amount that should be credited the defendants on the notes in suit on account of the contract of December 6, 1904. The plaintiff may, within thirty days from the date of the filing of the mandate of this court with the clerk of the circuit court for St. Croix county, elect to take judgment against the defendants Carl Koebernick and Emil Koebernick for the amount due on said notes after crediting thereon the amounts to which said defendants would be entitled to credit as of December 6, 1904, on the basis of an allowance of \$1,150 for the machinery returned. The judgment as to Augusta Koebernick is affirmed. Costs in this court are awarded to appellant.

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*The Effect of an Indorsement of a Non-negotiable Note* is discussed in the recent cases of *Bank of Luverne v. Sharp*, 152 Ala. 589, 126 Am. St. Rep. 58; *Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146. In *Chicago etc. Bank v. Chicago etc. Co.*, 190 Ill. 404, 83 Am. St. Rep. 138, it is said that mere indorsement does not operate to transfer or assign a non-negotiable instrument, nor does the title to such instrument, thus indorsed, pass by mere delivery.

*The President and Secretary of a Corporation*, it has been said, are not presumed to have power to execute commercial paper: *Gould v. W. J. Gould & Co.*, 134 Mich. 515, 104 Am. St. Rep. 624. See, also, *City Electric etc. Ry. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282; *Lloyd v. Matthews*, 223 Ill. 477, 114 Am. St. Rep. 346. But the president of a business corporation which receives, in the usual course of business, notes for its products, is presumed to have authority to transfer by indorsement a note made payable to his company: *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778; *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859.

## JOHNSON v. TUCKER.

[136 Wis. 505, 117 N. W. 1002.]

**LESSEE—Estoppel to Deny Landlord's Title.**—Where a married woman living with her husband in his house rents rooms therein and receives the rent as her own without his objection, and not as his agent, her tenants cannot question her title in an action by her against them to recover rents due. (p. 1099.)

**LEASED PREMISES—Constructive Eviction by Failure to Repair.**—The failure of a landlord to keep the gas-heater in a bathroom in repair for a considerable time does not, as a matter of law, constitute constructive eviction. (p. 1099.)

**LEASED PREMISES—Constructive Eviction by Failure to Repair.**—In an action to recover rent a question in a special verdict, "Was the defendant evicted from the leased premises?" is not improper, where eviction is based on the failure of the landlord to keep a gas-heater in repair, and the court instructs the jury on the law pertaining to constructive eviction. (p. 1099.)

F. K. Shuttleworth, for the appellant.

John C. Fehlandt, for the respondent.

**506 BARNES, J.** This action was commenced in justice's court to recover a balance of forty-six dollars, alleged to be due the plaintiff from the defendant for rent of certain rooms, and to recover the further sum of four dollars for gas furnished to the defendant. It was alleged in the complaint that on May 22, 1906, plaintiff and defendant entered into an agreement whereby plaintiff leased to the defendant certain rooms in a dwelling-house in the city of Madison for the term of one year, at a rental of twenty-three dollars per month, payable in advance, and that said defendant refused to pay the rent due on the twenty-second days of March and April, 1907. The defendant, by way of answer, alleged certain agreements made by the plaintiff to keep the premises in a proper state of repair, and a failure so to do on the part of the plaintiff, whereby the defendant was justified in vacating, and did vacate, the premises. The answer also denied all the allegations of the complaint not admitted. The trial in justice's court resulted in judgment for the plaintiff, from which judgment an appeal was taken and the case was tried before a jury in the circuit court of Dane county. A special verdict was returned by the jury, in which it was found: 1. That the defendant leased the rooms in question for one year from May 22, 1906; 2. That the plaintiff did not subsequently give the defendant permission to vacate the rooms before the expiration of the year; 3. That the defendant was

not evicted from the leased premises; 4. That the plaintiff did not agree to accept twenty-three dollars in full settlement of all claims against the defendant. Judgment was rendered on this verdict, and from such judgment this appeal is taken.

The defendant assigns as error: 1. Nonsuit should have been granted, because the relation of landlord and tenant did not exist between the parties; 2. The court should have directed a verdict; 3. The special verdict is incomplete <sup>507</sup> and insufficient to sustain a judgment, in that there is no finding that the relation of landlord or tenant existed between the parties to the suit; 4. Defendant's motion to change the answers in the special verdict should have been granted; 5. The court erred in submitting questions of law to the jury.

The appellant seeks a reversal of this judgment on three grounds; 1. Because the relation of landlord and tenant did not exist between the parties to the suit; 2. Because the defendant was evicted from the premises; 3. Because the special verdict is incomplete.

1. The first error assigned is predicated upon the proposition that the plaintiff is a married woman living with her husband, and that the house in question belonged to the husband, and, therefore, if rent was due to anyone, it was due to him. The testimony showed that the plaintiff, with the consent of the husband, for about fifteen years had been renting the rooms occupied by the defendant, and had been collecting rent all this time without let or hindrance from her husband, making such use thereof as she saw fit. The defendant rented the rooms from the plaintiff and paid her ten months' rent therefor. During this time the husband of the plaintiff made no claim to the rent, and, though he lived in the same house with the defendant, never talked with him upon the subject of rent in any way, and never took any step that could be construed as an attempted repudiation of his wife's authority to treat the rented rooms as her own and to do with them what she pleased. There is nothing to show that she was acting as the mere agent of her husband at the time the rooms were rented, or subsequently thereto, and the husband did not claim, and does not now claim, any right to the rent sued for. The sole ground <sup>508</sup> upon which the claim is based that the husband was in fact the landlord is his ownership of the property.

It was competent for the defendant to show that he did not rent the property from the plaintiff and that he did rent it from someone else. But this he might not do by showing that the lessor did not own the leased premises. The rule

that, under such circumstances as are disclosed here, the tenant cannot question the title of his landlord, is so nearly axiomatic in the law that it is unnecessary to cite authority to support it. There was no competent evidence from which a jury would be warranted in finding that the relation of landlord and tenant did not exist between the parties. This conclusion renders it unnecessary to consider the effect of the failure of the defendant to comply with the provisions of sections 3619 and 3620, Statutes of 1898, if he desired to raise the question of title.

2. As to the existence of most of the acts which constituted the alleged eviction, there was a dispute in testimony, and it was for the jury to determine the existence or nonexistence of such alleged facts. As to the failure of the plaintiff to keep the gas-heater in the bathroom in a state of repair for a considerable length of time, about which there was no substantial dispute in testimony, this court cannot say as a matter of law that it was of sufficient moment to constitute a constructive eviction. If, instead of submitting to the jury the sufficiency of the details relied on to constitute an eviction, the trial court had held as a matter of law that they were insufficient, we would feel loath to disturb his conclusion in this regard: *Young v. Burhans*, 80 Wis. 438, 50 N. W. 343; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A., N. S., 973; *Wood on Landlord and Tenant*, 2d ed., sec. 477.

3. The third question in the special verdict is the following: "Was the defendant evicted from the leased premises?" to which the jury answered "No." Counsel claims that it <sup>509</sup> was error to submit this question to the jury, as it called for a conclusion of law and not of fact, and argues that the question should be, "Was the gas-heater out of repair?" etc. The court instructed the jury on the law pertaining to constructive eviction. No exception was taken to such charge. The question submitted was proper and the one now suggested would have been immaterial, as it merely went to evidentiary facts, which at best only tended to show eviction and not to conclusively establish it.

By the COURT. Judgment affirmed.

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*The Estoppel of Tenants to Deny the Title of Their Landlord* is the subject of a note to *Davis v. Williams*, 89 Am. St. Rep. 62. It is axiomatic that a tenant, and those who enter under him are estopped to question their landlord's title: *Cobb v. Robertson*, 9 Tex. 138, 122 Am. St. Rep. 609; *Washington v. Moore*, 84 Ark. 220, 120 Am. St.



Rep. 29; *Hodges v. Waters*, 124 Ga. 229, 110 Am. St. Rep. 166. Thus a tenant in an office building owned and occupied in part by a national bank cannot set up as a defense in an action against him for rent that the bank has no power under its charter to erect an office building and let offices therein: *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.*, 215 Pa. 115, 114 Am. St. Rep. 949.

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## VILLAGE OF LITTLE CHUTE v. VAN CAMP.

[136 Wis. 526, 117 N. W. 1012.]

**SALOON ORDINANCE**—When Vests Arbitrary Power in Mayor.—A village ordinance requiring saloons to be closed at certain hours, “unless by special permission of the president,” is void, because it delegates legislative authority to an executive officer and gives him arbitrary power to discriminate among persons similarly situated. (p. 1100.)

**CONSTITUTIONAL LAW**—Ordinance Void in Part.—Where the valid and invalid parts of an ordinance are bound together, and the invalid part is a material inducement to the valid portion, the whole ordinance must fall. (p. 1101.)

J. Elmer Lehr, for the appellant.

Joseph Chopin and Albert H. Krugmeier, for the respondent.

**527 WINSLOW, C. J.** The defendant was convicted of violating an ordinance of the plaintiff village reading as follows: “All saloons in said village shall be closed at 11 o’clock P. M. each day and remain closed until 5 o’clock on the following morning, unless by special permission of the president.”

We regard the ordinance as void for two reasons: First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated (*State v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948, 54 N. W. 1104, 19 L. R. A. 858); second, because the power to regulate saloons is a law-making power vested in the village board (Stats. 1898, sec. 893, subd. 26), which cannot be delegated. A legislative body cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board: *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *Minneapolis etc. R. Co. v. Railroad Com.*, 136 Wis.

146, 116 N. W. 905, 17 L. R. A. 821. In the present case the ordinance by its terms gives power to the <sup>528</sup> president to decide arbitrarily, and in the exercise of his own discretion, when a saloon shall close. This is an attempt to vest legislative discretion in him, and cannot be sustained.

It is said that the latter clause of the ordinance may be stricken out as unconstitutional, and the balance, requiring saloons to close at 11 o'clock, may still be held valid. This, however, cannot be done, because it is very plain that the clause giving the president power to suspend the operation of the law at will is a compensation for the first clause. They are bound together, and the invalid clause was evidently a material inducement to the otherwise valid portion: *State v. Dousman*, 28 Wis. 541.

By the COURT. Judgment reversed, and action remanded with directions to enter judgment discharging the defendant.

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*An Ordinance Which Invests the Mayor and Council with Arbitrary Power to grant or withhold a permit or license to perform an act or conduct a business is unreasonable and void: Mayor etc. v. Baltimore etc. R. R. Co.*, 107 Md. 178, 126 Am. St. Rep. 382; *Boyd v. Board of Council of Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240; *City Council of Montgomery v. West*, 149 Ala. 311, 133 Am. St. Rep. 33, and note.

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### KING v. GRAEF.

[136 Wis. 548, 117 N. W. 1058.]

**SUNDAY CONTRACTS**—Whether may be Ratified.—Contracts made in violation of the statute forbidding business on Sunday are void and insusceptible of ratification. (p. 1102.)

**SUNDAY CONTRACTS**—Transaction Completed on Monday.—When an oral agreement to sell potatoes is made on Sunday, but they are not weighed, delivered, nor paid for until Monday, this is tantamount to a complete contract of sale on the latter day. (p. 1103.)

**SALE OF POTATOES**—Warranty of Quality.—If on the sale of a carload of potatoes they cannot all be examined without an expenditure of a great deal of time, but some sacks are opened and found good, and the seller states that the rest are of like quality, but the buyer, promptly unloading, finds one hundred sacks frozen, the jury is justified in finding an express warranty; and in the absence of such a warranty, he could recover on an implied one. (p. 1104.)

A. M. Spencer, for the appellants.

Giles H. Putnam and Gustav Buchheit, for the respondent.

549 BARNES, J. This action was brought to recover damages for breach of warranty. The defendants shipped a carload of potatoes from Hortonville to Watertown in February, 1906, the car arriving at its destination on Sunday morning, February 9th. During the day the agent of the defendants, who was in charge of the car, made an oral agreement with the plaintiff, whereby he agreed to sell the plaintiff the carload of potatoes at fifty-eight cents per bushel. The evidence further tended to show that the agent represented that the car of potatoes sold was as good in every respect as other potatoes formerly sold by the defendants to the plaintiff, and that the potatoes formerly sold were a good, merchantable article. Nothing more was done by the parties on Sunday, but on Monday morning the potatoes in the car were weighed, some twenty sacks in the car were opened and examined, and the potatoes were delivered to the plaintiff and were paid for by him without any further examination, or without any opportunity to examine them, except by unloading them from the car and opening the sacks. The testimony also tended to show that on Monday the agent in charge of the potatoes represented to the plaintiff that all of the potatoes in the car were as good in quality as those examined, and that plaintiff relied on such statement. Upon unloading the car it was found that one hundred bushels of the potatoes contained therein were frozen, and the evidence tended to show that they were frozen in transit, probably because of an accident to the car at Fond du Lac. On February 13th the plaintiff notified the defendants of the condition of the potatoes and demanded <sup>550</sup> settlement for the worthless potatoes found in the car. Payment was refused and this action was brought, which resulted in a trial and judgment for the plaintiff for damages sustained by reason of the potatoes in the car being frozen, from which judgment this appeal is taken.

Two errors are alleged: 1. That the contract was made on Sunday and is therefore void, and cannot furnish any basis for recovery in any action; 2. That no express or implied warranty followed the sale in any event, and that therefore the plaintiff could not recover.

It is well settled that contracts made in violation of the statute forbidding the doing of any business on Sunday are void and cannot be made the basis of a recovery in the law: *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393; *Howe v. Ballard*, 113 Wis. 375, 89 N. W.

136; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205. Neither can a contract made on Sunday be validated by proving acts tending to show a ratification, because such a contract is void and is not susceptible of ratification: *Jacobson v. Bentzler*, 127 Wis. 566, 115 Am. St. Rep. 1052, 107 N. W. 7, 4 L. R. A., N. S., 1151; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. If the acts done on Monday were mere incidents to the Sunday transaction, they would not save it from the condemnation of the statute: *Jacobson v. Bentzler*, 127 Wis. 506, 115 Am. St. Rep. 1052, 107 N. W. 7, 4 L. R. A., N. S., 1151. It follows that, in determining the rights of the parties here, the Sunday <sup>551</sup> transaction must be eliminated from consideration. In this case the potatoes were not weighed nor delivered until Monday and no part of the purchase price was paid until Monday. The agreement of Sunday was void under the statute of frauds (Stats. 1898, sec. 2308), even if it were not subject to any other infirmity. It might, of course, if made on a secular day, be validated by partial or complete performance. It was perfectly lawful for the defendants to deliver, and for the plaintiff to pay for, a carload of potatoes on Monday. These acts were not mere incidents to the transaction on Sunday, but comprehended all the elements necessary to make a complete contract in itself. If the potatoes had been delivered on credit the Sunday agreement would not govern as to price, but the defendant could recover on quantum meruit. The case is akin to an agreement for hire made on Sunday. The employé may not recover the contract price for his work, but he is entitled to recover what it is reasonably worth: *Pearson v. Kelly*, 112 Wis. 660, 100 N. W. 1064; *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393.

In *Taylor v. Young*, 61 Wis. 314, 21 N. W. 408, a settlement was agreed upon on Sunday for trespass done by livestock. The consideration was paid on a week day and was retained by the claimants. The court held that the settlement, being fully performed on a week day, was valid. So, too, it was held in *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787, that while a lease of premises made on Sunday was void and incapable of ratification, subsequent occupancy and payment of rent by the lessee created a tenancy, the terms of which would depend upon a contract to be implied from the acts of the parties. The delivery of the potatoes on Monday,



coupled with the fact that a consideration was paid for them, was tantamount to a sale on that day, and the payment and receipt of a sum of money for such potatoes was tantamount to an agreement upon the price to be paid, and the conclusion therefore follows that the transaction on Monday constituted a complete contract of sale and delivery.

**552** The testimony showed that, at the time of the delivery of the potatoes, they were in sacks; that some of the sacks were opened and the potatoes were found to be all right; that all of them could not be examined without unloading the car and opening the sacks, which work would necessitate a considerable expenditure of time—much more, perhaps, than the agent who made the sale desired to spend at Watertown; and that plaintiff promptly unloaded the car and found that one hundred bushels of the potatoes had been frozen, probably while in transit. A claim for damages was promptly made. The testimony further showed that at the time the twenty sacks of potatoes were opened and examined the agent of the defendants represented to the plaintiff that the rest of the potatoes in the car were as good as those examined, and that plaintiff relied upon such representation. This evidence was sufficient to warrant a finding of the jury that there was an express warranty of the potatoes sold and delivered, and that they did not conform to such warranty. If plaintiff were compelled to rely upon an implied warranty, we still think he was entitled to recover under the rule in *Northern S. Co. v. Wangard*, 117 Wis. 624, 98 Am. St. Rep. 963, 94 N. W. 785.

By the COURT. Judgment affirmed.

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*Sunday Contracts* are discussed in the note to *Henry Christian B. & L. Assn. v. Walton*, 59 Am. St. Rep. 641. In some states contracts entered into on Sunday are void: *International Text-book Co. v. Ohl*, 150 Mich. 131, 121 Am. St. Rep. 612; *Gordon v. Levine*, 197 Mass. 263, 125 Am. St. Rep. 361. And if void, they cannot be ratified: *Acme Electrical etc. Co. v. Van Derbeck*, 127 Mich. 341, 89 Am. St. Rep. 476. Some courts, however, hold that Sunday contracts are not void in the sense that they do not admit of ratification: *Cook v. Forker*, 193 Pa. 461, 74 Am. St. Rep. 699. See, also, *Rickards v. Rickards*, 98 Md. 136, 103 Am. St. Rep. 393. Where an agreement for the loan of money is made on Sunday, including the signing of the contract and the delivery of a check for the amount of the loan, the transaction is not relieved from the condemnation of the Sunday law by the fact that the check is not paid and the contract not acknowledged nor recorded until a later day: *Jacobson v. Bentzler*, 127 Wis. 566, 115 Am. St. Rep. 1052.

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## BANKS AND BANKING.

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**6. BANK ACCOUNT—Joint Owners—Survivorship.**—Where a mother, having a savings bank account in her individual name, has it changed so as to read "In account with Kate V. Beers or Sarah E. Kelly, daughter, or the survivor of them," the account on its face imports joint ownership during their lives, with right of sole ownership in the surviving daughter. But the mere form of the account does not sufficiently establish the intent of the mother to create such a trust or ownership, and her intent to this end may be further evidenced, and placed beyond question, by the circumstances surrounding the transaction and her declarations in respect thereto. (N. Y.) *Kelly v. Beers*, 543.

**7. BANK ACCOUNT—Joint Owners—Survivorship.**—In creating a joint bank account with right of survivorship, it is a matter of no importance that the particular terms "joint ownership" and "joint account" are not used; the controlling question is whether the person fixing the account intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. No particular formula is required, and courts will be controlled by the substance of the transaction rather than by the name given it. (N. Y.) *Kelly v. Beers*, 543.

### *Checks.*

**8. BANKS—Bank Checks and Their Character and Effect.**—A bank check is an instrument by which a depositor seeks to withdraw



funds from a bank, and as between the drawer and the payee it is an evidence of indebtedness, and in commercial transactions, as well as in law, it is equivalent to the drawer's promise to pay, and an action may be brought thereon, as upon a promissory note. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

9. **BANKING—Bank Checks, Actions upon.**—The payee of a bank check may maintain an action against the drawer to recover the debt evidenced by such check upon the drawee refusing to pay the same. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

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12. **BANKING—Check Drawn by Authority of Attorney.**—If a depositor gives a general authority to his agent to draw checks against his account, the bank upon which the check is drawn is under no duty to ascertain the purpose for which it was drawn, and is as safe in paying the check as if it had been drawn by the principal. (Pa.) *Snyder v. Corn Exchange Nat. Bank*, 780.

13. **BANKING—Checks, When Deemed Payable to a Fictitious Person.**—A check is drawn in the name of a fictitious person, whether a person of that name exists or not, if the person who drew it used the name as that of a person who should never receive, nor have the right to receive, it. The intent of the drawer of the check in inserting the name of the payee is the sole test of whether he is a fictitious person. (Pa.) *Snyder v. Corn Exchange Nat. Bank*, 780.

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15. **BANKING—Checks, Indorsement, Where in Favor of a Fictitious or Nonexisting Person.**—If checks are drawn by the agent of a depositor having authority so to do, but are made in the name of a fictitious or nonexisting person, and his name is forged on such checks, which are then delivered to the proprietor of a "bucket-shop" in connection with a gambling transaction, and the latter deposits them with a trust company for collection, which guarantees the signatures of its depositors and collects the checks of the bank on which they are drawn, such trust company is not answerable for the amount of the checks, for they must be regarded as checks payable to bearer and the indorsement only as a guaranty of the genuineness of the indorsements subsequently made upon them. (Pa.) *Snyder v. Corn Exchange Nat. Bank*, 780.

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**17. BANKING—Liability for Paying Check Issued in Connection with a Gambling Transaction.**—If a depositor has given his agent a general authority to draw checks in his name, the bank cannot be held answerable for paying checks so drawn, on the ground that they were used by the agent in connection with a gambling or wagering transaction, such use not being known either to the bank or the principal. (Pa.) *Snyder v. Corn Exchange Nat. Bank*, 780.

**18. BANKS AND BANKING—Effect of Deposit of Uncertified Check.**—The deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection, and not for payment, and if there be no funds to meet it, or if it be returned dishonored, the deposit bank may return it to the depositor and cancel the credit, and if the deposit bank receives notice of the invalidity of the check it cannot become a bona fide holder by subsequent payment. (Ohio) *Blake v. Hamilton Dime Sav. Bank Co.*, 684.

*Certified Check.*

**19. CERTIFICATION OF CHECK—Effect.**—The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. (Ohio) *Blake v. Hamilton Dime Sav. Bank Co.*, 684.

**20. CERTIFIED CHECKS—Liability to Assignee.**—The transfer of a certified check is an assignment of money to meet it, and the bank making the certification is liable therefor to the holder. (Ohio) *Blake v. Hamilton Dime Sav. Bank Co.*, 684.

**21. CERTIFIED CHECKS—Revocation of.**—The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it, is a bona fide holder and may enforce payment of it notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor. (Ohio) *Blake v. Hamilton Dime Sav. Bank Co.*, 684.

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#### BILLS AND NOTES.

**1. BILLS AND NOTES—Double Liability upon Renewal.**—A person who renews his note to a bank without exacting a surrender of the old one, when it has been pledged as security for a loan to the bank by other persons, may be liable on both notes if the new one is pledged to another bank without notice. (Ky.) *Citizens' Bank v. Bank of Waddy*, 282.

**2. BILLS AND NOTES—Indorsement of Non-negotiable Paper.**—An indorsement by the payee of his name on the back of a non-negotiable promise to pay, accompanied by a delivery of the instru-

ment, constitutes prima facie a valid transfer of the chose and the debt represented by it, and the purchaser may maintain an action thereon. (Wis.) *Swedish-American Nat. Bank v. Koebornick*, 1090.

**3. BILLS AND NOTES—Waiver on Renewal of Paper.**—The substitution of new notes for those originally given for machinery, under an agreement at the time of a return of part of the machinery to the seller, may be waived by the conduct of the makers. (Wis.) *Swedish-American Nat. Bank v. Koebornick*, 1090.

**4. EVIDENCE, Parol, of Collateral Agreement, When Admissible.** Evidence is properly received that certain promissory notes were executed because of an agreement between the payee and the maker that the latter would do certain acts, and that until they were done, the transaction should not be deemed complete, nor the notes enforceable. This is not a varying by parol of the terms of a writing, but amounts to a collateral agreement postponing the legal operation of the writing until the happening of a contingency. (N. C.) *Hughes v. Crooker*, 606.

**5. EVIDENCE—Agreement not to Use Promissory Notes Until the Happening of a Contingency, When Sufficiently Proved.**—In an action to recover damages sustained by the plaintiff by the wrongful negotiation of notes executed by him, testimony to the effect that the payee said that the maker was absolutely safe and that the contract was not finished until he had signed a certain expression of his satisfaction with the performance of another and collateral agreement between the maker and the payee, is sufficient to sustain the action. (N. C.) *Hughes v. Crooker*, 606.

**6. NEGOTIABLE INSTRUMENTS—Damages Recoverable by Their Wrongful Negotiation by the Payee.**—If, at the time of the negotiation of negotiable instruments by the payee named therein, he could not have recovered thereon against the maker because of a collateral, unfulfilled agreement between them, the payee is liable to the maker if the latter has been compelled to pay to an innocent indorsee. (N. C.) *Hughes v. Crooker*, 606.

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2. **CARRIERS—Passengers Assuming Dangerous Position.**—If a passenger, without an emergency excusing it, rides in a place of obvious danger, which he knows, or ought to know, is not provided for passengers, he is guilty of contributory negligence and cannot recover for an injury to which his act contributes as a proximate cause. (S. C.) *McLean v. Atlantic C. L. R. R. Co.*, 892.

3. **CARRIERS—Passenger Riding on Top of Car.**—A passenger who, without excuse or necessity, leaves his seat in a passenger-car attached to a freight train and takes a position upon the top of the caboose, is chargeable with negligence contributing as a proximate cause to his injury when the caboose is derailed while the passenger coach remains intact on the track. He cannot recover against the carrier. He assumes the risk of the dangerous position, and neither the suggestion of a brakeman to go there, nor the failure of the conductor to warn him while the train is standing at a station, can excuse his negligence. (S. C.) *McLean v. Atlantic C. L. R. R. Co.*, 892.

4. **CARRIER—Passenger Riding on Platform.**—A passenger who from choice, when there are seats inside, rides on the platform of a rapidly moving car as the train enters a washout in the night-time during or soon after a heavy rain, and is there fatally injured by the cars crushing together, while no one inside is killed, cannot be held, as a matter of law, not guilty of want of ordinary care contributing to his death. (Wis.) *Miller v. Chicago, St. P. M. & O. Ry. Co.*, 1021.

5. **CARRIERS—Injury to Passenger from Collapse of Bridge.**—A street railway company is not answerable to a passenger injured by the collapse of one of its bridges occasioned by an imperfect weld which could not have been detected by the utmost scrutiny, where the bridge was constructed by a competent and reliable company. (Va.) *Roanoke Ry. Co. v. Sterrett*, 971.

6. **CARRIERS—Injury to Passenger from Collapse of Bridge.**—In an action against a street railway company for injuries sustained by a passenger through the collapse of a bridge, an instruction is proper that the "slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been sustained, renders" the carrier liable. (Va.) *Roanoke Ry. Co. v. Sterrett*, 971.

7. **CARRIERS—Collapse of Bridge—Burden of Proof.**—When a passenger in an action against a street railway company for personal injuries shows that they resulted from the breaking down of one of the company's bridges, this places on the carrier the burden of establishing, by a preponderance of evidence, that the accident and resulting damage were occasioned by inevitable casualty, or by some cause which human foresight could not have prevented. (Va.) *Roanoke Ry. Co. v. Sterrett*, 971.

**8. CARRIERS.—A Presumption of Negligence Against a Carrier** does not arise from the abstract fact of an accident to a passenger, but from a consideration of the nature and quality of the accident. It must appear that the accident was such as does not, in the usual course of things, happen to passengers when due care is exercised by the carrier. (Va.) *Roanoke Ry. Co. v. Sterrett*, 971.

**9. RAILROADS—Passengers—Expulsion from Excursion Train.**—A railway company is liable for negligence in willfully ejecting a passenger from an excursion train operated by its servants for another who has fixed the rate of fare, simply because he refused to pay the excursion round-trip rate, but offered the usual rate. (S. C.) *Kirkland v. Charleston & W. Ry.*, 848.

**10. RAILROADS—Excursion Trains—Notice.**—Whether the public is invited to become passengers on an excursion train upon condition that each person who gets on board must purchase a round-trip ticket, and the question whether a certain passenger had notice of such requirement, are questions for the jury. (S. C.) *Kirkland v. Charleston & W. Ry.*, 848.

**11. STREET RAILWAY—Carrying Passenger Beyond Destination—Subsequent Injury.**—When a street railway company carries a passenger past the point where he has requested to be set down, and the conductor then refuses to take him back to the desired point, but directs him how to reach the same on foot, and the passenger, following such directions, in the darkness falls through a trestle, the railway company is answerable for his injuries. (Ky.) *Kentucky and Indiana B. & R. R. Co. v. Buckler*, 234.

#### *Of Livestock.*

**12. CARRIER OF LIVESTOCK—Extent of Liability.**—A carrier who contracts to transport horses is an insurer against all loss or damage during transit, except such as arises from acts of God, public enemies, or acts of the owner himself, subject to some restrictions arising out of the habits, propensities, or locomotion of the animals. (Wis.) *John Schroeder Lumber Co. v. Chicago & N. Ry. Co.*, 1039.

**13. CARRIER OF LIVESTOCK—Duty to Furnish Suitable Car.**—A railroad company in carrying out its contract to transport horses is bound to furnish suitable cars therefor. (Wis.) *John Schroeder Lumber Co. v. Chicago & N. Ry. Co.*, 1039.

**14. CARRIER OF LIVESTOCK—Imperfectly Ventilated Car.**—To relieve a carrier from liability for injury from inadequate ventilation to horses which it contracts to transport, it must appear that the shipper contracted to accept the car with full knowledge that it was so imperfectly ventilated as to be likely to produce the injury complained of. If the evidence shows that he accepted the car with such knowledge, he has no right to action. (Wis.) *John Schroeder Lumber Co. v. Chicago & N. Ry. Co.*, 1039.

**15. CARRIER OF LIVESTOCK—Imperfectly Ventilated Car.**—In an action by a shipper of horses for injuries sustained through imperfect ventilation, a failure fairly and clearly to submit to the jury the real issue, namely, whether or not the plaintiff's employe(s) knew the probable consequences of the defective ventilation, and, so knowing it, accepted or selected the car in question, calls for a reversal of the judgment and a new trial. (Wis.) *John Schroeder Lumber Co. v. Chicago & N. Ry. Co.*, 1039.

**16. RAILROADS—Injury to Stock in Transit—Burden of Proof.**—The burden of showing freedom from liability for damage to livestock while in transit is not cast upon the railroad company where the shipper is furnished free transportation for the purpose of enabling him to accompany his shipment, and he does in fact accompany the stock. (Iowa) *McManus v. Chicago G. W. Ry. Co.*, 180.

**17. RAILROADS—Injury to Livestock in Transit.**—If a railroad company limits its liability for the transportation of livestock to the terminus of its own line, it cannot be held liable in damages because one of a carload of cattle got down while in transit on its line, unless it is shown that the company was the cause of the condition of the animal at the time and of an injury thereto. (Iowa) *McManus v. Chicago G. W. Ry. Co.*, 180.

**18. RAILROADS—Care in Shipment of Livestock.**—A contract for the shipment of livestock, providing that the shipper or his agent in charge shall water, feed and care for the stock while in transit, imposes upon him the duty to see that the stock is furnished with such food and water as are properly required for consumption; but it does not impose upon him the duty of sprinkling and cooling the stock during hot weather. This duty devolves upon the railroad company alone. (Iowa) *Peck v. Chicago G. W. Ry. Co.*, 185.

**19. RAILROADS—Care of Livestock.**—In shipping swine crowded together, showering them with water in warm weather is essential to protect them from excessive heat, and as the facilities for doing so are entirely within the control of the railway company, it must be done by its employes alone, and the shipper cannot properly participate in the work. How frequently this should be done necessarily depends on the condition of the weather and the animals, and all that can be exacted from the shipper accompanying his stock is that, in the exercise of that care he has undertaken to bestow, he shall keep the railroad employes advised of the condition of the stock, that they may apply water as its necessities require. (Iowa) *Peck v. Chicago G. W. Ry. Co.*, 185.

**20. RAILROADS—Care of Livestock—Contract Against Negligence.**—A carrier of swine cannot by contract relieve itself from liability for its own negligence in failing to shower them during hot weather, and the most that can be required of the shipper is to notify the railroad employes of the need of such showering, and having called their attention to the condition of the swine and of the necessity of plenty of water to keep them cool, he has the right to rely upon the discharge by them of their plain duty of showering as their condition required. (Iowa) *Peck v. Chicago G. W. Ry. Co.*, 185.

**21. RAILROADS—Care of Livestock—Liability of Connecting Carrier.**—If no injury occurs to livestock while in transportation on the line of a connecting carrier, joined in a suit for the negligent care of the stock, a verdict should be directed in its favor. (Iowa) *Peck v. Chicago G. W. Ry. Co.*, 185.

#### *Of Goods in General.*

**22. RAILROADS—Authority of Agent—Burden of Proof.**—There is no presumption that the local agent of a railroad company at one station has any authority to enter into a contract for a shipment from another station, and if it is claimed that such authority exists, the burden of proof is upon the plaintiff to affirmatively show the authority claimed. (Iowa) *McManus v. Chicago G. W. Ry. Co.*, 180.

**23. CARRIERS—Receipt for Goods not Received.**—No carrier nor warehouseman has authority to issue any receipt for goods not actually received into its possession. (Ark.) *St. Louis I. M. & S. Ry. Co.*, 17.

**24. CARRIERS—Liability for Goods When as Depositary Only.**—A delivery of goods to a carrier must be for immediate transportation, and if the goods are delivered to him to be stored by him for a certain time or until the happening of a certain event, or until further orders, the carrier becomes a mere depositary or bailee, and



his liability is measured only by the principles governing that relation, and not as a carrier. (Ark.) St. Louis I. M. & S. Ry. Co., 17.

25. **CARRIERS, Damages Recoverable of for Delay in Shipment of Goods Ordered for a Special Purpose.**—When goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or use indicated. (N. C.) Harper Furniture Co. v. Southern Express Co., 588.

26. **CARRIERS—Notice to that Goods are Shipped for a Specific Purpose or for Present Use, When Implied—Damages.**—Where a company engaged in the manufacture and sale of furniture causes an engine shaft to be shipped to itself, which is a part by which the power of the engine is applied to carrying on its machinery and without which the engine and the machinery dependent upon it are for the time out of action, the carrier must take notice, especially when the shipment is in an unusual way and at a higher price than if shipped in the ordinary manner, that some unusual result may ensue from delay, and the damages recoverable for the delay in the transportation are not nominal only, but the amount must be submitted to the consideration of the jury. (N. C.) Harper Furniture Co. v. Southern Express Co., 588.

27. **RAILROADS—Limitation of Liability—Connecting Lines—Burden of Proof.**—If a railroad company, by written agreement, limits its liability for the transportation of property to the terminus of its own line, it is not chargeable with damages occurring on a connecting line, nor is the burden of proof upon it to show freedom from such liability. (Iowa) McManus v. Chicago G. W. Ry. Co., 180.

27a. **RAILROADS—Overcharges for Freight.**—To recover for overcharges for freight at the destination of the goods there must be a showing of the weight of the shipment carried by each car, when the charge is based on car capacity. (Iowa) McManus v. Chicago G. W. Ry. Co., 180.

#### *Bill of Lading.*

28. **CARRIERS—Bills of Lading.**—If a carrier issues a bill of lading for goods and surrenders them without taking up such bill, it is liable for the value of the goods to a bona fide holder of the bill of lading. (Ark.) St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank, 17.

29. **CARRIERS—Bills of Lading—Authority to Take Up.**—If a carrier ships goods and delivers them to a compress company at their destination as a warehouseman, the compress company becomes the agent of the carrier to take up the carrier's bills of lading and issue warehouse receipts therefor. (Ark.) St. Louis, I. M. & S. Ry. Co., v. Citizens' Bank, 17.

30. **CARRIERS—Bills of Lading—Effect—Impeachment.**—A bill of lading has a twofold aspect, as it is both a receipt and a contract, and as a receipt it is only prima facie evidence of the facts recited, and between the parties it is impeachable for mistake, error or false statements in it. (Ark.) St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank, 17.

31. **CARRIERS—Bills of Lading—Authority of Agents.**—A carrier acts through agents, and is bound by all they do within the scope of their authority, and it is within the scope of their authority to receive goods and issue bills of lading therefor, but not to issue bills of lading when the goods are not received. (Ark.) St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank, 17.



32. **CARRIERS—Bills of Lading—Authority of Agent.**—It is beyond the scope of a railroad freight agent's authority to issue a bill of lading or receipt for goods not actually received, and such receipt is not binding upon the carrier, at least before the right of a bona fide holder of a negotiable bill of lading intervenes. (Ark.) *St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank*, 17.

33. **CARRIERS—Bills of Lading—Due-bills—Liability.**—If a bill of lading for goods delivered by a carrier to a warehouseman has been surrendered for a due-bill, issued by the carrier's agent without authority and the carrier has been induced to ship out the goods on other orders obtained through fraud, the carrier's liability cannot be made to rest on the bill of lading, but must rest on the due-bill alone. (Ark.) *St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank*, 17.

*Bill of Lading with Draft Attached.*

34. **CONSIGNOR AND CONSIGNEE, Rights of the Holder of a Draft and Bill of Exchange, with the Bill of Lading Attached.**—When a vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order upon drawing a draft payable to his own order upon the vendee, and attaching the bill of lading and indorsing such draft to a third person for value, the title to the goods vests in the indorsee, at least to the extent of the amount advanced. (N. C.) *Mason v. Nelson Cotton Co.*, 635.

35. **INDORSEE of Draft or Bill of Exchange with a Bill of Lading Attached, Nonliability of.**—When the shipper of goods draws a draft or bill of exchange on the purchaser for the purchase price and obtains a bill of lading, and then indorses the draft or bill of exchange and assigns the bill of lading to a third person for value, this does not make the latter liable on the original contract of sale nor for any breach of warranty on the part of such vendor, though the purchaser was compelled to pay the draft or bill of exchange before he could inspect or get possession of the goods. (Overruling *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679.) (N. C.) *Mason v. Nelson Cotton Co.*, 635.

36. **RIGHTS OF PURCHASER of a Draft with a Bill of Exchange Attached.**—One who purchases a draft with a bill of exchange attached, by reason of the consideration moving from him as such purchaser, acquires a position superior to that of the drawee, and has the right to insist on the drawee's recognizing this position before delivering to him the bill of lading. (N. C.) *Mason v. Nelson Cotton Co.*, 635.

See Damages, 8, 9.

**CASHIER.**

See Banks and Banking, 2, 3.

**CEMETERIES.**

1. **CEMETERIES.—Rights of Lot Owners.**—While a purchaser of a lot in a cemetery company does not acquire the fee simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the managers of the company, yet he has a property right in his lot which the law recognizes and protects from invasion, whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. (Ky.) *Hertle v. Riddell*, 364.

2. **CEMETERIES.—Remedies of Lot Owner.**—A lot owner in a cemetery may maintain either trespass for damages or injunction to enforce and uphold his rights whenever those remedies may be necessary, and this either against the trespasser or the company itself. (Ky.) *Hertle v. Riddell*, 364.

**3. CEMETERIES—Injunction Against Burial of Dog.**—When a lot owner has buried a dog in a cemetery, an adjoining lot owner may compel the removal of the body by a mandatory injunction against the trustees of the corporation and the offending lot owner. (Ky.) *Hertle v. Riddell*, 364.

**4. CEMETERIES—Damages to Adjacent Property.**—One is not entitled by the common law to damages against a city on account of its establishing a cemetery adjacent to his property, merely because it offends his taste or feelings or affects the fastidious sentiments of prospective purchasers. (Va.) *Lambert v. Norfolk*, 945.

**5. CEMETERIES—Damages to Adjacent Owners.**—A Statute Providing that the owners shall have a right of action when "damage" is done to adjacent lands by the establishment of a cemetery has reference to injuries to the corpus of the property or some right connected therewith, and it does not give to adjacent proprietors a right of recovery because the cemetery is offensive to his tastes or sentiments and renders his property less desirable or salable. (Va.) *Lambert v. Norfolk*, 945.

See Constitutional Law, 23-25.

#### CERTIFIED CHECKS.

See Banks and Banking, 19-21.

#### CHARITIES.

**1. CHARITY, Public, What Constitutes.**—A gift to a designated town toward the erection of buildings for the sick and poor, those without homes, constitutes a public charity. (Mass.) *Bowden v. Brown*, 419.

**2. CY PRES—Charitable Purposes, Refusal of a Gift for—Right of Residuaries.**—If a will is made declaring that the remainder of the testatrix's estate shall be given to the town of M. toward the erection of a building for the sick and poor, and specifies persons in whose hands the gift is to be left, and the town refuses to accept the legacy, and it appears that the fund is not sufficient to carry out the testatrix's purposes and that it is impossible to do what she had in mind, the doctrine of cy pres does not apply, the charity fails altogether, and the property goes to the next of kin. (Mass.) *Bowden v. Brown*, 419.

#### CHATTEL MORTGAGES.

**1. CHATTEL MORTGAGES—Death of Mortgagor—Right of Mortgagee to Maintain Replevin.**—Where the mortgagor dies in possession of the goods and chattels covered by the mortgage, even after condition broken, and his administrator has taken possession of said goods and chattels in his trust capacity, the mortgagee cannot maintain replevin against such administrator for their possession. In such case, if the mortgage is valid, the interest of the mortgagee in the property under mortgage is transferred to the fund arising from the sale by the administrator. (Ohio) *Lingler v. Wesco*, 714.

**2. ACTIONS, Abatement of.**—If a chattel mortgagee seeking to foreclose his mortgage is in possession thereof during all the time payments are made thereon, and alleges his ownership and brings the mortgage and notes into court, and the mortgagor pleads and relies upon payments made to such mortgagee, and treats him as the owner of the mortgage long after the date of its alleged assignment to another, he cannot rely upon a general allegation that the mortgagee is not shown to be the real party in interest, and that the action must therefore be abated. (Iowa) *Cain v. Vogt*, 216.

**3. CHATTEL MORTGAGES—Assignments of.**—Though no statute requires the recording of an assignment of a chattel mortgage,

failure to make such record will subordinate the assignee to the rights of a bona fide purchaser of a second mortgage upon the same property from the original mortgagee, who, after such assignment, fraudulently cancels the mortgage of record and obtains another for the same debt and puts it in circulation. (Iowa) Central Trust Co. v. Stepanek, 175.

4. **CHattel MORTGAGES**—Assignments—Purchasers.—A subsequent assignee of a chattel mortgage, as well as a subsequent mortgagee, is a purchaser within the meaning of a statute providing that "no unrecorded mortgage of personal property where the possession is retained by the mortgagor is valid against existing creditors or subsequent purchasers." (Iowa) Central Trust Co. v. Stepanek, 175.

#### CHECKS.

See Banks and Banking, 8-21; Gaming.

#### CHILD LABOR STATUTE.

See Master and Servant, 7-10.

#### CIRCUS.

See Licenses, 4.

#### CLAMS.

See Fish; Larceny.

#### CONFLICT OF LAWS.

See Limitation of Actions, 7-9; Marriage, 2-8.

#### CONSTITUTIONAL LAW.

##### *In General.*

1. **CONSTITUTIONAL LAW**—Delegation of Legislative Power.—The legislature cannot delegate the power to make laws, and no delegation of authority for local or special purposes or in matters of administration can sustain the delegation of authority to change a general law for all the people of the state, with no local or special reason for seeking the aid of an administrative body. (Mass.) Wyeth v. Board of Health, 439.

2. **CONSTITUTIONALITY OF LAW**—Who may Question.—A person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof. (Wis.) Bonnett v. Vallier, 1061.

##### *Unconstitutional Statute.*

3. **CONSTITUTIONAL LAW**—Ordinance Void in Part.—Where the valid and invalid parts of an ordinance are bound together, and the invalid part is a material inducement to the valid portion, the whole ordinance must fall. (Wis.) Village of Little Chute v. Van Camp, 1100.

4. **CONSTITUTIONAL LAW**—Statutes Void in Part.—Where parts of a law viewed by themselves are unconstitutional and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable; otherwise not. In case the act as a whole has one or more invalid features pervading the entire act, it must be regarded as an entirety and all be condemned as unconstitutional. (Wis.) Bonnett v. Vallier, 1061.

5. **CONSTITUTIONAL LAW**—Statutes Invalid in Part.—If the last part of a statute is so far separable from the preceding parts



that the legislature probably would have enacted the one part, though it had supposed that it could not constitutionally enact the other, each part may stand by itself, and one be held valid though the other is not. (Mass.) *Mutual Loan Co. v. Martell*, 446.

**6. UNCONSTITUTIONAL LAW—Duty of Court to Condemn.**—A court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate, and thus upheld the constitution as superior to legislative will. (Wis.) *Bonnett v. Vallier*, 1061.

**7. CONSTITUTIONAL LAW—Presumption in Favor of Act.**—In testing legislative enactment as regards its constitutionality all reasonable doubts must be resolved in favor of legislative power. (Wis.) *Bonnett v. Vallier*, 1061.

**8. UNCONSTITUTIONAL LAW—Enjoining State Officers from Enforcing.**—An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only. (Wis.) *Bonnett v. Vallier*, 1061.

**9. UNCONSTITUTIONAL LAW—Status and Effect.**—An unconstitutional legislative enactment, though law in form, is in fact not law at all. "It confers no rights; it imposes no duties; it affords no protection; . . . it is in legal contemplation as inoperative as though it had never been passed." (Wis.) *Bonnett v. Vallier*, 1061.

#### *Representative Districts.*

**10. CONSTITUTIONAL LAW—Representative Districts.**—Whether a Statute Redistricting the state into representative districts makes a division so unequal as to violate a constitutional provision that such division must be in proportion to the population is not so essentially a political question as to be beyond the jurisdiction of the courts. (Ky.) *Ragland v. Anderson*, 242.

**11. CONSTITUTIONAL LAW—Representative Districts—Inequality.**—A statute redividing the state into representative districts and placing three counties with a population of fifty-three thousand and an area of twelve hundred square miles into one district with one representative, while placing one county with a population of seven thousand and an area of two hundred square miles in another district with one representative, violates a provision of the constitution requiring such districts to be as nearly equal in population as may be without dividing counties. (Ky.) *Ragland v. Anderson*, 242.

**12. CONSTITUTIONAL LAW—Joining Two Counties to Form Representative District.**—The provision of the Kentucky constitution that not more than two counties shall be joined together to form a representative district does not forbid such joining when necessary to effectuate equality of representation. (Ky.) *Ragland v. Anderson*, 242.

#### *Police Power.*

**13. CONSTITUTIONAL LAW—States may Require Individuals** to so manage and use their property that the public health and safety are best conserved. (N. C.) *State v. Whitlock*, 670.

**14. CONSTITUTIONAL LAW—Limitations on Police Power.**—Legislative authority in the field of police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those



"unalienable rights" with which all men are endowed and to secure which "governments are instituted among men." When it goes beyond that it enters the field of the destructive, and so offends against some constitutional limitation. (Wis.) *Bonnett v. Vallier*, 1061.

**15. CONSTITUTIONAL LAW—Police Power—Province of Courts and Legislature.**—What constitutes a proper subject for regulation under the police power is a judicial question. Matters of mere expediency in respect thereto are wholly for legislative cognizance. What is reasonable is primarily for legislative judgment, but in the ultimate it is a judicial question. There must be reasonable ground, having regard for the public welfare, for the interference, and the means adopted to accomplish the purpose in view must be reasonably necessary. (Wis.) *Bonnett v. Vallier*, 1061.

**16. CONSTITUTIONAL LAW—Police Power—Province of Courts and Legislature.**—What is reasonable in any given case being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom, but where the interference is plainly excessive, the duty of the court to repel the encroachment is absolute. (Wis.) *Bonnett v. Vallier*, 1061.

**17. CONSTITUTIONAL LAW—Reasonableness of Police Regulation.**—What is reasonable is not necessarily what is best, but what is fairly appropriate to the purpose, under all the circumstances. The scope of the term "reasonable" as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution, adapting the same to modern conditions. (Wis.) *Bonnett v. Vallier*, 1061.

**18. CONSTITUTIONAL LAW—Reasonableness of Police Regulation.**—In determining what is reasonable the court must look to the language of the statute and the facts which appear because of judicial knowledge thereof or otherwise. (Wis.) *Bonnett v. Vallier*, 1061.

*Regulating Occupations—Undertakers—Burials.*

**19. CONSTITUTIONAL LAW—Right to Pursue any Vocation.**—The right to enjoy liberty and the pursuit of happiness is secured to every one by the constitution of Massachusetts, and this includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the constitution of the United States. (Mass.) *Wyeth v. Board of Health*, 439.

**20. CONSTITUTIONAL LAW—Police Power, Interference Permitted in the Exercise of.**—In the exercise of the police power, such kinds of business as require regulation in the interests of the public health, the public safety or morals, and perhaps in a strict sense, in the interest of the public welfare, may be regulated by the state, but no other interference of the public to the detriment of the individual is permissible. (Mass.) *Wyeth v. Board of Health*, 439.

**21. CONSTITUTIONAL LAW.—The Refusal to Permit One to Engage in the Business of an Undertaker** is violative of the right to enjoy life, liberty and the pursuit of happiness, unless there is good reason for the refusal. (Mass.) *Wyeth v. Board of Health*, 439.

**22. CONSTITUTIONAL LAW.—The Refusal to Permit One to Bury the Body of a Relative or friend**, except under unreasonable limitations, is interference with a private right not allowable under the constitution of Massachusetts nor that of the United States. (Mass.) *Wyeth v. Board of Health*, 439.

**23. CONSTITUTIONAL LAW.—The Burial of the Dead has Such Relation to the Public Health, morals and safety** that it may be regu-

lated by law; and of the power of the legislature to exercise complete control of burials of the dead so far as is necessary for the protection of the public health and the protection of the public safety there is no question. (Mass.) *Wyeth v. Board of Health*, 439.

**24. CONSTITUTIONAL LAW—Police Power—Requirement of Knowledge of Embalming on the Part of Undertakers.**—Embalming is not generally an essential part of the duties of an undertaker and has no relation to the public health, and if there is some slight increase of knowledge from this source to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation. (Mass.) *Wyeth v. Board of Health*, 439.

**25. CONSTITUTIONAL LAW—Police Power—Board of Health Requirement that Undertakers be Licensed Embalmers.**—There is no such connection between the requiring of undertakers to be licensed embalmers and the protection of the public health as to justify the refusal of a license by a board of health to an undertaker who is not such an embalmer. (Mass.) *Wyeth v. Board of Health*, 439.

*Regulating Tenement Houses.*

**26. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—The construction and maintenance of tenement, lodging, and boarding houses is a proper subject for legislative regulation, but the degree of regulation permissible varies greatly according to circumstances. (Wis.) *Bonnett v. Vallier*, 1061.

**27. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A police regulation in the field mentioned in the last foregoing paragraph which is not excessive as to a large city might be held unreasonable if applied to the state at large. (Wis.) *Bonnett v. Vallier*, 1061.

**28. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—Limitations in the field suggested impossible or impracticable to comply with, either because of absence of facilities necessary therefor, or expense so great as to render the regulation prohibitive in many situations, are unreasonable. (Wis.) *Bonnett v. Vallier*, 1061.

**29. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A general police regulation down to minute particulars of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance, and containing no provision for such approval, is unreasonable. (Wis.) *Bonnett v. Vallier*, 1061.

**30. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—Where the penal feature of police regulation is so severe, having regard to the nature of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging-house purposes and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws, rendering the act void irrespective of whether its provisions would otherwise be valid. (Wis.) *Bonnett v. Vallier*, 1061.

**31. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—To penalize good faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point of view. It denies the equal protection of the laws; it violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property, and violates every principle of civil liberty. (Wis.) *Bonnett v. Vallier*, 1061.

**32. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A law regarding the construction of tenement houses requiring street courts to be six feet in width between the lot line and the opposite wall of the building—that is, under all conditions and in all localities to be at least six feet wide—is an unreasonable interference. (Wis.) *Bonnett v. Vallier*, 1061.

**33. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—A police regulation making every habitation, regardless of locality, a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping-room in the house, and regulates the maintenance of the house as regards light, location of beds, equipment with water-closets, etc., is an unreasonable interference. (Wis.) *Bonnett v. Vallier*, 1061.

**34. CONSTITUTIONAL LAW—Regulation of Tenement Houses.**—There is a wide interval between the ideal and the practical. The latter standard should prevail as to legislative regulations as to the construction and maintenance of tenement, lodging, and boarding houses. Common sense as to what is reasonable in such matters should prevail, not the extreme views of well-meaning persons, as to what is for the best. (Wis.) *Bonnett v. Vallier*, 1061.

*Assignment of Wages.*

**35. CONSTITUTIONAL LAW—Assignment of Wages to be Earned, Regulation of.**—The legislature is justified, in the exercise of the police power, in enacting regulations of the right to make assignment of wages to be earned, and may require that such assignment be recorded. (Mass.) *Mutual Loan Co. v. Martell*, 446.

**36. CONSTITUTIONAL LAW—Assignment of Wages, Statute Invalidating Unless Accepted by the Employer.**—A statute providing that no assignment of wages to be earned shall be valid, as against any employer, unless accepted in writing by him, is constitutional. (Mass.) *Mutual Loan Co. v. Martell*, 446.

**37. CONSTITUTIONAL LAW—Discrimination Between Assignment to Secure Loans and Mortgages and Assignments to Secure Other Obligations.**—A statute invalidating assignments of wages to be earned to secure loans of less than two hundred dollars unless accepted by the employer, is unconstitutional because of the distinction made between such loans and assignments to secure liabilities arising from credit extended for other purposes. (Mass.) *Mutual Loan Co. v. Martell*, 446.

**38. CONSTITUTIONAL LAW—Assignment of Wages to be Earned, Statute Making Consent of Wife Necessary.**—A statute providing that no assignment of or order for wages to be earned in the future to secure a loan of less than two hundred dollars shall be valid if made by a married man unless the written consent of his wife is attached thereto, is not unconstitutional. (Mass.) *Mutual Loan Co. v. Martell*, 446.

**39. CONSTITUTIONAL LAW—Discrimination in Favor of Certain Banking Institutions.**—A statute invalidating assignments of wages to be earned to secure loans of less than two hundred dollars unless accepted in writing by the employer, or consented to in writing by the wife of the assignor if he is married, is not unconstitutional, because it exempts from its operation national banks or banking institutions under the supervision of the bank commissioner and loan companies established by special charters and placed under such supervision. The legislature may be supposed to have known that the business done by those corporations would not need regulation in the interest of employers or employes. (Mass.) *Mutual Loan Co. v. Martell*, 446.

See Elections; Game Laws.



**CONTRACTS.**

**1. CONTRACTS—Mutuality of Obligation and Remedy.**—To constitute an executory contract there must be mutuality of obligation, but mutuality of remedy is not always essential. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

**2. CONTRACTS—Enforcement Against Public Policy.**—If a contract is against public policy, courts will not lend their aid to its enforcement. The defense need not be pleaded; if at any time it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief. (Ky.) *Howe v. Griffin*, 296.

**3. CONTRACTS, PUBLIC, Trustees of School District not to be Interested in.**—The clear intention of the provisions of section 82 of our school laws, as amended by the Session Laws of 1905, page 71, was to prohibit a trustee from making a contract with his district in which he is pecuniarily interested. (Idaho) *Independent School Dist. v. Collins*, 76.

**4. CONTRACTS, PUBLIC—Recovery of Moneys Paid Under Void.** The penalty of prohibition in said section is that no action can be maintained or recovery had against the district on such contracts; but that does not change the rule to the effect that money paid by a municipal corporation upon a void contract may be recovered back. (Idaho) *Independent School Dist. v. Collins*, 76.

**5. CONTRACTS, VOID, Persons Retaining Advantage of, When not Bound by.**—The rule that neither party to a transaction will be permitted to take advantage of its validity while retaining its benefits, applies only to voidable contracts and not to contracts of a municipal corporation that are absolutely void. (Idaho) *Independent School Dist. v. Collins*, 76.

**6. CONTRACTS, PUBLIC, When Void—School Districts.**—Under the provisions of said section 82, school trustees are prohibited from having any interest in any contract let or made by or with the board of trustees of such district or with any officer thereof, and in case such a contract is made, the same is void and no action can be maintained or recovery had in favor of the district upon any such contract or obligation. This rule is founded in public policy, and is a salutary one to prevent the risk of abuses in the public service. (Idaho) *Independent School Dist. v. Collins*, 76.

**7. CONTRACTS, VOID, Suit by Private Citizen to Recover Moneys Paid Under.**—Where a municipal corporation has paid money on a void contract and the properly constituted authorities of such corporation refuse to bring an action to recover back the money so illegally paid, an action therefor on behalf of the corporation may be maintained by any taxpayer thereof. (Idaho) *Independent School Dist. v. Collins*, 76.

See Damages, 6, 7; Sunday, 1-3.

**CONVERSION.****WILLS—Construction—Conversion of Realty into Personality.**

If a husband bequeaths to his wife "the furniture, pictures, household goods, horses, carriages and house and lot in which we now reside, to have and to hold as long as she may desire to live there, after which time I direct that they be disposed of by my executors and become part of my estate," and, "I also direct the legal share of all my real estate and personal property to be paid to my wife as her share out of my estate," and after giving a money legacy and the balance of his estate to relatives he gives direction to his executors to dispose of all of his estate within three years after his death, the direction in the will to sell works a conversion of the realty into personality, and the



widow takes one-half of the entire estate absolutely as personalty. (Pa.) Dull's Estate, 796.

### COPYRIGHT.

1. **COPYRIGHT.**—At the Common Law the Author of a Literary Composition has an absolute property right in his production, of which he cannot be deprived so long as it remains unpublished, and he cannot be compelled to publish it. (Ill.) Frohman v. Ferris, 135.

2. **COPYRIGHT.**—Upon the Publication of a Literary Production the author's common-law rights cease and it becomes public property unless protected by statute. (Ill.) Frohman v. Ferris, 135.

3. **COPYRIGHT.**—Public Performance of Drama in Manuscript.—There is no provision in our copyright statute for securing to the author of a drama the exclusive right to perform it except when it is printed in a book, but the common law applies in such cases, and the author does not lose his rights in the manuscript production by a public performance thereof. (Ill.) Frohman v. Ferris, 135.

4. **COPYRIGHT.**—Performance of Manuscript Drama in England. The exclusive right in the United States of the author of a drama in manuscript, or of his assignee is not extinguished by its public performance in England, which in that country is equivalent to publication. (Ill.) Frohman v. Ferris, 135.

### CORPORATIONS.

#### *In General.*

1. **CORPORATION.**—Misnomer in Pleading.—The misnomer of a corporation defendant cannot be objected to for the first time on appeal. The objection should be made in the trial court by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name. The plaintiff may then amend his petition. (Ky.) University of Louisville v. Hammock, 355.

2. **CONSTITUTIONAL LAW.**—Effect on Corporate Charters.—If a constitution provides that it shall apply only to corporate charters or grants of corporate franchises under which organization has not in good faith taken place at the time of the adoption of such constitution, it does not affect in any way charters previously granted in good faith. (S. C.) Man v. Boykin, 830.

3. **CORPORATION.**—Authority of Secretary to Assign Note.—In an action on a note assigned by the secretary of a business corporation, the assignor need not prove the authority of the secretary to make the assignment, such authority being presumed in the absence of notice to the person receiving the paper. (Wis.) Swedish-American Nat. Bank v. Koebernick, 1090.

4. **CORPORATIONS.**—Ratification of Contracts.—A gas company cannot avoid its contract to sell its gas to another company on the ground that the contract is not binding upon it, because not approved at a meeting of the directors when a quorum was present, if the negotiations leading to the contract were known to such board of directors, and the other party has spent large sums of money to convey the gas to its mains, has appointed employes to read meters, has secured rights of way, and both companies have treated the contract as valid and have done everything required by its terms, for a considerable length of time. (Pa.) Greensboro Gas Co. v. Home Oil & Gas Co., 790.

#### *Dissolution.*

5. **CORPORATIONS.**—Dissolution of.—A provision in a statute that whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of the corporation that it

shall be dissolved and two-thirds in interest of the stockholders consent to such dissolution, it may, in a certain manner be dissolved, enters into every charter, and every stockholder takes and holds his stock subject to this power of voluntary dissolution, and when the board of directors have determined, in their best judgment, that the corporation be dissolved and are pursuing the methods specified by the statute, it is only in rare and exceptional cases that their action will be stayed or interfered with by the courts. (N. C.) *White v. Kincaid*, 663.

6. **CORPORATIONS—Dissolution—Injunction.**—When the directors of a corporation, under the power vested in them by statute, lawfully proceed to wind up its affairs, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry, nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem. (N. C.) *White v. Kincaid*, 663.

7. **CORPORATIONS — Dissolution — Directors as Trustees.**—The directors of a corporation, in dissolving it and winding up its affairs, are to be considered and dealt with as trustees, in respect to their corporate management. (N. C.) *White v. Kincaid*, 663.

8. **CORPORATIONS—Dissolution—Rights of Stockholders.**—If it clearly appears that the action of the board of directors in dissolving a corporation and winding up its affairs under statutory authority has been superinduced by fraud and undue influence and that its action has not been taken for the benefit of the corporation or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders or any of them and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, the court will control the action of such board of directors, but if, on the contrary, no such state of affairs appears the court will not interfere. (N. C.) *White v. Kincaid*, 663.

9. **CORPORATIONS—Dissolution—Dissolution of Injunction—Procedure.**—If an order dissolving a temporary restraining order issued at the request of a stockholder to prevent the directors of a corporation from proceeding under statutory authority to dissolve it is affirmed on appeal, the appellate court will not dismiss the case, but will remand it to the trial court to supervise the dissolution under statutory authority. (N. C.) *White v. Kincaid*, 663.

*Stock—Increase and Transfer.*

10. **CORPORATIONS—Increase in Capital Stock.**—If corporations are permitted by law to increase their capital stock, mere irregularities will not invalidate the increased issue. (S. C.) *Man v. Boykin*, 830.

11. **CORPORATIONS—Transfer of Stock.**—Under a statute providing that no transfer of corporate stock shall be valid, except as between the parties, until it shall have been regularly made and entered upon the books of the corporation, such books must show the date of surrender, the number of the new certificate and the date of reissue, or at least something to show a proper transfer, and if this is not done, the original holder of the stock is liable to a creditor of the bank, but has an action against the transferee for reimbursement. (S. C.) *Man v. Boykin*, 830.

*Stockholders' Liability.*

12. **CORPORATIONS—Unpaid Subscriptions, Person Liable Therefor.**—Where one who has an option to sell a patent organizes a corporation to make the purchase and advances five thousand dollars

of the necessary money, the remainder of which is to be paid by the corporation, an arrangement whereby he receives stock of the face value of fifty thousand dollars in return for the five thousand dollars and the benefit of the option, amounts to an issue of stock at one-tenth of its value, and he is liable to creditors of the company for the unpaid amount. (Ill.) *Moore v. United States Barrel Co.*, 153.

13. **CORPORATIONS—Stockholders' Liability.**—The Illinois statute makes every stockholder and assignee of stock liable for the debts of the corporation to the extent of the amount unpaid on his stock, and such amount constitutes a fund to which creditors of the company have a right to resort for the satisfaction of their debts, without regard to when they accrued or the creditors' knowledge of the fact that the stock has not been paid for. (Ill.) *Moore v. United States Barrel Co.*, 153.

14. **CORPORATIONS.—Stockholders cannot Escape Their Liability** to pay the full amount unpaid upon stock held by them so long as any creditor of the corporation remains unpaid. (Ill.) *Moore v. United States Barrel Co.*, 153.

15. **CORPORATIONS—Release of Stockholders by Company.**—A corporation cannot release a stockholder from liability to existing creditors for his unpaid subscription by rescinding the transaction whereby the stock was acquired and restoring him to his original status as creditor of the corporation. (Ill.) *Moore v. United States Barrel Co.*, 153.

16. **CORPORATIONS.—Rescission of a Contract Between a Stockholder** and the corporation effected by a resolution adopted by himself and two other directors under his domination does not bind the company. (Ill.) *Moore v. United States Barrel Co.*, 153.

17. **CORPORATIONS—Persons Liable for Unpaid Subscriptions.**—A creditor of a corporation who with full knowledge receives in payment of his debt stock of a face value ten times greater than his claim is liable for the unpaid subscription, and cannot insist upon the postponement of his liability to that of other stockholders. (Ill.) *Moore v. United States Barrel Co.*, 153.

18. **CORPORATIONS—Stockholders' Liability.**—The Assignee of a Judgment against a corporation may enforce its collection by a bill to enforce the liability of stockholders for unpaid subscriptions. (Ill.) *Moore v. United States Barrel Co.*, 153.

19. **CORPORATIONS—Insolvency—Stockholders.**—If a bank is insolvent, judgment should be entered for their full liability against the stockholders, and such assessments should be made from time to time as are found to be necessary. (S. C.) *Man v. Boykin*, 830.

See Receivers.

Note.

**Corporations**, subpoena duces tecum to compel production of books and papers of, 766, 767.

### COTENANCY.

See Partition; Tenancy in Common.

### COTRUSTEES.

See Trusts.

### COURTS.

1. **STARE DECISIS**, Refusal of the Court to be Controlled by.—Though the court will, as a general rule, adhere to a decision found to be erroneous, when it has been acquiesced in for so great a length of time as to become accepted law constituting a rule of real prop-



erty, it will not adhere to a decision found to be clearly erroneous which affects injuriously the general business law and which has been generally disapproved by all commentators upon it. (N. C.) *Mason v. Nelson Cotton Co.*, 635.

2. **STARE DECISIS, Contract Made After an Erroneous Decision and Before It was Overruled.**—The fact that the contract in question was made after an erroneous decision had been pronounced by the highest court of the state does not preclude that court from overruling that decision and applying to the contract what it conceives to be the correct rule upon the subject. (N. C.) *Mason v. Nelson Cotton Co.*, 635.

3. **STARE DECISIS—Retrospective Effect of an Overruling Decision.**—The decision of the court of supreme jurisdiction overruling a former decision is retrospective in its operation, because it, in effect, declares that the former decision never was the law. This rule will be applied to an erroneous decision in general mercantile law which is contrary to accepted doctrine and recognized business methods. (N. C.) *Mason v. Nelson Cotton Co.*, 635.

See Removal of Causes.

#### CRIMINAL LAW.

1. **CRIMINAL TRIAL—Asking Defendant if He has been Indicted.**—The defendant cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt; and a general objection thereto is sufficient to raise reversible error. (N. Y.) *People v. Morrison*, 552.

2. **CRIMINAL LAW—Former Jeopardy.**—If one is indicted for burglary and larceny and convicted for larceny after the prosecution has announced that he will not ask for a conviction for burglary because of the insufficiency of the evidence, and the court has stated that it will not direct a verdict of not guilty as to the burglary, and the defendant has obtained a new trial, he may be tried under a new indictment charging both larceny and burglary, and such trial is not putting the accused twice in jeopardy. (S. C.) *State v. Hamilton*, 881.

3. **CRIMINAL LAW—Former Jeopardy.**—If one is indicted in separate counts for burglary and larceny, and being convicted of the latter obtains a new trial, the court has no right to consider the effect of the conviction for larceny in the first instance. (S. C.) *State v. Hamilton*, 881.

#### CURTESY.

1. **CURTESY in Equitable Estate.**—A husband is entitled to curtesy in the equitable estate of his wife, and this rule is not abrogated by the married woman's statute of Missouri. (Mo.) *Donovan v. Griffith*, 458.

2. **CURTESY is an Equitable Estate in Lands or Tenements** to which a man is entitled on the death of his wife, she having been seised in fee simple or fee tail during their coverture, provided they had legal issue born alive which might have been capable of inheriting the estate. (Mo.) *Donovan v. Griffith*, 458.

3. **CURTESY—Death of Child Before Wife Becomes Seised of an Estate.**—A husband's claim to curtesy in the lands of his wife is not defeated by the death of their child before she became seised of any estate in such estate. (Mo.) *Donovan v. Griffith*, 458.



**CY PRES DOCTRINE. •**

See Charities.

**DAMAGES.***For Pain and Suffering—Mental Anguish.*

1. **DAMAGES.**—**Mental Suffering Means** distress or serious pain as distinguished from annoyance, regret or vexation; mental anguish is intense mental suffering. (S. C.) *Johnson v. Western Union Tel. Co.*, 905.

2. **NEGLIGENCE—Damages for Pain and Suffering.**—In an action to recover for pain and suffering, the jury may and should award compensation for pain and suffering whenever the evidence furnishes just ground for the belief that such pain and suffering will likely or probably ensue. (Pa.) *Wallace v. Pennsylvania R. R. Co.*, 817.

3. **NEGLIGENCE—Damages for Future Pain and Suffering.**—If a passenger on a railroad train has his leg broken and it is set in such a way as to make a second operation necessary, and if such second operation is performed in good faith before the recovery of the patient from the original injury with a view to promote and insure complete recovery, or to mitigate the patient's pain either by correcting what has been done, or by supplementing it, by a surgeon in whose skill and judgment an ordinarily prudent person would have a right to rely, the consequences following the operation and directly resulting therefrom are, in a legal sense, the result of the original accident, and no compensation can be recovered for the future pain and suffering resulting therefrom. (Pa.) *Wallace v. Pennsylvania R. R. Co.*, 817.

4. **CONSTITUTIONAL LAW—Damnum Absque Injuria.**—If a person, corporation, or individual is doing a lawful thing, in a lawful way, his conduct is not actionable, though it may result in damage to another. (N. C.) *White v. Kincaid*, 663.

*For Destruction of Orchard.*

5. **DAMAGES—Measure of for Destruction of Orchard.**—In an action against a railroad company for injury to an orchard from fire, the measure of damages is not the difference in value between the whole farm before and after the fire, but the reasonable value of the trees destroyed and the difference in value of those injured before and after the fire. (Ky.) *Louisville & Nashville R. R. Co. v. Beeler*, 291.

*For Breach of Contract.*

6. **DAMAGES, Presumption of.**—For every breach of a promise made on good consideration the law awards some damage. (Mass.) *Sherlag v. Kelley*, 414.

7. **DAMAGES, When Sufficiently Alleged.**—A general averment of damages in the ad damnum clause is sufficient where there are previous averments showing a liability, and special damages are not claimed. It is not material whether the action is in contract or tort. (Mass.) *Sherlag v. Kelley*, 414.

*For Loss of Profits.*

8. **DAMAGES—Loss of Profits of a Manufacturing Enterprise.**—The current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and fluctuations of the market value of the products, are, as a general rule, too uncertain to form the basis of an award of damages in breaches of contract

affecting the operation of the plant. (N. C.) Harper Furniture Co. v. Southern Express Co., 588.

9. **THE DAMAGES Recoverable for the Loss of Profits of a Manufacturing Enterprise** due to the breach of a contract must be ascertained on the basis of the capital invested which is unproductive for a time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed and some other incidental expenses, reasonably referable to the defendant's wrong, which may at times include outlay in the reasonable effort to reduce or minimize the loss. (N. C.) Harper Furniture Co. v. Southern Express Co., 588.

See Death; Sales: Telegraphs and Telephones.

## DEAD BODIES.

See Cemeteries; Constitutional Law, 23-25.

## DEATH.

### *Actions for and Damages.*

1. **DEATH of Human Being, Action for.**—Except where a different rule has been introduced by statute, no action can be sustained by one person for causing the death of another. The decisions except, as a ground for recovery, all elements of damage which arise solely from the death, and, as to such damage, are equally applicable to actions of contract and to actions of tort. (Mass.) Sherlag v. Kelley, 414.

2. **HUSBAND AND WIFE, Action of the Former to Recover for the Death of the Latter.**—A husband cannot maintain an action of contract to recover damages for causing the death of his wife, nor for loss of consortium, companionship or services resulting from her death. (Mass.) Sherlag v. Kelley, 414.

3. **DEATH of Human Being, Statutory Remedy for, Exclusiveness of.**—A statute giving a cause of action for the death of a human being through neglect is exclusive, whether the relations of the parties are such that there is a breach of an express or implied contract, or whether the duty neglected arises outside of any contract. (Mass.) Sherlag v. Kelley, 414.

4. **EVIDENCE—Judicial Record.**—If in an action for wrongful death by decedent's administrator, the defendant pleads and puts in evidence her alleged settlement of the claim and its approval by the court, together with so much of the record of the probate court as has any tendency to support the defense, the record of a subsequent order of the court disapproving such settlement is admissible when the defendant claims that the approval of the settlement was a prior adjudication of the rights involved in the action. (Iowa) Kelly v. Chicago R. I. & P. Ry. Co., 195.

5. **ACTIONS to Recover for Negligent Death—Damages—Instructions.**—If, in an action to recover for negligent death, the court charges that the damages recoverable are those occasioned to the estate of the decedent by his premature death, taking into consideration his age, health, occupation, earning capacity, earnings and other matters in evidence tending to show the extent of such loss, a refusal to charge that in estimating damages, the jury should not allow anything for his pain and suffering, or as exemplary damages, is not erroneous. (Iowa) Kelly v. Chicago R. I. & P. Ry. Co., 195.

### *Settlements and Release.*

6. **SETTLEMENTS for Death Caused by Wrongful Act** which bear the taint of fraud or undue influence in their procurement will be set aside. (Iowa) Kelly v. Chicago R. I. & P. Ry. Co., 195.

**7. RAILROADS—Death by Wrongful Act—Avoiding Settlement.**

A settlement and release from liability obtained by a railway company or its agents for a death caused by wrongful act, from one who, by reason of inexperience or weakness of body or mind, or of lack of independent counsel and advice, is not in condition to deal on equal terms with the party seeking the release, will be scrutinized with jealous care, and any contract or agreement thus unfairly obtained will be set aside. (Iowa) *Kelly v. Chicago R. I. & P. Ry. Co.*, 195.

**8. RES JUDICATA—Approval of Settlement for Negligent Death.**

If a settlement and release by an administratrix for the negligent death of her intestate is fraudulently obtained, its approval by the court is not an adjudication between her and the person causing the death, and does not prevent her, in an action for such death, from pleading and relying on the fraud of the defendant in procuring such settlement and release. (Iowa) *Kelly v. Chicago R. I. & P. Ry. Co.*, 195.

**DEEDS.***Sale of Timber.*

**1. DEEDS TO TIMBER.**—A deed conveying "all the pine trees and timber suitable for milling purposes" conveys a fee simple in such trees at the date of the deed and in so much of the land as is necessary to sustain them, and the fact that the grantee exercises part of his right under the deed does not deprive him or his grantees from again entering upon the land and cutting such trees as were suitable for milling purposes at the time of the execution of the deed, and the terms thereof being unconditional, he is not required to cut the timber within a reasonable time. (S. C.) *Wilson Lumber Co. v. Alderman*, 865.

*Conveyance for Future Support.*

**2. CONTRACTS to Convey for Future Support—Equitable Relief.** One who has agreed to convey property to another in consideration of the latter furnishing him a home during his life may be enjoined from conveying the property, and interfering with the possession of the other contracting party so long as the latter continues to perform, or is ready to perform, such contract on his part. (Iowa) *Newman v. French*, 211.

**3. CONTRACTS to Convey for Future Support—Equitable Relief.** A grantee with notice that his grantor has agreed to convey the property to another on his agreement to furnish him with a home for life, may be decreed in equity to hold the property subject to the rights of the promisee to have the property conveyed to him when his obligations under the contract have been fully performed. (Iowa) *Newman v. French*, 211.

See Estates; Vendor and Vendee.

**DE FACTO OFFICERS.**

See Officers, 1, 2.

*Note.*

**Definition of specific performance**, 383.  
of wagering policies, 306.

**DEPOSITIONS.**

**TRIAL—Evidence—Rules of Court.**—Although a rule of court provides for the taking of depositions of ancient, infirm and going witnesses, such witnesses must be shown to be within the meaning of the rule, or that their presence in court cannot be obtained, before their depositions can be admitted. (Pa.) *Lyttle v. Denny*, 814.

**DEVISES.**

See Wills.

**DISBARMENT.**

See Attorney and Client, 4, 5.

**DIVORCE.**

**DIVORCE, Decision Denying Validity and Effect of.**—The courts of Utah, having decided that a divorce granted by the Mormon church was illegal and void, and did not terminate the marriage relation between the parties thereto, in an action involving the validity of said divorce, fixed and determined the status of such parties, and controls and governs the courts of this state in an action involving the validity of such divorce. (Idaho) *Hilton v. Stewart*, 48.

**DOWER.**

See Vendor and Vendee, 1, 2.

**DRAFTS.**

See Carriers, 34-36.

**DRUGGISTS.**

See Mandamus, 5.

**EASEMENTS.**

**1. EASEMENT—Definition.**—An easement is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former. (Ohio) *Yeager v. Tuning*, 679.

**2. EASEMENTS, What are.**—The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former is an easement. (Ohio) *Yeager v. Tuning*, 679.

**3. EASEMENTS, How may be Created.**—An easement can be created only by deed or by prescription. (Ohio) *Yeager v. Tuning*, 679.

**4. EASEMENTS BY PRESCRIPTION—Maintenance of Gates.**—The fact that a private passageway was for a number of years closed at both ends by gates does not negative a claim of easement by prescription if they did not interfere with the use of the passageway for the purpose for which it was intended. (Ill.) *Smith v. Roath*, 123.

**5. EASEMENTS BY PRESCRIPTION—Merger of Estates.**—In order to have the unity of title of the dominant and servient estates work an extinguishment of an easement by prescription existing between them, the ownership of both must be coextensive; where the owner of an undivided one-third of the servient estate obtains full title to the dominant estate this does not extinguish the easement. (Ill.) *Smith v. Roath*, 123.

See Private Ways; Railroads, 9.

**EJECTMENT.**

**EJECTMENT.**—Notice and Demand are Unnecessary Before Bringing ejectment where the possession is unlawful and there is no privity between the parties. (Ill.) *Mapes v. Vandalia R. R. Co.*, 117.

See Railroads, 4-7.



## ELECTIONS.

1. **ELECTIONS—Increase of Indebtedness—Right of Women to Vote.**—A statute authorizing cities having a certain population to erect a city hall and containing a section authorizing a special tax to pay therefor, and another section authorizing the issuance of bonds in anticipation of the special tax authorized by the first section, and containing another section providing that no building shall be erected unless a majority of the legal voters voting thereon shall vote in favor of the foregoing propositions, does not make such sections independent of each other, but they are interdependent and were enacted with a view to the accomplishment of a single object, and should be construed together, and the question submitted at an election under such statute is that of issuing bonds and increasing taxation; hence under a statute providing that the right of any citizen to vote on the issuance of bonds, borrowing money, or increasing the tax levy shall not be denied on account of sex, women are entitled to vote. (Iowa) *Coggeshall v. Des Moines*, 221.

2. **ELECTIONS.—Right to Vote at Elections** is not a natural or inherent right, but exists only as conferred by the constitution or some statute. (Iowa) *Coggeshall v. Des Moines*, 221.

3. **ELECTIONS—Right to Vote.**—If the state constitution has declared, by prescribing definite qualifications, the persons who shall represent the interests of all at the polls, it is not competent for the legislature to add to, or subtract from, the qualifications as determined by the fundamental law at any election therein contemplated. (Iowa) *Coggeshall v. Des Moines*, 221.

4. **ELECTIONS—Right to Vote—Constitutional Law.**—Under a constitutional provision that "every male citizen . . . of the age of twenty-one years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law," the word "elections" has reference to a choice of officers alone, whether they are state, county, or municipal, but it does not necessarily refer to other elections which may be authorized by statute. (Iowa) *Coggeshall v. Des Moines*, 221.

5. **CONSTITUTIONAL LAW—Right to Vote—Women as Voters.** A constitutional provision that "every male citizen of the United States of the age of twenty-one years . . . shall be entitled to vote at all elections which are now or may hereafter be authorized by law," has reference to elections for a choice of officers alone, and a statute authorizing women to vote on the issuance of bonds, borrowing money, or increasing the tax levy, in cities containing a certain population, is not in conflict with such constitutional provision. (Iowa) *Coggeshall v. Des Moines*, 221.

6. **CONSTITUTIONAL LAW—Class Legislation—Women as Voters.**—A statute authorizing women to vote at elections on questions of municipal indebtedness in cities containing a certain population, without requiring registration as a prerequisite to the right to vote, is not unconstitutional as class legislation. (Iowa) *Coggeshall v. Des Moines*, 221.

7. **ELECTIONS—Denial of Right of Women to Vote.**—If a statute authorizes women to vote at elections on questions involving the issuance of bonds, borrowing money and increasing the taxation in cities containing a certain population, and the refusal of permission to allow certain women to vote at such an election is not based upon their disqualification as individuals, but as members of a class, and when the body of voters of such class thus denied the privilege of voting is numerous enough to have changed the result of the election, it is invalid, though the votes of those actually rejected would not have changed the result. (Iowa) *Coggeshall v. Des Moines*, 221.

**EMINENT DOMAIN.**

1. **EMINENT DOMAIN.**—The Word "Damage," as Used in the Law of eminent domain, refers to physical damage to the corpus of the property, or to some right appurtenant thereto, and not damage to the feelings, tastes or sentiments of the owner. (Va.) *Lambert v. Norfolk*, 945.

2. **EMINENT DOMAIN**—Condemnation—Public Use.—An act incorporating a corporation and providing "that the said power company shall, on demand, sell and furnish power to any person or corporation for manufacturing or lighting purposes, upon such persons or corporations paying the usual rates or charges for same," makes it a public corporation, which may be empowered to condemn land of private persons to be flooded by a dam erected across a navigable stream. (S. C.) *McMeekin v. Central Carolina Power Co.*, 885.

**EMPLOYER'S LIABILITY.**

See Master and Servant.

**ENTIRETIES.**

See Husband and Wife, 5-8.

**EQUITABLE CONVERSION.**

See Conversion.

**EQUITY.**

1. **EQUITY JURISDICTION**—Relief Granted.—In equity the court should grant such relief as the plaintiff shows himself entitled to under the evidence, and should adjust the decree to the evidence, irrespective of failure to make specific objection to the sufficiency of the allegations and prayer to entitle the plaintiff to the kind of form of relief which is asked. (Iowa) *Newman v. French*, 211.

2. **EQUITY**—Construction of Will.—An executor who, as a devisee, is entitled to at least a life estate thereunder, and who is also sole heir, and as such presumably in possession of the land, may maintain a suit to have the will construed, to the end that partition may be decreed if the claim of others in the land is adjudged valid, and if not, to remove the cloud which arises from the terms of the will from the plaintiff's title. (S. C.) *Hunt v. Gower*, 862.

**ESTATES.**

1. **POSSIBILITY OF REVERTER**—Whether an Estate.—The possibility of reverter after the termination of a fee conditional, being a mere possibility, is not an estate. (S. C.) *Vaughan v. Langford*, 912.

2. **POSSIBILITY OF REVERTER**—Grant or Devise.—The possibility of a reverter, after the termination of a fee conditional, is not the subject of devise, inheritance or grant. (S. C.) *Vaughan v. Langford*, 912.

3. **POSSIBILITY OF REVERTER**—Release by Will.—It seems that a possibility of reverter cannot be released by will to the tenant in fee conditional. (S. C.) *Vaughan v. Langford*, 912.

**ESTATES OF DECEDENTS.**

See Executors and Administrators; Wills.

**ESTOPPEL.**

See Husband and Wife, 11, 12; Railroads, 4-7.

**EVIDENCE.***Sufficiency.*

1. **EVIDENCE—Sufficiency to Sustain Verdict.**—The evidence in this case examined, and held to support the verdict. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

*Law of Sister State or Foreign Country.*

2. **THE LAW of a Foreign Country** is not Judicially Noticed, but must be proved like any other fact in the case. (Mass.) *Electric Welding Co. v. Prince*, 434.

3. **FOREIGN LAW, When a Question for the Jury.**—When the law of a foreign country is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally or by way of analogy, and where inferences may be drawn from them, the question is one of fact, to be determined by the jury and not by the judge. (Mass.) *Electric Welding Co. v. Prince*, 434.

4. **FOREIGN LAW—Jury Trial—Error in Taking the Case from the Jury.**—If a case depends on a question of foreign law, respecting which an expert testifies, and other evidence is received from which an inference may be drawn that certain of the defendants were or were not liable, the court cannot take such question of law from the jury and direct a verdict for or against such defendants. (Mass.) *Electric Welding Co. v. Prince*, 434.

5. **FOREIGN LAW—Former Decision Respecting.**—Where the question is what is the law of a foreign country upon a matter in dispute in the case, the former opinion of the supreme court on an appeal in the same case is not admissible in evidence for the purpose of proving such law. (Mass.) *Electric Welding Co. v. Prince*, 434.

6. **THE LAW OF ANOTHER STATE** is Presumed to be the Same as that of the state where the action is commenced and tried. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

7. **THE STATUTORY and Constitutional Law of Another State** are Facts to be Proved as are any other facts in the case by the party who seeks to take advantage of any difference that may exist between them and the law of the forum. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

*Subpoena Duces Tecum.*

8. **SUBPOENA DUCES TECUM, Certainty in.**—The same reasonable certainty in describing what is required should be observed in a subpoena duces tecum as is held necessary in the case of applications for orders to produce books and papers. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

9. **SUBPOENA DUCES TECUM—Fishing Expeditions.**—Anything in the nature of a fishing expedition is not to be encouraged. Where the plaintiff swears that some specific book contains material evidence, and sufficiently identifies and describes what he wants, it is proper that he should have it produced, but this does not entitle him to have brought in a mass of books and papers, in order that he may search them through to gather evidence. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

10. **A PECULIARITY of the Subpoena Duces Tecum** is that, from the nature of things, it must specify with as much precision as is fair and feasible the particular documents desired, because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

11. **SUBPOENA DUCES TECUM, When not Sufficiently Specific.**—An order or subpoena to produce papers concerning matter in dispute is not sufficiently specific. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

12. **SUBPOENA DUCES TECUM.**—A Subpoena Commanding a Witness to Produce a List of All the Persons and Firms with whom contracts had been made during a year is too indefinite to be sustained, and the court will excuse the witness from answering or producing such list, in the absence of all particularity in specifying what is wanted or of any showing of materiality. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

See Bills and Notes, 4-6; Depositions; Homicide.

#### Note.

**Evidence, parol concerning the mode of payment of written obligations, 629, 630.**

parol on the part of acceptors to avoid or modify the effect of the acceptance, 627-629.

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parol to show that delivery of a note was conditional, 611, 612.

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parol to show that note was delivered on condition that it was to be signed by another, 617, 621.

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parol to show that writing was delivered as a mere memorandum, 618.

parol to show the medium of payment of written obligations, 630.

parol to show the place of payment of written obligations, 630.

parol to show the time of payment of written obligations, 630.



**EXECUTION.**

1. **EXECUTION—Issuance Against One Defendant.**—An execution must conform to and follow the judgment; hence it is error, where default has been entered in assumpsit brought against several defendants jointly, to issue execution against only two of them. (Ill.) *Merrifield v. Western C. P. & Organ Co.*, 148.

2. **EXECUTION—Whether must be Against All Defendants.**—An execution on its face must appear to be against all defendants, notwithstanding that from death, bankruptcy or some other cause no levy can be made on the property of some. (Ill.) *Merrifield v. Western C. P. & Organ Co.*, 148.

3. **EXECUTIONS—Issuance of Requisites.**—If an execution is filled up by the clerk and a memorandum that it has issued is made on his docket, but it is not sent out of his office or issued therefrom, nor delivered to the sheriff, it does not prevent the judgment from becoming dormant. (N. C.) *McKeithen v. Blue*, 654.

4. **EXECUTIONS—Defective Issuance—Effect on Judgment.**—A dormant judgment is not invalidated by an execution not issued from the clerk's office and the defendant may either by motion before the clerk or the superior court have the judgment declared dormant and the execution recalled. (N. C.) *McKeithen v. Blue*, 654.

5. **EXECUTION SALES—Irregularity—Innocent Purchasers.**—Failure to give a judgment defendant notice of an execution issued under a dormant judgment is only an irregularity and does not render a deed to land sold under such execution to a purchaser without notice invalid. (N. C.) *McKeithen v. Blue*, 654.

6. **EXECUTIONS—Irregularities—Effect.**—If execution is formally issued and acted upon, and only defective on account of minor irregularities not pointed out or insisted upon, it will not be recalled, nor the results under it set aside or disturbed, on a mere subsequent showing that such irregularities existed without more. (N. C.) *McKeithen v. Blue*, 654.

7. **EXECUTIONS—Irregularities—Waiver.**—If a judgment defendant appears before the court in homestead appraisement proceedings and moves to set them aside on the ground that he was not duly notified of the time and place of appraisement alone, he cannot, after a reallocation of his homestead to him and after recognizing the validity of the execution and sale under which it was made, assert that such execution was defective because issued without notice to him. (N. C.) *McKeithen v. Blue*, 654.

8. **EXECUTION.—Real Estate is not Subject to an Execution Levy**, in the sense of an actual seizure of the property, as in case of personality, but it may be constructively levied upon, a specific lien being thereby obtained. (Wis.) *Hyman v. Landry*, 1044.

9. **EXECUTION—Manner of Levying on Real Estate.**—There is no way pointed out by statute for making a levy on real estate under an execution. (Wis.) *Hyman v. Landry*, 1044.

10. **EXECUTION—Levying on Real Estate.—Any Overt Act by an Officer** holding an execution collectible out of realty, showing a formed purpose to appropriate such property to the satisfaction of the writ, such as an advertisement upon such writ of a levy upon the property, with the purpose of pursuing the same to effect, is an efficient levy thereon. (Wis.) *Hyman v. Landry*, 1044.

**EXECUTORS AND ADMINISTRATORS.***In General.*

1. **JUDGMENT, Parties to, When the Same—Executor of the Same Person in Different States.**—A person nominated as executor

by a will probated in the state of Utah, and appointed as such in that state, and afterward appointed administrator (with the will annexed) in this state, represents said estate in both jurisdictions, and occupies the same position with reference to all controversies and suits by or against said estate, and in that respect, and to that extent, is the same person in both states. (Idaho) *Hilton v. Stewart*, 48.

2. **PROBATE COURTS—Collateral Attack.**—An order of the probate court appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court; but if made in the exercise of proper jurisdiction over the subject matter and estate, although based upon erroneous conclusions of law or fact, it cannot be collaterally attacked. (Ohio) *Union Sav. Bank & Trust Co. v. Western Union Tel. Co.*, 675.

#### *Limitation of Actions.*

3. **LIMITATION OF ACTIONS.**—An Executor or Administrator is not Bound to Plead the statute of limitations. (Mass.) *Haskell v. Manson*, 452.

4. **LIMITATIONS OF ACTIONS.**—Partial Payment by One of Two Joint Administrators or Executors ordinarily has the same effect as payment by all, but it is not settled that such payment has this effect if made against the objection of the coexecutor, if the indebtedness was entered into in the lifetime of the decedent. (Mass.) *Haskell v. Manson*, 452.

5. **LIMITATION OF ACTIONS.**—An Administrator cannot Revive a Debt Due to Himself if it was barred at the time of the death by the statute of limitations. (Mass.) *Haskell v. Manson*, 452.

### EXEMPTIONS.

**EXEMPTIONS—Nonresidents.**—If the facts fully justify the conclusion that a convicted defendant has fled the state without any intention to return and serve the sentence which the law has imposed upon him, and his whereabouts are unknown, he is not a resident of the state nor entitled to the benefit of its exemption laws. (N. C.) *Cromer v. Self*, 658.

See Homesteads.

### FELLOW-SERVANTS.

See Master and Servant, 1-4.

### FIRES.

See Railroads, 8.

### FISH.

**CLAMS AND OYSTERS—Nature of Property.**—Clams and oysters in their natural state are in the nature of *feræ naturæ*; but when a person reclaims and transplants them they cease to be common property and become exclusively his, and whoever then takes them without permission is a trespasser and it may be a thief. (N. Y.) *People v. Morrison*, 552.

### FOREIGN LAWS.

See Evidence, 2-7.

### FORMER JEOPARDY.

See Criminal Law, 2, 3.

**FRAUDULENT CONVEYANCES.**

**1. FRAUDULENT CONVEYANCE.**—The Word "Void" in section 2320, Statutes of 1898, relating to conveyances of property in fraud of creditors, means voidable. (Wis.) Hyman v. Landry, 1044.

**2. FRAUDULENT CONVEYANCE.**—If a Debtor, by Collusion with Another, Conveys his realty to such other in fraud of his creditors, notwithstanding section 2320, Statutes of 1898, the title to such realty thereby passes to such other, subject to such remedies as the law affords the creditors to reach the same for the satisfaction of their claims. (Wis.) Hyman v. Landry, 1044.

**3. FRAUDULENT CONVEYANCE.**—Lien of Subsequent Judgment.—In case of a conveyance of realty, falling under the condemnation of section 2320, Statutes of 1898, a judgment subsequently entered in favor of a creditor, intended to be defrauded, does not by such entry alone become a lien on such realty. (Wis.) Hyman v. Landry, 1044.

**4. FRAUDULENT CONVEYANCE.**—In Case of the Entry of a Judgment in the circumstances before stated, the judgment creditor may obtain a lien on the realty by an execution levy, and then maintain an action in equity to remove the cloud thereon consisting of the fraudulent transfer. (Wis.) Hyman v. Landry, 1044.

**5. FRAUDULENT CONVEYANCE.**—In Case of the Entry of a Judgment in the circumstances stated, the judgment creditor may, without first obtaining a specific lien on the realty, enforce his right thereto, conditioned upon his not having any remedy at law to collect his claim, by an action in equity to remove the fraudulent transfer, interfering with such judgment attaching to the property. (Wis.) Hyman v. Landry, 1044.

**6. FRAUDULENT CONVEYANCE.**—In an Action to Remove a Fraudulent Transfer of realty, interfering with an efficient sale thereof under an execution levy, the complaint sufficiently shows the acquirement of a specific lien by means of such levy, if it shows a legitimate basis for an execution and that before the commencement of the action execution was duly issued upon the judgment and the property was thereunder duly levied upon. (Wis.) Hyman v. Landry, 1044.

**7. FRAUDULENT CONVEYANCE.**—Setting Aside.—It is sufficient in a Complaint for a legitimate basis for a valid execution against an alleged judgment creditor, to show that the judgment was "rendered and entered" in an appropriate jurisdiction. (Wis.) Hyman v. Landry, 1044.

**FUTURE SUPPORT.**

See Deeds, 2, 3.

Note.

Gambling Debts, checks, actions upon when given for, 92, 93.

**GAME LAWS.**

**1. GAME LAWS.**—Birds Taken in Foreign Countries.—A statute forbidding possession within the state, during the closed season, of game birds taken in foreign countries is constitutional and does not deprive any person of property without due process of law. (N. Y.) People v. Hesterberg, 528.

**2. GAME LAWS.**—Birds Taken in Foreign Countries.—The act of Congress of May 25, 1900, prohibiting the importation or interstate transportation of game killed in violation of local statutes confers power upon the legislature of a state to forbid possession, during the closed season, within the state of game birds taken in foreign countries. (N. Y.) People v. Hesterberg, 528.

**3. GAME LAWS—Birds Taken in Foreign Countries.**—The fact that game birds taken in a foreign country and imported into a state where their possession is prohibited, during the closed season, differ in some respects from local birds of that variety, is no defense to a prosecution under the statute. (N. Y.) *People v. Hesterberg*, 528.

**GAMING.**

**1. GAMBLING—Bank Checks Given to Procure Money for.**—Where a bank check is given for the purpose of procuring money with which to gamble, and the person to whom the check is given has knowledge that the same is to be used for such unlawful purpose, and cashes such check with that knowledge, he cannot recover the debt evidenced thereby, from the drawer of such check. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

**2. GAMBLING—Question of Fact.**—In a suit, by a payee of a bank check, to recover the debt evidenced thereby upon the drawee refusing to pay the same, and a defense is interposed by the drawer that the money advanced upon such check was used for the purpose of gambling, and that the payee knew such fact at the time the check was cashed, the issue is one of fact to be determined by the jury, and the verdict of the jury will not be disturbed if the evidence supports the same. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

**GRAND JURY.**

**GRAND JURY.**—The Statute of Wisconsin providing for the selection of grand jurors does not contravene the state or federal constitution. (Wis.) *Vought v. State*, 1008.

**HEALTH.**

See Constitutional Law, 23-25.

**HIGHWAYS.**

See Negligence, 6, 7.

**HOMESTEADS.**

**HOMESTEAD—Purchase with Exempt Money.**—A debtor has the right as against his creditors to invest in a homestead money which he is entitled to hold under the exemption laws. (Ky.) *Nicholson's Trustees v. Nicholson*, 263.

**HOMICIDE.**

**1. HOMICIDE.—Evidence of Previous Quarrels, ill-feeling, or hostile acts between the parties is admissible to show the animus probably existing between them at the time of the homicide.** (S. C.) *State v. Brooks*, 836.

**2. HOMICIDE, Justifiable—Duty to Retreat.**—If a person is forbidden by an owner to enter premises, but he does enter, the owner is justified in using sufficient force to expel him, and he may repel force by force in the defense of his person, habitation, or property against one who manifestly intends and endeavors by violence to commit a felony on either. In such case he is not bound to retreat, but may pursue his adversary until he has secured himself from danger, and if he kills his adversary it is excusable homicide. (S. C.) *State v. Brooks*, 836.

**3. HOMICIDE—Duty to Retreat.**—One within the curtilage of his dwelling is in fact and in law within his dwelling, and is not bound



to retreat before the violent assault of a trespasser. (S. C.) *State v. Brooks*, 836.

4. **MURDER—Self-defense—Burden of Proof.**—On a murder trial, "if there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit, but if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, to show that it was excusable as an act of self-defense. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades of manslaughter at least. (Pa.) *Commonwealth v. Palmer*, 809.

5. **MURDER—Self-defense—Burden of Proof.**—A person accused of murder is not bound to show beyond all doubt that he was compelled to take human life, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise be saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense, is not to be satisfied that it was so taken, and when this affirmative defense is left in doubt it has not been established at all as a basis for acquittal. (Pa.) *Commonwealth v. Palmer*, 809.

6. **MURDER—Insanity as Defense—Burden of Proof.**—If the state clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed, and if the defense is insanity, the burden of sustaining it is upon those having charge of the defense, for the accused is presumed to be sane, and his insanity must be established by a fair preponderance of the testimony. (Pa.) *Commonwealth v. Palmer*, 809.

## HOSPITALS.

1. **HOSPITAL—Liability for Injuries Inflicted by Patient.**—If the persons in charge of a hospital, knowing the condition of a patient suffering from delirium tremens, leave him in an insecure apartment in charge of a woman powerless to restrain him, and he escapes from her control and assaults another patient, the jury may find a verdict of negligence. (Ky.) *University of Louisville v. Hammock*, 355.

2. **DAMAGES—Personal Injuries to Hospital Patient.**—A verdict of one thousand dollars for injuries sustained by a woman patient in a hospital through an attack upon her by an insane patient, negligently allowed to escape by the hospital authorities, is not excessive if her present illness is thereby greatly aggravated and her health is to some extent permanently impaired. (Ky.) *University of Louisville v. Hammock*, 355.

3. **HOSPITAL—When not Charitable Institution Exempt from Liability.**—A hospital conducted by a university as an adjunct of its medical school, which exacts compensation from patients able to pay but treats others free of charge, is not a charitable institution exempt from liability for the negligence of its agents and employes. (Ky.) *University of Louisville v. Hammock*, 355.

## HOTELS.

See Innkeepers.

## HOUSE-BREAKING.

See Burglary.

**HUSBAND AND WIFE.***In General.*

1. **HUSBAND AND WIFE, His Right to Recover for Injuries Though Her Death Resulted.**—If, through the breach of a contract, there is an injury to a wife causing damage to her husband, he may recover therefor, although from such injury she subsequently dies. A declaration seeking such recovery may be treated as if the allegations of death and the consequences of death were omitted. (Mass.) *Sherlag v. Kelley*, 414.

2. **A HUSBAND may Recover of a Physician for a Breach of His Contract** to attend and care for the plaintiff's wife in childbirth, though her death also resulted, if the recovery is limited to the damages incident to additional expenses of care, nursing and treatment. (Mass.) *Sherlag v. Kelley*, 414.

3. **MARRIED WOMAN—Property Purchased Partly with Her Moneys and Partly with Those of Her Husband.**—If real property is paid for partly with the separate moneys of a wife and partly with the moneys of her husband, and a conveyance is taken in their joint names without her consent in writing, a court of equity will protect her interest and declare a trust in her favor, and, in the event of her death, will not permit the whole to go to the husband as survivor of a tenancy by the entireties. (Mo.) *Donovan v. Griffith*, 458.

4. **HUSBAND AND WIFE—Charging Him for Rent or Use of Her Property.**—If a husband and wife live in harmony during her life, he not denying her any control which she seeks to exercise over her separate real property, but they together enjoying its use, benefits and profits, he is not liable, after her death, to account with her other heirs for the rent of such property. This rule is not abrogated by the married woman's statute of Missouri. (Mo.) *Donovan v. Griffith*, 458.

*Tenancy by Entireties.*

5. **HUSBAND AND WIFE—Tenancy by Entirety.**—A conveyance to a husband and wife conveys an estate by the entirety, and by the right of survivorship the entire estate vests in him at her death. (Ark.) *Robertson v. Robinson*, 35.

6. **ESTATES BY ENTIRETIES—Right of Survivorship.**—If husband and wife, after marriage, acquire title to land, they take as tenants by the entirety, and neither can dispose of any part without the assent of the other, but the whole must remain to the survivor. (N. C.) *Jones v. Smith*, 661.

7. **ESTATES BY ENTIRETIES—Partition of Timber.**—If a wife is seised of land as tenant by the entirety with her husband, she is not entitled to partition of the lumber into which timber cut therefrom by her husband without her consent, has been converted. (N. C.) *Jones v. Smith*, 661.

8. **ENTIRETIES, Estate in When the Property Belongs in Equity to the Wife.**—If property is purchased with moneys of a wife, and the conveyance is taken in the names of her and her husband, she has an equitable title to the whole of the land, and hence such conveyance does not vest any estate in him and her as tenants by the entireties. (Mo.) *Donovan v. Griffith*, 458.

*Antenuptial Contracts.*

9. **HUSBAND AND WIFE.—Antenuptial Contracts**, though not inherently fraudulent, require good faith, but fraud is not presumed in them any more than in other cases, and there must be some evidence of gross disproportion or other fact from which fraud may be inferred before the onus changes. (Pa.) *Robinson's Estate*, 794.

10. **HUSBAND AND WIFE—Antenuptial Contracts—Widow as Witness.**—After the death of her husband his widow is not competent to testify that in signing an antenuptial contract she was under the impression that she was signing another and different contract previously shown to her. (Pa.) Robinson's Estate, 794.

*Estoppel of Wife to Assert Rights.*

11. **Laches in Asserting the Rights of a Wife.**—A wife, who does not assert her rights to or interest in the property of her husband until after his death, even though living separate and apart from such husband, but does assert such right immediately after the death of such husband, and prosecutes her action with diligence, is not guilty of laches or estopped from asserting such right. (Idaho) Hilton v. Stewart, 48.

12. **ESTOPPEL of Wife to Show Her Wifehood.**—In an action involving the validity of a marriage and the right of a surviving wife or widow to her interest as such in her deceased husband's property, she is not estopped from maintaining such action on the ground of public policy, morality or decency, where it appears that she may have honestly believed that she had been legally divorced from her said husband, even though she has lived with another as his wife. (Idaho) Hilton v. Stewart, 48.

**INCEST.**

**INCEST—Daughter of Half Sister.**—Carnal intercourse of a man with a woman who is the daughter of his half sister is incest. (N. C.) State v. Harris, 669.

**INDORSEMENT.**

See Bills and Notes.

**INFANTS.**

See Master and Servant, 7-10; Negligence, 1-5.

**INHERITANCE TAXES.**

See Taxation, 8-14.

**INJUNCTION.**

See Constitutional Law, 8; Taxation, 1; Trademarks.

**INNKEEPERS.**

1. **INNKEEPERS—Liability of.**—The duty imposed by law upon an innkeeper requires him to furnish safe premises for his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. (Pa.) Lytle v. Denny, 814.

2. **INNKEEPERS—Liability—Folding-beds—Burden of Proof.**—If the heavy top of a folding-bed in a hotel, without apparent cause, falls forward and down over a guest while he is quietly lying upon the bed, injuring him severely, the burden of proof is upon the innkeeper to show that the bed was in proper condition for use to relieve him from liability. (Pa.) Lytle v. Denny, 814.

**INSANITY.**

See Homicide, 6.

**INSTRUCTIONS.**

See Trial.

## INSURANCE.

*Accident Insurance.*

1. **ACCIDENT INSURANCE—Subrogation by Insurer.**—In the absence of a stipulation in the policy to that effect, an insurance company is not subrogated, on the payment of an accident policy, to the rights of the insured against the one who caused the injury, since accident insurance, unlike fire insurance, is not an indemnity contract, but an investment contract, in which the only parties concerned are the insurer and the insured or the beneficiary. (*Wis.*) *Gatzweiler v. Milwaukee etc. Power Co.*, 1057.

*Life Insurance in General.*

2. **LIFE INSURANCE—Waiver of Cash Premium.**—A condition for the prepayment in cash of the first premium before a life insurance policy takes effect is waived when an agent, in accordance with a practice approved by the company, delivers the policy and accepts the premium, part in cash, and a note for the balance, which is not paid until several days after maturity. (*Va.*) *Life Ins. Co. of Virginia v. Hairston*, 989.

3. **LIFE INSURANCE.—The Declarations by the Insured to His Physician,** after the policy payable to his wife has become effective, to the effect that he is addicted to the opium habit, are not admissible under the rule barring statements to a physician, unless made to the knowledge of the declarant against his obvious and real interest of a pecuniary or proprietary nature. (*Va.*) *Life Ins. Co. of Virginia v. Hairston*, 989.

4. **LIFE INSURANCE.—Evidence of the Health and Habits of the Insured** after the contract of insurance is complete is no longer material. (*Va.*) *Life Ins. Co. of Virginia v. Hairston*, 989.

5. **LIFE INSURANCE—Fraud and Misrepresentation by the Insured.**—Under the Virginia statute no answer to interrogatories by the applicant for life insurance vitiates the policy by reason of any warranty in the application, unless it is clearly proved that the answer was "willfully false or fraudulently made, or that it was material." The defense of fraud in an action on a policy must be established by clear and satisfactory proof such as to overcome the presumption of innocence of moral turpitude or crime. (*Va.*) *Life Ins. Co. of Virginia v. Hairston*, 989.

6. **LIFE INSURANCE—Opinion as to When Consummated.**—It is not competent for a witness to state whether a policy of life insurance, after issuance and delivery by the insured, is binding on him. (*Va.*) *Life Ins. Co. of Virginia v. Hairston*, 989.

7. **INSURANCE, LIFE—Primary Intent of Insurance.**—If all the conditions of fact expressly provided for in any contract have failed, and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. A contract of life insurance contemplates a payment by the insurer upon the death of the insured, and that is the primary intent, while the secondary question, as to whom the payment is due, is contingent on the circumstances. (*Pa.*) *Smith v. Metropolitan Life Ins. Co.*, 799.

*Conspiracy to Defraud Company.*

8. **INSURANCE COMPANY—Conspiracy to Defraud—Rights of Parties.**—When two persons enter into a fraudulent conspiracy to cheat a life insurance company, neither of them can recover of the company, and if either of them does obtain the proceeds of the policy, the other cannot recover of him. (*Ky.*) *Howe v. Griffin*, 296.

9. **INSURANCE—Right to Proceeds of Policy Fraudulently Procured.**—Where the insured and beneficiary participate equally in a



fraud whereby a contract of life insurance is obtained which is void for want of insurable interest, and the insurance is paid to the beneficiary, the administrator of the insured cannot recover it from the beneficiary on the ground that he holds it as trustee. (Ky.) *Howe v. Griffin*, 296.

*Right of Beneficiary to Recover Premiums or Damages.*

10. **LIFE INSURANCE—Right of Beneficiary to Recover Premiums.**—The beneficiary in a life insurance policy cannot recover premiums paid by the insured on a wrongful rescission of the policy by the insurer. The right of recovery is in the insured. (Wis.) *Slocum v. Northwestern Nat. Life Ins. Co.*, 1028.

11. **LIFE INSURANCE—Right of Beneficiary to Damages for Rescission.**—The beneficiary in a life insurance policy cannot recover damages for a rescission by the insurer where the law gives the insured the right to dispose of the policy without the consent of the beneficiaries. (Wis.) *Slocum v. Northwestern Nat. Life Ins. Co.*, 1028.

*Beneficiaries—Insurable Interest.*

12. **LIFE INSURANCE—Who may be Named Beneficiary.**—A person obtaining insurance on his life in a mutual benefit society may designate whom he pleases as the beneficiary, in the absence of any statutory restriction. (Ky.) *Hess v. Segenfelder*, 343.

13. **LIFE INSURANCE—Absence of Insurable Interest.**—A person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor; nor can he obtain an assignment of such insurance. (Ky.) *Hess v. Segenfelder*, 343.

14. **LIFE INSURANCE.—One cannot Insure His Own Life** for the benefit of another, when the latter induces him to procure the insurance and pays the premiums thereon, or when the insurance is obtained with a view to evade the law against speculative insurance. (Ky.) *Hess v. Segenfelder*, 343.

15. **LIFE INSURANCE—Insurable Interest.**—When it is contrary to the statute for benefit associations to issue certificates unless the beneficiaries have a legal insurable interest in the life of the insured, a member who insures his life and pays the premiums cannot, though permitted by charter of the society, designate first cousins as beneficiaries. (Ky.) *Hess v. Segenfelder*, 343.

16. **LIFE INSURANCE—What Law Governs.—The Rights of the Parties** to a contract of insurance in a benefit society are governed by the laws in force at the time of the issuance of the certificate. (Ky.) *Hess v. Segenfelder*, 343.

17. **LIFE INSURANCE—Insurable Interest.**—In order that there may be an insurable interest the relationship of creditor and debtor must exist, or the beneficiary must have or expect some pecuniary relief, benefit or advantage from the continuance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the belief that loss or disadvantage will naturally and probably arise to the beneficiary from the death of the insured. (Ky.) *Hess v. Segenfelder*, 343.

18. **LIFE INSURANCE.—Insurable Interest is not Dependent upon pecuniary loss**, if the relationship between the parties is so close as to preclude the probability that mercenary motives will induce the sacrifice of life to gain the insurance. (Ky.) *Hess v. Segenfelder*, 343.

19. **LIFE INSURANCE—Insurable Interest.—First Cousins have**, from the mere fact of relationship, no insurable interest in the life of the insured. (Ky.) *Hess v. Segenfelder*, 343.

*Change of Beneficiary.*

20. **INSURANCE, LIFE—Change of Beneficiary—To Whom Insurance Money Should be Paid.**—A provision in an insurance policy that "the production by the company of the policy and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to it," does not relieve the insurer when it has paid the amount of the policy to the executor of the insured instead of to the beneficiary lawfully entitled to it. (Pa.) *Smith v. Metropolitan Life Ins. Co.*, 799.

*Death of Beneficiary.*

21. **INSURANCE, LIFE—Death of Beneficiary.**—If a husband takes out an insurance policy on his life in favor of his wife, without further mention, and pays the premiums and survives the beneficiary, he may change the policy for the benefit of some other person. (Pa.) *Smith v. Metropolitan Life Ins. Co.*, 799.

22. **INSURANCE, LIFE—Death of Beneficiary.**—The naming of a beneficiary in life insurance to whom payment is to be made is a gift of a benefit in the future, contingent on the circumstances. It carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums, as that is contingent on his doing so voluntarily, and the nature of the thing given implies that the beneficiary must survive the insured. (Pa.) *Smith v. Metropolitan Life Ins. Co.*, 799.

23. **INSURANCE—Death of Beneficiary—Effect.**—Ordinarily, where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes at his death a part of his estate, to be administered as his will, or in the absence of a will, as the law directs. (Pa.) *Smith v. Metropolitan Life Ins. Co.*, 799.

24. **INSURANCE, LIFE—Death of Beneficiary—Change of.**—If a husband names his wife, without more, as his beneficiary in a life insurance policy, and after her death secures from the insurance company a printed blank designated as a "change of designation," which he executes, substituting his daughter as beneficiary, and this is accepted by the company, which continues to receive the premiums of the policy, it is estopped from disputing the validity of the paper containing the "change of designation," although such paper may have not been executed strictly in accordance with the by-laws of the company. (Pa.) *Smith v. Metropolitan Life Ins. Co.*, 799.

*Suicide of Insured.*

25. **LIFE INSURANCE—Evidence and Instructions as to Suicide.** The jury should be instructed that the evidence to warrant a verdict for the insurer on the ground that the insured came to his death by suicide should exclude every reasonable hypothesis of accidental death. (Va.) *Life Ins. Co. of Virginia v. Haitston*, 989.

26. **LIFE INSURANCE—Suicide—Statements of Insured as Res Gestae.**—A letter written by an insured to his wife in the morning is not admissible as part of the res gestae of the issue whether he committed suicide, where his death occurred in the evening of that day. (Va.) *Life Ins. Co. of Virginia v. Hairston*, 989.

27. **LIFE INSURANCE—Proof of Suicide.**—The Defense of Suicide in an action on a life insurance policy must be established by clear and satisfactory proof—not proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence of moral turpi-

tude or crime; but not that degree of proof is required which is necessary to convict of crime. (Va.) *Life Ins. Co. of Virginia v. Hairston*, 989.

*Notice of Illness and Claim Therefor.*

28. **INSURANCE, LIFE**—**Notice of Claim of Illness.**—A provision in a policy of insurance that written notice of illness must be given at a certain place within ten days from the beginning of such illness is not void because unreasonable. (S. C.) *Craig v. United States H. & A. Ins. Co.*, 877.

29. **INSURANCE, LIFE**—**Notice of Claim of Illness.**—Mailing notice within the time limited for service of notice of the illness of the insured required by the policy is sufficient service of such notice. (S. C.) *Craig v. United States H. & A. Ins. Co.*, 877.

30. **INSURANCE, LIFE**—**Notice of Illness and Claim Therefor.**—If an insurance policy requires notice by the insured within ten days from the beginning of the illness for which claim can be made, and that the illness must last for more than one week, and the insured must be continuously confined to bed and regularly attended by a physician, notice given within ten days from the day a physician begins to visit the insured is within the terms of the policy. (S. C.) *Craig v. United States H. & A. Ins. Co.*, 877.

**INTEREST.**

See Usury.

**INTOXICATING LIQUORS.**

See Municipal Corporations, 1.

**JUDGMENTS.**

*In General.*

1. **JUDGMENT NON OBSTANTE VEREDICTO.**—Under the act of April 22, 1905, of the legislature of Pennsylvania, if a point requesting binding instructions for the plaintiff is refused, and a verdict is rendered for the defendant, the court may subsequently enter judgment for the plaintiff non obstante veredicto if a binding instruction in his favor would have been proper at the close of the trial. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

2. **JUDGMENT**—**Opening Default as to One Defendant.**—A default should be set aside as to all defendants or none; it is error to set it aside as to one only. (Ill.) *Merrifield v. Western C. P. & Organ Co.*, 148.

3. **JUDGMENT of a Subordinate Court Conflicting with that of the Supreme Court**—**Evidence.**—A judgment of the district court of a state affirming the invalidity of a marriage should not be admitted in evidence if there has been a judgment of the supreme court of the same state deciding directly to the contrary. (Idaho) *Hilton v. Stewart*, 48.

*Effect on Remaindermen.*

4. **JUDGMENTS**—**Equity**—**Remaindermen not in Esse.**—The rights of remaindermen not in esse may be finally adjudged in equity when the remaindermen in esse are made parties as representatives of the class. (S. C.) *Hunt v. Gower*, 862.

5. **JUDGMENTS**—**Effect on Contingent Remaindermen.**—Contingent remaindermen, not in esse, are bound by a decree, when the holder of the preceding estate is a party to the cause. They, as well as the purchaser, are bound after their birth, by a sale based on such decree. (S. C.) *Bernard v. Bernard*, 852.



*Res Judicata.*

6. **RES JUDICATA.**—A Judgment in an Action on Contract is an estoppel to an action in tort brought by the defendant in the former action against the plaintiff therein, and based upon the same facts, with an additional allegation of fraud inducing the contract, of which fraud the plaintiff in the latter action was cognizant when he filed his answer in the former suit. (S. C.) *Greenwood Drug Co. v. Bromonia Co.*, 929.

7. **RES JUDICATA, Test of.**—To make the matter *res adjudicata*, it is immaterial that the question alleged to have been settled by a former adjudication was determined in a different kind of proceeding or a different form of action from that in which the estoppel is claimed. The test is, was the question actually and directly in issue and judicially determined in the former suit between the same parties or their privies by a court of competent jurisdiction. (Idaho) *Hilton v. Stewart*, 48.

**LABOR UNIONS.**

See Trade Unions.

**LANDLORD AND TENANT.**

1. **LESSEE**—Estoppel to Deny Landlord's Title.—Where a married woman living with her husband in his house rents rooms therein and receives the rent as her own without his objection, and not as his agent, her tenants cannot question her title in an action by her against them to recover rents due. (Wis.) *Johnson v. Tucker*, 1097.

2. **LEASED PREMISES**—Constructive Eviction by Failure to Repair.—The failure of a landlord to keep the gas-heater in a bath-room in repair for a considerable time does not, as a matter of law, constitute constructive eviction. (Wis.) *Johnson v. Tucker*, 1097.

3. **LEASED PREMISES**—Constructive Eviction by Failure to Repair.—In an action to recover rent a question in a special verdict, "Was the defendant evicted from the leased premises?" is not improper, where eviction is based on the failure of the landlord to keep a gas-heater in repair, and the court instructs the jury on the law pertaining to constructive eviction. (Wis.) *Johnson v. Tucker*, 1097.

See Taxation, 2-7.

**LARCENY.**

1. **LARCENY.**—When Clams or Oysters are reclaimed from nature and transplanted to a bed where none grow naturally, and the bed is so marked out by stakes as to show that they are in the possession of a private owner, they are personal property and may become the subject of larceny. (N. Y.) *People v. Morrison*, 552.

2. **LARCENY**—Acquittal of One of Several Defendants.—Where several officials are jointly indicted for larceny in participating in a scheme to issue town orders to fictitious persons for the purpose of misappropriating public funds, the acquittal of one of them who did not cash or receive any money on the orders does not interfere with the conviction of another who did. (Wis.) *Vought v. State*, 1008.

3. **LARCENY**—Testimony of One of Several Defendants.—Where several officials are jointly indicted for larceny in participating in a fraudulent scheme to issue town orders for the purpose of misappropriating public funds, the testimony of one of them, corroborated in many respects, will sustain a conviction of others. (Wis.) *Vought v. State*, 1008.



4. **LARCENY**.—A Town Order is the Subject of Larceny under the Wisconsin statutes. (Wis.) Vought v. State, 1008.

5. **LARCENY**—Fraudulent Issue of Town Orders.—Larceny is Committed where, in pursuance of a scheme between the members of a town board and other officials, they allow claims of fictitious persons, issue orders regular on their face therefor, and cash them in an amount over one hundred dollars. (Wis.) Vought v. State, 1008.

6. **LARCENY**.—A Trespass in the Technical Sense is not necessary to constitute larceny, when the taking is by artifice, fraud or false pretense. (Wis.) Vought v. State, 1008.

## LEGACIES.

See Wills.

## LICENSES.

### *In Respect to Real Property.*

1. **LICENSE**—Definition.—A license is a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts upon land without possessing any interest therein. (Ohio) Yeager v. Tuning, 679.

2. **LICENSE**, Revocable, When Created.—A parol agreement by several adjoining land owners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed. (Ohio) Yeager v. Tuning, 679.

### *License Tax.*

3. **LICENSE TAX**—Revenue or Police Regulation.—A tax imposed under a general taxing ordinance is presumed to be for revenue alone, unless the contrary is made clearly to appear. To construe a general taxing ordinance as a police regulation, it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions. (Va.) Robinson v. Norfolk, 934.

4. **LICENSE TAX**—Territorial Limits of City.—The legislature cannot authorize a city to levy a license tax upon a circus, exhibiting beyond its territorial limits, for the sole purpose of raising revenue to defray the general expenses of the city. (Va.) Robinson v. Norfolk, 934.

See Constitutional Law, 21-25; Mandamus, 5.

## LIENS.

See Attorney and Client, 1-3; Mechanic's Lien.

### *Note.*

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### LIMITATION OF ACTIONS.

#### *In General.*

1. **STATUTE OF LIMITATIONS**—Basis and Purposes.—Anciently the plea of limitation was based upon the presumption of a grant; this was a fiction invented to relieve from frequent hardship resulting from the inevitable loss of evidence by death and lapse of time. But the modern statute of limitations rests upon no fiction nor presumed ground; it is the fiat of the legislature, which cuts off the right to maintain the suit. It rests upon the wise public policy that favors peace, the settlement of disputes out of court, and the repose of conditions which the parties have suffered to remain without question so long as to indicate acquiescence. Nothing is presumed or required to be presumed, in aid of the statute. (Ky.) Louisville etc. R. R. Co. v. Smith, 254.

#### *Part Payment.*

2. **LIMITATION OF ACTIONS**—Partial Payment Made Before the Statute has Run.—Under the provisions of section 4817 of Ballinger's Annotated Code of Washington, a partial payment made upon a promissory note, after due and before the statute of limitations has run, fixes the date of such payment as the time from which the statute begins to run. (Idaho) Sterrett v. Sweeney, 68.

**3. LIMITATION OF ACTIONS—Effect of the Statute of Limitations.**—The statute of limitations does not mean that the debt has been paid. It is a personal privilege which the law gives to the debtor, whereby he may say that the debt is stale, and for that reason should not be enforced. (Idaho) *Sterrett v. Sweeney*, 68.

**4. LIMITATION OF ACTIONS—Effect of Partial Payments.**—This statute of Washington, however, says to the debtor that if he acknowledge the indebtedness by making a payment thereon, it becomes an acknowledgment that the debt has not been discharged, and recognizes the debt as in existence, and fixes the date of payment as a new date from which the statute begins to run. (Idaho) *Sterrett v. Sweeney*, 68.

**5. LIMITATION OF ACTIONS—Partial Payments Made After the Maturity of the Debt.**—This statute in effect declares that the making of a partial payment by a debtor, after the maturity of the debt and before the statute of limitations has run, is a waiver of the debtor's privilege to claim the maturity of the debt as the date from which the statute begins to run. (Idaho) *Sterrett v. Sweeney*, 68.

**6. LIMITATION OF ACTIONS—Partial Payments Made in Another State.**—Where a resident of this state goes into the state of Washington and makes a partial payment upon a Washington contract after its maturity, and before such contract is barred by the statute of limitations of that state, upon his return to this state the contract follows him as made, and is enforceable under the laws of this state, and the statute of limitations of this state begins to run upon his re-entry into this state, after such payment. (Idaho) *Sterrett v. Sweeney*, 68.

*Nonresidence and Conflict of Laws.*

**7. LIMITATION OF ACTIONS—Application of the Statute of Another State.**—In order to determine the application of the statute of limitations of this state to a contract entered into in the state of Washington, it is necessary to examine said contract and the laws of the state of Washington for the purpose of determining the date from which the statute runs. (Idaho) *Sterrett v. Sweeney*, 68.

**8. LIMITATION OF ACTIONS—Residence Within One State, Effect upon Contract Made in Another.**—Whether residence within this state for the statutory period will prevail as a plea in bar upon a written contract depends upon the nature of the contract, its maturity, and the date from which the statute begins to run. (Idaho) *Sterrett v. Sweeney*, 68.

**9. LIMITATIONS OF ACTIONS—Nonresidents.**—The words "return to the state" used in section 4069, Revised Statutes, providing that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state," apply to a nonresident debtor who enters into a contract in a foreign state, and thereafter comes into this state, as well as to a citizen who enters into a contract within this state, and thereafter departs from the state. (Idaho) *West v. Theis*, 58.

**10. LIMITATION OF ACTIONS—Cause of Action Arising in Another State.**—The phrase "has arisen in another state" used in section 4079, Revised Statutes, providing that "when a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state," refers to and means the state in which the foreign contract is to be paid or discharged, and has

no application to an intermediate state or foreign country through which the debtor may subsequently travel or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state prior to coming to this state, where an action is eventually commenced. (Idaho) *West v. Theis*, 58.

**11. LIMITATION OF ACTIONS, Where Deemed to have Arisen.** Under the provisions of section 4079, Revised Statutes, "a cause of action arises" at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed, and the cause of action thus arising continues and follows the debtor until such time as it is either barred by the statute of limitations of the state wherein it arose, or until the debtor has lived within the state a sufficient length of time to bar it by the statute of limitations of this state. (Idaho) *West v. Theis*, 58.

**12. LIMITATIONS OF ACTIONS—Statute Neither of the Forum nor of the Place Where the Contract was Made.**—Where T. executed promissory notes in the state of Kansas and agreed to pay at a definite time and place within that state, and thereafter left the state and went to the state of Washington, and there resided a sufficient length of time to bar the right of action under the statutes of the state of Washington, and thereafter came to Idaho where he was sued upon the cause of action, and it appears that the statute of limitations of the state of Kansas has not yet run against the obligation, and that the debtor has not been in this state a sufficient length of time to bar the action here, he will not be permitted to plead the bar of the statute of limitations of the state of Washington; in such case the only inquiry is as to the statute of limitations of the state in which the debt was contracted and agreed to be paid, and of this state wherein the action is being prosecuted. (Idaho) *West v. Theis*, 58.

See Executors and Administrators, 3-5; Railroads, 10.

## LOGS AND LOGGING.

See Deeds.

## MALICIOUS MISCHIEF.

**1. MALICIOUS MISCHIEF** is not mischief or injury done to the property through mere wantonness, or a mere intent to injure it, but is mischief or injury inflicted with the malicious intent to injure some person, ordinarily the owner of the property; and it need not be shown that the offender knew who the owner was, as it is sufficient if it be established that he was bent on mischief against the owner, whoever he might be proven to be. (Iowa) *State v. Leslie*, 160.

**2. MALICIOUS MISCHIEF.**—In the crime of malicious mischief or injury to property the idea of malice toward the owner or some other person is an essential element. (Iowa) *State v. Leslie*, 160.

Note.

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**MANDAMUS.**

1. **MANDAMUS**—Waiver of Summary Method of Trial.—Where the relator consents to a summary method of trial in mandamus proceedings, he cannot complain thereof on appeal, at least if the substantial ends of justice have been met. (Wis.) *State v. District Board of School District No. 1*, 1050.

2. **MANDAMUS**—An Appeal from a Judgment for the respondent in mandamus proceedings does not permit a review of an order denying a motion, made after judgment, to amend the petition. (Wis.) *State v. District Board of School District*, 1050.

3. **MANDAMUS**—Control of Official Discretion.—Courts have authority to control the action of officers or official boards, vested with discretionary power, when they refuse to act in consequence of a conclusion they have reached, which is without any foundation in the facts before them and is, in the view of the court, capricious or arbitrary. (S. C.) *Mauldin v. Matthews*, 919.

**4. MANDAMUS—Interference with Official Discretion.**—Courts should interpose by mandamus, in the case of officers vested with discretionary power, only where it clearly appears that they refuse to perform official duty, or so misconceive official power or duty that the purpose of the law will be defeated. (S. C.) *Mauldin v. Matthews*, 919.

**5. MANDAMUS Against Pharmaceutical Examiners to Issue License.**—When the statute provides that a graduate of a reputable college of pharmacy is entitled to a license, the board of pharmaceutical examiners may be compelled by mandamus to license a graduate of a college held in high esteem by physicians, pharmacists and the public, notwithstanding the instruction at such college does not come up to what the examiners themselves conceive to be the proper standard. (S. C.) *Mauldin v. Matthews*, 919.

See *Waters and Watercourses*, 1.

### MARRIAGES.

**1. COMMON-LAW MARRIAGE—Cohabitation After Removal of Impediment.**—Where persons marry in violation of a statute forbidding marriage within one year after divorce, their continued cohabitation after the expiration of the year does not of itself establish a common-law marriage. (Wis.) *Lanham v. Lanham*, 1085.

**2. MARRIAGE—What Law Governs Validity.**—To the General Rule that a marriage valid where celebrated is valid everywhere are two exceptions, namely, marriages which are deemed contrary to the law of nature as generally recognized in Christian civilized states, and marriages which the law-making power of the forum has declared shall not be allowed validity on the grounds of public policy. (Wis.) *Lanham v. Lanham*, 1085.

**3. MARRIAGE—Validity When Contracted Out of State.**—The legislature has power to declare that marriages between citizens of the state contrary to its established public policy shall have no validity in its courts, even though they are celebrated in other states under whose laws they would ordinarily be valid. (Wis.) *Lanham v. Lanham*, 1085.

**4. MARRIAGE—Celebration in Another State.**—A statute declaring that it shall not be lawful for any person to marry within one year after his divorce, and that a marriage so attempted shall be void, is intended to control the conduct of the residents of the state, whether they are within or outside its boundaries. (Wis.) *Lanham v. Lanham*, 1085.

**5. MARRIAGE Contracted Without the State, in Violation of Its Laws.**—A statute declaring marriages void if contracted within a year after divorce applies to persons who, to evade the law, leave the state and celebrate marriage outside its boundaries, and then return to take up their residence. (Wis.) *Lanham v. Lanham*, 1085.

**6. MARRIAGES Without the State, Statute Controlling.**—Under section 2428, Revised Statutes, "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." (Idaho) *Hilton v. Stewart*, 48.

**7. MARRIAGE, Judgment Affirming, Admissibility of as Evidence.**—The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state, to be a common-law marriage and to evidence which the following certificate was issued: "John Rockey Park, born Tiffin, Seneca, Ohio, 7 May, 1833. Annie Flora Armitage born Nottingham, London, 19 February, 1853. The above parties were sealed by Prest.

D. H. Wells in the presence of Emeline Free Young, at her residence in Salt Lake City, U. T., Dec. 5, 1872. The lady being on her supposed deathbed. Daniel H. Wells,"—is admissible in evidence in an action in this state, involving the marriage status between the same parties. (Idaho) *Hilton v. Stewart*, 48.

**8. MARRIAGE, Decision of the Court of Another State Respecting.**—The judgment and decree of the supreme court of the state of Utah, adjudging and decreeing a marriage performed in that state to be valid, in an action involving the validity of such marriage, controls and governs the court, in an action in this state between the same parties involving the validity of such marriage and the marriage status of the parties thereto. (Idaho) *Hilton v. Stewart*, 48.

See Husband and Wife.

### MARRIED WOMEN.

See Husband and Wife.

### MASTER AND SERVANT.

#### *Fellow-servants.*

**1. RAILWAY EMPLOYE.**—**Liability to Coemployé.**—A railway employé in charge of the tanks and pumps of the company at a station is not liable to a brakeman injured by a water-pipe placed too near passing trains, if the offending employé is merely a subordinate who has had nothing to do with constructing or placing the fixtures of the plant, and at most has merely failed to take affirmative action to remedy the dangerous condition after his attention has been directed to it. (Ky.) *Dudley v. Illinois Cent. Ry. Co.*, 335.

**2. MASTER AND SERVANT**—**Liability of the Former to the Latter for Employing Incompetent Fellow-servants.**—One who employs an incompetent servant, having reason to know or opportunity to discover his want of capacity, is liable to any other employé, who, being in the exercise of due care, is injured as the proximate result of some act of the incompetent servant growing out of his want of capacity. (Mass.) *Beers v. Isaac Prouty Co.*, 374.

**3. MASTER AND SERVANT, Right of the Latter to Assume that Due Care has been Exercised in the Selection of His Coemployés.**—An employé has the right to assume that the fellow-servants employed to work with him will not be lacking in those attributes which will make them ordinarily safe coworkers. He may act on the theory that he will in the performance of his duties be free from the danger of the want of capacity of his fellow laborers to perform their duties. (Mass.) *Beers v. Isaac Prouty Co.*, 374.

**4. MASTER AND SERVANT**—**Employment of Colaborers Ignorant of the English Language.**—One at work for his employer upon somewhat complicated machinery requiring the labor of two or more men, and in the natural and proper operation of which it is necessary for the one to communicate with the other through the medium of speech, may recover for injuries received because of the inability of the assistant furnished to him to understand the English language, such inability not being known to the person injured, or, at least, such inability may justify the jury in finding that the master was guilty of employing an incompetent fellow-servant. (Mass.) *Beers v. Isaac Prouty Co.*, 374.

#### *Promise to Repair.*

**5. MASTER AND SERVANT**—**Promise to Repair Instrument or Tool.**—The rule that a direction by the master to continue the use of a defective instrument or tool, coupled with a promise to replace



it with one not defective, relieves the servant from the doctrine of assumed risk if injured during such continued use and because of the defect, does not apply to cases of ordinary labor with a tool of simple construction with which the servant is entirely familiar, and which he understands and comprehends as fully as the master. (Ohio) *McGill v. Cleveland etc. Traction Co.*, 705.

**6. MASTER AND SERVANT—Promise to Repair Instrument or Tool—Liability.**—Where an employé, whose duties require him to use an ordinary step-ladder, discovers and appreciates that the step-ladder has become and is defective, dangerous and "unfit for him to use in connection with his said work," and he notifies the master, who promises to furnish another, but before doing so the employé in using such defective step-ladder is injured, the master, under such circumstances, is not liable. (Ohio) *McGill v. Cleveland etc. Traction Co.*, 705.

*Child Labor Statute.*

**7. CHILD LABOR STATUTE—Purposes and Interpretation.**—One of the purposes of a statute forbidding the employment of children is to protect them from their own immaturity, inexperience and heedlessness; and such construction should be given it as will effectuate its purpose if this can be done without violating the letter of the act. (Ill.) *Strafford v. Republic Iron Co.*, 129.

**8. CHILD LABOR STATUTE—Notice of Age.**—An Employer must know at his peril that children employed by him are of an age that he may lawfully employ them. (Ill.) *Strafford v. Republic Iron Co.*, 129.

**9. CHILD LABOR STATUTE.—One Who Employs a Child in Willful Violation** of a statute forbidding the employment of children cannot escape responsibility for injuries to the child by showing that he left the work given him to perform and negligently undertook to do something else which resulted in the injury. (Ill.) *Strafford v. Republic Iron Co.*, 129.

**10. CHILD LABOR STATUTE.—A Liability for Damages** resulting from the violation of a statute forbidding the employment of children is created whether the act expressly so declares or not. (Ill.) *Strafford v. Republic Iron Co.*, 129.

See Constitutional Law, 35-38.

**MECHANIC'S LIEN.**

**MECHANICS' LIENS—Effect of Taking Notes.**—As a general principle, the taking of the notes of the contractors for the amount due for material does not of itself effect a relinquishment of the right to file a lien. Nothing less than an agreement of the parties that it shall do so has the effect of waiving the right to file the lien. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

**MERGER.**

See Easements, 5.

**MINES AND MINERALS.**

**1. MINES—Right to Support.**—In a grant of all the coal underlying a tract of land, the grantor, in the absence of an express waiver, is entitled to have his surface reasonably supported by the coal stratum granted. (Pa.) *Dignan v. Altoona Coal & Coke Co.*, 812.

**2. MINES AND MINING—Right to Surface Support.**—A grant of all the coals or other minerals lying in or being in, upon, or under a tract of land described in a deed does not deprive the grantor of



the right of surface support, nor is such right waived by a provision in the deed providing that all these said mining rights, liberties and privileges are to be used and exercised without any liability for damages arising and resulting from their use. (Pa.) *Dignan v. Altoona Coal & Coke Co.*, 812.

**3. MINES AND MINING—Right to Surface Support.**—If in a grant of all the coal underlying a tract of land the grantor in express terms enumerates what surface privileges are to be enjoyed by the grantee, such as sinking air-shafts, erecting buildings for a pumping station, and then provides that such mining operations, however, are "not to interfere with the surface of the land," the grant indicates an intention to reserve all surface rights, including sufficient support not expressly granted. (Pa.) *Dignan v. Altoona Coal & Coke Co.*, 812.

### MONOPOLY.

**MONOPOLY, What cannot be the Subject of.**—At the common law personal services could not be the subject of a monopoly. Unless there is property to be affected by a public interest, there is no basis for a charge of monopoly. (Mo.) *Lohse Patent Door Co. v. Fuelle*, 492.

### MORTGAGES.

**1. MORTGAGES—Equity of Redemption, Nature of.**—An equity of redemption in mortgaged property is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly descendible by inheritance, devisable by will and alienable by deed, precisely as if it were an estate of inheritance at law. (Ark.) *Kitchens v. Jones*, 36.

**2. MORTGAGES—Foreclosure—Nature of Estate in Surplus After Sale.**—If a decedent leaves real estate subject to a mortgage which is afterward regularly foreclosed, the surplus of the proceeds of the sale retains the character of real estate, for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion. (Ark.) *Kitchens v. Jones*, 36.

See Chattel Mortgages.

### MUNICIPAL CORPORATIONS.

#### *Saloon Ordinance.*

**1. SALOON ORDINANCE—When Vests Arbitrary Power in Mayor.**—A village ordinance requiring saloons to be closed at certain hours, "unless by special permission of the president," is void, because it delegates legislative authority to an executive officer and gives him arbitrary power to discriminate among persons similarly situated. (Wis.) *Village of Little Chute v. Van Camp*, 1100.

#### *Streets and Sidewalks in General.*

**2. PUBLIC STREETS—Purposes for Which Dedicated.**—When a street has been dedicated for ordinary street purposes, it must be presumed that the parties contemplated that it is to be used in the usual way, that is, for a carriageway in the center and sidewalks on the sides. (Ky.) *City of Georgetown v. Hambrick*, 333.

**3. PUBLIC STREETS—Regulating Width of Sidewalks.**—A city council may fix the width of the carriageway or the sidewalks of a street, or determine how much space shall be given to each, but it cannot say that the whole street shall be used as a carriageway and no part of it used as a sidewalk. (Ky.) *City of Georgetown v. Hambrick*, 333.

**4. PUBLIC STREETS—Right of Abutting Owner to Construct Sidewalk.**—The owner of property abutting on a public street is en-

titled to construct a sidewalk of a reasonable width, and the city cannot arbitrarily prevent him from so doing. (Ky.) *City of Georgetown v. Hambrick*, 333.

#### *Dangerous Sidewalks.*

5. **MUNICIPAL CORPORATIONS—Defective Sidewalks—Evidence of Notice of Defect.**—In an action to recover for injury alleged to have resulted from a defective sidewalk, evidence that the street commissioner and a member of the city council had actual notice of the condition of the walk prior to the accident is admissible. (Iowa) *Woods v. Town of Lisbon*, 208.

6. **DANGEROUS SIDEWALKS—Evidence of Prior Accidents.**—In an action against a city for injuries received from an alleged dangerous sidewalk, evidence of prior accidents may be received to show that the sidewalk was in a condition calculated to occasion accidents, if the negligence of the city is debatable, but such evidence is not of itself sufficient to sustain a charge of negligence and to lay the foundation for damages. (N. Y.) *Gastel v. New York*, 540.

7. **DANGEROUS SIDEWALKS—Trivial Differences in Level.**—To maintain a sidewalk so that there is about an inch difference in the level of adjacent portions is not such negligence on the part of the city as will support an action by a pedestrian who trips thereon and falls. (N. Y.) *Gastel v. New York*, 540.

8. **DANGEROUS SIDEWALKS.—The Tendency of the Law** as evidenced by legislative enactments has been in the direction of making less rather than more stringent the rules of municipal liability in cases of accident to persons using sidewalks. (N. Y.) *Gastel v. New York*, 540.

#### *Billboards.*

9. **POLICE POWER—Billboards.**—City authorities generally have power to regulate the construction and use of billboards within its limits, and an ordinance enacted for that purpose, unless an unreasonable and unnecessary restriction of the right of the land owner to erect structures upon his land, must be sustained as a proper exercise of the police power. Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. (N. C.) *State v. Whitlock*, 670.

10. **MUNICIPAL CORPORATIONS—Billboards—Police Power.**—It is within the power of a city to prohibit the erection of insecure billboards or other structures, to require the owners to maintain them in a secure condition and to provide for their removal at the expense of such owners, if they become dangerous. (N. C.) *State v. Whitlock*, 670.

11. **MUNICIPAL CORPORATIONS—Billboards—Police Power.**—An ordinance requiring all billboards within a city to be securely kept and placed "at a distance of at least two feet more than the height of such billboard from the outer edge of the sidewalk of the street" is invalid as an unnecessary restriction of a private right. (N. C.) *State v. Whitlock*, 670.

#### *Division into Wards.*

12. **MUNICIPAL CORPORATIONS—Division into Wards.**—It is competent for the legislature to authorize cities of the fourth class to divide the municipality into wards and provide for the election of councilmen therefrom. (Ky.) *Moore v. Georgetown*, 349.

13. **MUNICIPAL CORPORATION—Division into Wards—Judicial Review.**—The action of city councilmen in dividing the municipality into wards and allotting the number of councilmen to be elected from

each ward is not subject to review by the courts upon the theory that the division violates fundamental principles of equality in representative government in giving the residents of one locality more power than the same number in another locality. (Ky.) *Moore v. Georgetown*, 349.

See Licenses, 3, 4.

#### MURDER.

See Homicide.

#### NEGLIGENCE.

##### *Sale of Dangerous Substance—Infants.*

1. **INFANTS—Negligence—Sale of Dangerous Substances.**—If one sells a dangerous article to a child whom he knows to be, by reason of his youth and inexperience, unfit to be trusted with it, and who probably might innocently and ignorantly play with it to his own injury, and injury does in fact result, he is negligent, and liable in damages therefor. (Iowa) *McEldon v. Drew*, 203.

2. **INFANTS—Negligence—Care Required of.**—The care required of an infant is that degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity and understanding of the child. (Iowa) *McEldon v. Drew*, 203.

3. **INFANTS—Negligence.**—Children under seven years of age are incapable of contributory negligence as a matter of law, and children between seven and fourteen are presumed incapable of contributory negligence, although the contrary may be shown. (Iowa) *McEldon v. Drew*, 203.

4. **INFANTS—Contributory Negligence.**—A child twelve years of age cannot ordinarily be guilty of contributory negligence. (Iowa) *McEldon v. Drew*, 203.

5. **INFANTS—Contributory Negligence.**—If a person sells gunpowder to an infant, twelve years of age, the question as to whether the manner in which he exploded the powder to his injury was the proximate cause thereof is a question for the jury. (Iowa) *McEldon v. Drew*, 203.

##### *Unhitched Horses in Highway.*

6. **NEGLIGENCE.—One Who Leaves a Horse Unhitched and Unattended on a City Street** takes the risk of what the horse may do and is presumed to have been guilty of negligence. The strength of the presumption varies with the circumstances, being strong when the animal is young, nervous or unused to the sights and sounds of such city, and slight when he is old, staid and accustomed to city life. (Pa.) *Stevenson v. United States Express Co.*, 725.

7. **NEGLIGENCE, Temporary Question of, When for the Jury.**—If an invalid left unattended in a rolling-chair in a city street some twenty feet behind an unhitched and unattended horse and wagon is injured by the backing of such horse and the consequent overturning of the chair, the question of contributory negligence is for the jury. (Pa.) *Stevenson v. United States Express Co.*, 725.

See Damages; Death; Hospital; Master and Servant; Municipal Corporations; Railroads; Telegraphs and Telephones.

#### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.



## NEW TRIAL.

**APPEAL AND ERROR**—New Trial for Newly Discovered Evidence—Want of Knowledge.—A new trial will not be granted on the ground of newly discovered evidence, if there is no showing of diligence, nor when it appears that the alleged newly discovered evidence was in the possession and knowledge of the defendant at the time of the trial. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

## NUISANCE.

*In General.*

1. **NUISANCE**.—A Nuisance Per Se is any Act, omission, or use of property or thing, which is of itself hurtful to the health, tranquility, or morals, or outrages the decency of the community. It is not permissible or excusable under any circumstances. (Ky.) *Ehrlick v. Commonwealth*, 269.

*Private Nuisance—Acid Plant.*

2. **PRIVATE NUISANCE**—Sulphuric Acid Plant.—The erection and operation in close proximity to a dwelling-house, of a sulphuric acid plant which emits such fumes and substances as to render the dwelling unfit for occupancy, constitutes a private nuisance, although the business is not unlawful and the plant not per se a nuisance. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

3. **PRIVATE NUISANCE**.—The Question of Nuisance in Maintaining Any Business depends not only upon the character thereof, but also upon its proximity to the dwellings, business, property, or occupancy of others. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

4. **PRIVATE NUISANCE**.—An Industry not a Nuisance Per Se may be conducted in such a manner or in such a place as to be a nuisance. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

5. **PRIVATE NUISANCE**.—Where the Nature and Location of a Business must be relied upon in determining whether a nuisance is created, it is not necessary to state the extrinsic circumstances relating to the method of operation. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

6. **PRIVATE NUISANCE**—Location of Business.—When the basis of an action to abate a nuisance is the location of the business complained of, whether or not the location is convenient, under all the circumstances, is a question that may properly be raised by the answer. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

7. **PRIVATE NUISANCE**.—A Complaint is not Demurrable in an action to abate a nuisance and for damages, simply because the court on final hearing may not grant all the relief prayed for. (Wis.) *Holman v. Mineral Point Zinc Co.*, 1016.

*Pool-room.*

8. **NUISANCE**.—In an Indictment for Keeping a Pool-room, it is proper to state the particular facts relied upon to sustain the charge. (Ky.) *Ehrlick v. Commonwealth*, 269.

9. **NUISANCE**.—Keeping a Pool-room to Which There is Common Resort for betting on horse-races is per se a nuisance at common law. (Ky.) *Ehrlick v. Commonwealth*, 269.

10. **NUISANCE**—Pool-room—Absence of Disturbance.—It is no defense to keeping a pool-room that there is no noise or disturbance, or that the community is not disturbed by its presence. (Ky.) *Ehrlick v. Commonwealth*, 269.

11. **NUISANCE**—Pool-room—Persons Liable.—All who set up, operate, or promote a common gaming-house, including its employes, are



guilty of maintaining a nuisance; and one who is shown to have been usually present at a pool-room when the betting was going on, apparently in authority, and who has admitted on more than one occasion his connection therewith, may be found guilty of maintaining the nuisance. (Ky.) *Ehrlick v. Commonwealth*, 269.

12. **NUISANCE—Evidence of Keeping Pool-room.**—On the trial of an indictment for maintaining a pool-room, prior admissions made by the defendant in the police court where he had pleaded guilty to the same offense are competent evidence against him. (Ky.) *Ehrlick v. Commonwealth*, 269.

13. **NUISANCE—Pool-room—Former Conviction.**—A conviction under an ordinance of a district for maintaining a pool-room does not bar a prosecution by the state for the same acts. (Ky.) *Ehrlick v. Commonwealth*, 269.

14. **NUISANCE—Pool-room—Judgment of Abatement.**—Upon a verdict of guilty for maintaining a pool-room, the commonwealth is entitled to a judgment of abatement. (Ky.) *Ehrlick v. Commonwealth*, 269.

*Actions in Abatement.*

15. **NUISANCE—Successive Actions, Whether Maintainable.**—When an act complained of as a nuisance is unlawful in itself, a right of action accrues immediately, and includes all subsequent damage flowing from it. But when the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery, and until the damage does occur there is no cause of action; and for repeated injuries resulting from the same cause repeated actions may be brought. (Va.) *American Locomotive Co. v. Hoffman*, 953.

16. **NUISANCE—Abatement—Obstruction of Stream—Indictment.** The obstruction of a navigable stream cannot be declared a public nuisance and abated at the instance of a private party in a civil action without showing special damages. In such case indictment is the proper remedy. (S. C.) *McMeekin v. Central Carolina Power Co.*, 885.

See Railroads, 11-15.

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when will support several recoveries and when but one, 959.

**OBSCENITY.**

**1. JURY TRIAL**—Instruction as to Meaning of Words, When Unnecessary.—The words "obscene," "indecent," "impure," and "manifestly" may be assumed to be understood in their common meaning by the ordinary juror, and hence not be defined in the instructions. (Mass.) *Commonwealth v. Buckley*, 425.

**2. OBSCENE LANGUAGE, Definition of.**—Obscenity means offensive to morality or chastity; indecent, nasty. (Mass.) *Commonwealth v. Buckley*, 425.

**3. IMPURE LANGUAGE** is that Which Manifestly Tends to Incite in the Minds of people susceptible to such influence obscene, impure and indecent thoughts. (Mass.) *Commonwealth v. Buckley*, 425.

**4. OBSCENE PUBLICATIONS, Right of the Jury to Consider Books Offending in the Same Manner.**—In a prosecution for selling a book containing obscene, indecent and impure language, it is proper to refuse to instruct the jury that they may consider other works or literature widely read in the community and the subjects discussed in them, and, on the other hand, to instruct that it is entirely immaterial whether other books are as bad or worse than the publication complained of. (Mass.) *Commonwealth v. Buckley*, 425.

**5. OBSCENE PUBLICATIONS — Purpose of the Author.**—In a prosecution for selling a book containing obscene, indecent and impure language, it is proper to refuse to instruct the jury to consider the apparent purpose and intent of the story as a whole, and, on the other hand, to instruct them that the defendant is being tried only with regard to such parts of the books as the prosecution complains of, and that it makes no difference what the object in writing the book was or what its whole tone is, if the parts complained of are in the opinion of the jury obscene, indecent and impure and manifestly tend to corrupt the morals of youth. (Mass.) *Commonwealth v. Buckley*, 425.

**6. OBSCENE PUBLICATION, What may be Found to be.**—Under an indictment for selling a publication containing certain obscene, indecent and impure language, and manifestly tending to the corruption of youth, the jury may find the defendant guilty, if the publication contains descriptions of seductive actions and highly wrought sexual passion, and discloses much of the details of the way to an adulterous bed. (Mass.) *Commonwealth v. Buckley*, 425.

**OFFICERS.**

*De Facto Officer.*

**1. OFFICER DE FACTO**—Right to Compensation.—One who holds an office to which he knows his right is denied cannot claim compensation for services, upon its being decided that he has no right to the office, although there is no other claimant. (Ky.) *Eubank v. Montgomery County*, 340.

**2. OFFICER DE FACTO**—Right to Compensation.—It is a general rule of public policy that those who hold public offices without right are not entitled to the emoluments thereof. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves for the discouragement of the seizure of public offices. (Ky.) *Eubank v. Montgomery County*, 340.

*Bonds of Officers.*

**3. OFFICIAL BOND**—Liability for Death of Prisoner.—When a marshal wrongfully kills a person whom he has arrested, the sureties on his bond are liable therefor. (Ky.) *Growbarger v. United States F. & G. Co.*, 274.

**4. OFFICIAL BOND—Extent of Liability for Death.**—A statutory provision that the recovery against a principal and sureties shall not be limited by the amount of the penalty named in the bond, applies to an action on the bond of a marshal for wrongfully killing a person whom he arrests. (Ky.) *Growbarger v. United States F. & G. Co.*, 274.

**5. OFFICIAL BOND.—Punitive Damages** may be recovered of a marshal who wrongfully kills a person whom he has arrested, but only compensatory damages can be recovered of his sureties. (Ky.) *Growbarger v. United States F. & G. Co.*, 274.

**6. OFFICIAL BOND—Failure to Accept or Record.**—The failure of town authorities to make or keep a record of the execution of a marshal's official bond, or of its acceptance, does not relieve the sureties from liability, if in fact it was executed and accepted. (Ky.) *Growbarger v. United States F. & G. Co.*, 274.

**7. OFFICIAL BOND.—Only a Substantial Compliance** with statutory requirements is necessary in executing an official bond. (Ky.) *Growbarger v. United States F. & G. Co.*, 274.

#### *Resignation of Officer.*

**8. OFFICE, PUBLIC — Resignation.**—A public officer who has tendered his resignation unconditionally may withdraw before its acceptance. (S. C.) *Jernigan v. Stickley*, 855.

**9. OFFICERS, PUBLIC—Resignations.**—A meeting of part of the voters of a town, without any regular call for a mass meeting, has no power to accept the resignation of a public officer and elect his successor, and such officer may subsequently withdraw his resignation and hold the office, although his successor has been elected. (S. C.) *Jernigan v. Stickley*, 855.

### OPTION TO SELL.

See Vendor and Vendee, 3-7.

### ORCHARD.

See Damages, 5.

### OYSTERS.

See Fish; Larceny.

### PARTITION.

#### *In General.*

**1. PARTITION—Grantee of Easement as Party.**—The grantee of one cotenant of an easement to overflow a part of the common property is a necessary party to partition. (S. C.) *In re Union Mfg. & Power Co.*, 908.

**2. PARTITION—Relief for One not Made a Party.**—The grantee of one cotenant of an easement to overflow a part of the common property, who has been given no notice of partition, is entitled, on intervention, to have the decree opened and his interest protected, if practicable, by allotting to his grantor the portion of property burdened with the easement. (S. C.) *In re Union Mfg. & Power Co.*, 908.

**3. PARTITION—Fees of Solicitor as Costs.**—When there is a substantial contest in partition proceedings over an easement to which the defendant is entitled, the solicitor's fees of the complainant should not be charged as costs. (Ill.) *Smith v. Roath*, 123.

*Personal Property.*

**4. PARTITION OF PERSONALTY—Equity Jurisdiction.**—The circuit court has equity jurisdiction to entertain an action to partition personal property, and therein to appoint a receiver, order the property delivered to him, enter an interlocutory decree, and so modify its final decree as to cover and provide every possible form or kind of relief made necessary by the exigencies of the case or the contumacy of the parties in order to do final and complete justice. (Wis.) *Laing v. Williams*, 1025.

**5. PARTITION OF PERSONALTY—Conclusiveness of Interlocutory Findings.**—The interlocutory decree in an action to partition personal property is appealable, and if there is no exception to the interlocutory findings and no bill of exceptions preserving the evidence resulting therein, they are conclusive upon appeal from the final judgment founded upon them. (Wis.) *Laing v. Williams*, 1025.

**6. PARTITION OF PERSONALTY—Refusal to Comply with Decree.**—Where the defendant in an action to partition personal property refuses to comply with the interlocutory decree ordering delivery to the receiver therein appointed, the court in protecting the other party is not limited to contempt proceedings, and may in the final decree award damages. (Wis.) *Laing v. Williams*, 1025.

*Equities of Parties—Rents and Betterments.*

**7. COTENANCY—Adjusting Equities in Partition.**—In decreeing partition, a court of equity should adjust and settle the equities of the cotenants with respect to betterments, waste and rents from the common property. (S. C.) *Vaughan v. Langford*, 912.

**8. COTENANCY—Lien in Favor of Co-owner for Rents.**—There is no fixed lien on the common property for rents, in favor of one cotenant against another, and the court in partition will not provide for the payment of such rents from the common property to the prejudice of persons holding conveyances or liens on the interest of the cotenant owing the rent. But, as among the parties themselves, the court in decreeing partition has the power, in doing full justice in the premises, to adjust all demands for rent, and require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the cotenant owing the rent. (S. C.) *Vaughan v. Langford*, 912.

**PARTNERSHIP.**

**PARTNERSHIP.**—Each Partner has a Lien on the Firm Assets for his portion thereof after the payment of the partnership debts. (Ky.) *Harlan & Co. v. Bennett*, 360.

**PARTY-WALLS.**

**PARTY-WALL—Payment for Use.**—One Who Uses a Wall Erected on the Dividing Line by the owner of an adjacent lot should pay a reasonable price for the use estimated as of the time the user takes place, and this although neither he nor his vendor was a party to the erection of the wall, and made no agreement express or implied concerning it. (Ky.) *Spaulding v. Grundy*, 328.

**PAYMENT.**

**1. PLEADING IN ACTION to Recover Moneys Paid Under Contracts Claimed to be Void.**—Where an action is brought under the provisions of said section 82 to recover money paid on a void contract, the complaint must allege that such contract was made with the defendant during the time that such defendant was a member of the board of trustees of the district. (Idaho) *Independent School Dist. v. Collins*, 76.



**2. PAYMENTS, Application of.**—If a creditor holds claims secured by chattel mortgage of his debtor and his wife upon property which belongs to the husband alone and for his debts alone, and also unsecured claims against such husband alone, he may apply payments made from money obtained by the mortgagor's sale of a part of the mortgaged property upon the unsecured debts, in the absence of any direction as to their application. (Iowa) *Cain v. Vogt*, 216.

**3. PAYMENTS, Application of.**—The fact that the wife of a debtor is a surety upon a mortgage debt, and not upon another unsecured debt, does not deprive the creditor of his right to apply payments received to the latter, in the absence of any direction to credit them upon the former. (Iowa) *Cain v. Vogt*, 216.

**4. PAYMENTS, Application of.**—If but one of several debts are secured and payments are made of which neither the creditor nor the debtor makes application, the court will apply them to the unsecured claim. (Iowa) *Cain v. Vogt*, 216.

**5. PAYMENTS, Application of.**—Rules which bind the mortgagee, who sells upon foreclosure to apply the proceeds to the satisfaction of the mortgage debt have little application, where the payment is made from money obtained by a voluntary sale of the property by the mortgagor. (Iowa) *Cain v. Vogt*, 216.

#### **PERJURY.**

See Attorney and Client, 5.

#### **PHARMACISTS.**

See Mandamus, 5.

#### **PHYSICIANS.**

See Hospitals; Railroads, 2; Witnesses.

#### **PLEADING.**

**1. PLEADING—Failure to Set Up a Defense.**—In a suit upon a bank check, the defense that the drawer was intoxicated to an extent disabling him from being himself cannot be received in evidence if not pleaded. (Idaho) *Camas Prairie State Bank v. Newman*, 81.

**2. PLEADING—New Cause of Action—Notice.**—A substituted complaint alleging the generally dangerous condition of a sidewalk complained of, whereas the original complaint had complained of specific defects only, does not plead a new cause of action of which notice must be given. (Iowa) *Woods v. Town of Lisbon*, 208.

**3. PLEADING—Breach of Contract, How may be Alleged.**—It is a general rule of pleading that the breach of a contract may be assigned in the negative of the words of the contract. The exception is when such a negative does not plainly show that there is a breach. (Mass.) *Sherlag v. Kelley*, 414.

See Abatement and Revivor.

#### **POLICE POWER.**

See Constitutional Law.

#### **POOL-ROOM.**

See Nuisance, 8-14.

#### **PRESCRIPTION.**

See Easements.

**PRINCIPAL AND AGENT.**

**1. PRINCIPAL AND AGENT—Burden of Proving Authority of Agent.**—A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of proof lies on him to establish the agency and the extent of it. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

**2. WITNESS, Cross-examination of Should Extend to His Authority.**—Where the defendant puts an alleged agent of the plaintiff on the stand for the purpose of proving the scope of his authority, this opens the door to plaintiff on cross-examination, to show precisely the limits of that authority. (Pa.) *American Car & Foundry Co. v. Alexandria Water Co.*, 749.

**PRIVATE WAYS.**

**1. PRIVATE WAYS, Rights of the Public Therein.**—A private way, however extensively used by the public, does not give them therein any rights beyond those of licensees. (Mass.) *Bowler v. Pacific Mills*, 432.

**2. PRIVATE WAYS, Duty of Land Owner to Persons Using.**—The measure of duty of a land owner to persons using a private way over his lands, no matter how long or extensive has been the use, is to refrain from doing them intentional injury and from wantonly or recklessly exposing them to danger. (Mass.) *Bowler v. Pacific Mills*, 432.

**3. PRIVATE WAYS, Liability of Property Owner to Person Injured in.**—If a land owner constructs a private way or street over his lands, keeping up notices showing that it is not public, and maintains a business on adjacent property of such a character that he cannot exclude the public from such way without interfering with his own use thereof, he does not thereby invite the public to use the way, and is not liable to a person who, being therein, is injured by a private freight train belonging to such land owner, if the latter has not done the former any intentional injury, nor wantonly nor recklessly exposed him to danger. (Mass.) *Bowler v. Pacific Mills*, 432.

**PRIVILEGED COMMUNICATIONS.**

See Witnesses.

**PROBATE LAW.**

See Executors and Administrators; Wills.

**PROCESS.**

**TO AN ACTION for Malicious Abuse of Legal Process Two Elements are Necessary:** The existence of an ulterior purpose, and an act in the use of the process not proper in the regular prosecution of the proceeding. (Ill.) *Keithley v. Stevens*, 120.

**QUO WARRANTO.**

**1. QUO WARRANTO** is a civil remedy in which the state is a necessary party. (S. C.) *Jernigan v. Stickley*, 855.

**2. QUO WARRANTO—Injunction—Bar.**—An action in equity to restrain a person from exercising the duties of a certain office is not the same cause of action as a proceeding by quo warranto to try the title to such office. Therefore, the maintenance of one such action is not a bar to maintaining the other. (S. C.) *Jernigan v. Stickley*, 855.

## RAILROADS.

*Injury to Person on Track.*

1. **NEGLIGENCE, Presumption of from Standing in Front of a Car.**—A person who walks in front of a moving car which he saw, or could have seen, by the exercise of the reasonable care which the law requires, will be conclusively presumed to have been negligent. (Pa.) *Yevsack v. Lackawanna etc. R. R. Co.*, 746.

2. **NEGLIGENCE—Standing in Front of a Moving Car, Where There is a Passageway.**—Though there are platforms along the track of an electric railway and a passageway extending from one platform to another, a person alighting from a moving car must, before going along such passageway from one platform to another, use the great care required of a person at a crossing over which he knows trains constantly pass. (Pa.) *Yevsack v. Lackawanna etc. R. R. Co.*, 746.

*Employment of Surgeon.*

3. **RAILROADS—Authority to Employ Surgeon.**—If a stranger is injured by the operation of a train, at a point distant from the railroad company's chief offices, and there is immediate necessity for the employment of a surgeon, the train conductor, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency. (Ark.) *Bonnette v. St. Louis etc. Ry. Co.*, 30.

*Right of Way—Estoppel—Ejectment.*

4. **RAILWAYS—Estoppel—Ejectment.**—A land owner who stands by and sees a railroad, to be devoted to a public use, constructed on his land without enjoining or otherwise preventing the construction, acquiesces in such use of his land, and is estopped from maintaining ejectment for the entry, and is restricted to a recovery for the damages sustained. (Ark.) *Union Sawmill Co. v. Felsenthal L. & T. Co.*, 25.

5. **EJECTMENT—Taking of Land—Trespass.**—If land is taken by a private corporation not possessing the right of eminent domain, but is not devoted to a public use, such taking is a mere trespass, and the land owner may recover possession in ejectment. (Ark.) *Union Sawmill Co. v. Felsenthal L. & T. Co.*, 25.

6. **EJECTMENT Lies Against a Railroad Company** for a portion of its right of way used in the performance of its duties as a common carrier; and it is no defense to show that the company took possession of the premises before the plaintiff acquired his title. (Ill.) *Mapes v. Vandalia R. R. Co.*, 117.

7. **EJECTMENT.**—When a Judgment is Recovered Against a Railroad Company in ejectment for a portion of its right of way, the company should not be required summarily to surrender possession, but execution should be stayed to enable it to make compensation or institute condemnation proceedings. (Ill.) *Mapes v. Vandalia R. R. Co.*, 117.

*Right of Way—Fires.*

8. **RAILROADS—Fire—Weeds and Grass Along Track.**—The owner of property along a railroad owes the corporation no duty to keep his land free from grass, weeds or brush to guard against fire. (Ky.) *Louisville etc. R. R. Co. v. Beeler*, 291.

*Right of Way—Easement and Adverse Possession.*

9. **RAILROAD—Acquisition of Easement in Right of Way.**—Neither an individual nor the public can acquire an easement in the nature of a passageway along or across a railway right of way.



But such easements are neither conferred nor protected by statutes of limitations; they are titles by prescription, as to which the fiction of a grant and its loss are still adhered to. (Ky.) Louisville etc. R. R. Co. v. Smith, 254.

10. **RAILROAD.**—The Law of Adverse Possession applies to railroad rights of way. They are generally only easements in land, but since the fee can be lost by adverse possession, it follows that every lesser estate may also be so lost. (Ky.) Louisville etc. R. R. Co. v. Smith, 254.

*Negligent Construction—Damage from Water.*

11. **RAILWAY, Liability of for Injury to Real Property Due to Negligent Construction of Its Roadbed.**—Damages incident to the negligent construction of a railroad may be recovered though the right of way has been purchased or regularly acquired by condemnation. (N. C.) Davenport v. Norfolk etc. R. R. Co., 599.

12. **RAILWAYS, Liability of for Crossing Drainage Ditches Without Leaving Sufficient Means for the Escape of Water.**—If a land owner through whose premises a railroad passes maintains certain lead and tap ditches, and the railway company, in constructing and maintaining its road, crosses all these ditches and provides openings only for the lead ditches, it is answerable to the land owner for the damages accruing to him by its failure to provide as adequate means for the drainage and escape of water as if the small or tap ditches had been left open. (N. C.) Davenport v. Norfolk etc. R. R. Co., 599.

13. **RAILWAYS, Right of to Cut and Maintain Ditches.**—If it is necessary in order to drain a railway track to cut ditches over adjacent lands across the lands of a particular proprietor, the railway company has the right to make a continuous ditch through such adjacent lands to the other side, but it is the duty of the company to have the ditches of sufficient capacity to carry off this water in addition to that which would be on the land without such change. (N. C.) Davenport v. Norfolk etc. R. R. Co., 599.

14. **RAILWAYS—Water, Damages Arising from Accumulating Without Providing Means of Escape.**—A request for an instruction that a railway company in constructing its roadbed had the right to accumulate all waters which would naturally flow upon the plaintiff's land and convey them by ditches in and upon his lands "and for damages incident to this right, no recovery can be had," is properly modified by striking out the words within quotation marks, where the evidence tends to show that the defendant had not provided any sufficient culvert or drainage to carry off such water. (N. C.) Davenport v. Norfolk etc. R. R. Co., 599.

15. **DAMAGES, Question Respecting Amount of, When not Improper Because Calling for an Opinion.**—In an action to recover for damages alleged to be due to ponding water on the plaintiff's land, the question, "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" is properly allowed. The answer does not involve a mere opinion, but an estimate by the witness, from personal observation and view and knowledge of the conditions, and it should, therefore, be considered as the statement of a fact. (N. C.) Davenport v. Norfolk etc. R. R. Co., 599.

See Carriers; Death, 6-8.

**RECEIVER'S CERTIFICATES.**

1. **RECEIVER'S CERTIFICATES.**—The Effect of an Assignment of a receiver's certificate is to substitute the assignee for the original



holder, to enable him to share in any distribution which may be made of the assets, and to enforce his rights to the same extent as the assignor. (Ill.) *McCarthy v. Crawford*, 95.

**2. RECEIVER'S CERTIFICATES—Assignment Without Transfer on Books.**—The fact that a receiver's certificate provides that it is transferable only on the books of the corporation and upon surrender of the certificate does not preclude its assignment without a compliance with such provision. (Ill.) *McCarthy v. Crawford*, 95.

**3. RECEIVER'S CERTIFICATES—Bona Fide Purchase from Broker.**—Where the owner of a receiver's certificate purporting to be transferable by assignment signs the form of transfer and letter of attorney in blank and delivers the certificate to a broker to sell, he clothes the broker with the indicia of ownership and is estopped to deny that he is an assignee for value as against a subsequent bona fide purchaser. (Ill.) *McCarthy v. Crawford*, 95.

**4. RECEIVER'S CERTIFICATES—Pre-existing Debt as Consideration for Assignment.**—Where brokers deliver a receiver's certificate to a customer as security for railroad stock which he has paid them for, and the customer afterward agrees with the brokers to purchase the certificate in lieu of taking the stock, the purchaser is entitled to the same protection as if he had paid a new consideration. (Ill.) *McCarthy v. Crawford*, 95.

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**Receiver's Certificates**, to pay taxes in the case of a private corporation, 108.

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#### RELEASE.

See Death, 6-8.

#### REMAINDERMEN.

See Judgments, 4, 5.

#### REMOVAL OF CAUSES.

**1. REMOVAL OF CAUSES.**—It is for the State Court to Determine from the record, when a motion for the removal of a cause to a federal court is made, whether or not there is then present a state of case authorizing a removal. (Ky.) *Dudley v. Illinois Cent. Ry. Co.*, 335.

**2. REMOVAL OF CAUSES.**—The Motive or Purpose of the Plaintiff in joining the defendants will not be inquired into, on motion to remove the cause to a federal court, provided a cause of action is stated against them jointly. (Ky.) *Dudley v. Illinois Cent. Ry. Co.*, 335.

**3. REMOVAL OF CAUSES**—Fraudulent Joinder of Defendants. When it becomes apparent during the progress of a trial, wherein a resident defendant has been joined with a nonresident, that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption that a stronger case could have been made out when the petition was filed, the court may grant a renewed motion by the nonresident defendant for a removal of the cause to a federal court; state courts will not permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of the right of removal guaranteed by law. (Ky.) *Dudley v. Illinois Cent. Ry. Co.*, 335.

#### REPLEVIN.

See Chattel Mortgages, 1.

#### REPRESENTATIVE DISTRICTS.

See Constitutional Law, 10-12.

#### RES JUDICATA.

See Judgments, 6, 7.

#### RESTRAINT OF TRADE.

See Trade Unions.

#### REVERTER.

See Estates.

#### SALES.

**1. SALE OF POTATOES**—Warranty of Quality.—If on the sale of a carload of potatoes they cannot all be examined without an expenditure of a great deal of time, but some sacks are opened and found good, and the seller states that the rest are of like quality, but the buyer, promptly unloading, finds one hundred sacks frozen, the jury is justified in finding an express warranty; and in the ab-

sence of such a warranty, he could recover on an implied one. (Wis.) *King v. Graef*, 1101.

2. **SALES—Breach by Seller—Loss of Profits.**—If a manufacturer fails to deliver clothing which he has sold to a retailer, and the latter thereafter makes diligent but ineffectual efforts to purchase like goods in the market, he may recover the increased market value of the goods from the time of purchase to the time of their delivery, and the reasonable profit he would have made on them had they been delivered in accordance with the contract. (Ky.) *Roberts, Wicks & Co. v. Lee*, 265.

See Negligence, 1.

### **SALOON ORDINANCE.**

See Municipal Corporations, 1.

### **SCHOOLS.**

1. **SCHOOLS.**—A School Board may Suspend a Pupil Although No Rule has been prescribed relating to the misconduct for which suspension is made. (Wis.) *State v. District Board of School Dist. No. 1*, 1050.

2. **SCHOOLS—Misconduct Out of School Hours.**—School authorities have the power to suspend a pupil for an offense committed out of school hours and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. (Wis.) *State v. District Board of School Dist. No. 1*, 1050.

3. **SCHOOLS.**—Pupils may be Suspended Until They Apologize for causing the publication in a newspaper of a satirical poem reflecting on the rules of the school. (Wis.) *State v. District Board of School Dist. No. 1*, 1050.

See Contracts, 5-7.

### **SELF-DEFENSE.**

See Homicide, 2-5.

### **SIDEWALKS.**

See Municipal Corporations.

### **SPECIFIC PERFORMANCE.**

1. **SPECIFIC PERFORMANCE—Contracts for Future Support.**—An executory oral contract to convey land in consideration of support or care to be furnished to one person by another during the lifetime of the latter, cannot be specifically enforced until it has been fully executed. (Iowa) *Newman v. French*, 211.

2. **SPECIFIC PERFORMANCE.**—A Subvendee of a Portion of the land which the vendor agreed to sell cannot compel a conveyance to himself from the vendor, except upon the payment of the whole amount due from the original vendee of the entire tract. (Va.) *Hoover v. Baugh*, 985.

3. **SPECIFIC PERFORMANCE—Parol Contract Partly Performed.**—Equity will compel the performance of a parol contract for the sale of real estate which is certain and definite when there have been such acts of part performance that neither party can be restored to his former position, but for a vendee to remove the briars and weeds from a tract so as to pasture it, and to make costly im-

provements to his house on the adjoining lot, which he would not have been justified in making, except on expectation of acquiring title to the tract, are not such acts of part performance as to be insusceptible of compensation in damages. (Va.) *Hoover v. Baugh*, 985.

4. **SPECIFIC PERFORMANCE.—A Parol Contract by a Vendee** to sell a portion of the land purchased to a subvendee, assented to by the vendor, is within the statute of frauds and unenforceable if there have been no acts of part performance other than such as may be compensated in damages. (Va.) *Hoover v. Baugh*, 985.

5. **SPECIFIC PERFORMANCE—Necessary Parties.**—In suits for specific performance, the only necessary parties are ordinarily the parties to the contract. (Va.) *Steinman v. Hagan*, 978.

6. **SPECIFIC PERFORMANCE.—A Person is not Ordinarily a Necessary Party** to specific performance when there is no proper privity or common interest between him and the plaintiff such as would warrant the court in decreeing between them. (Va.) *Steinman v. Hagan*, 978.

7. **SPECIFIC PERFORMANCE—Subpurchaser not Necessary Party.**—In a suit by a vendor, who has not parted with the legal title, for specific performance of the contract of sale, a purchaser of the vendee is not a necessary party, and he is bound, although not made a party, by any decree in the action affecting the title. (Va.) *Steinman v. Hagan*, 978.

8. **SPECIFIC PERFORMANCE, When may be Refused.**—The right to specific performance is not absolute, but rests in the sound discretion of the court, and may be refused to anyone who has been guilty of any unfair conduct or has taken any inequitable advantage of the other party to the agreement, even though there is no sufficient ground for its rescission. (Mass.) *Banaghan v. Malaney*, 378.

9. **SPECIFIC PERFORMANCE may be Refused Where the Defendant was an Aged, Inexperienced and Ignorant Woman**, as against a plaintiff whose agent in procuring the contract, being the superior in mental ability to the defendant, persuaded her to refrain from consulting advisers on whom she was disposed to rely, and wrought upon a racial prejudice to persuade her to make the agreement at once, upon the terms offered, and failed to disclose to her the circumstances which led him to believe that a higher price could be obtained. (Mass.) *Banaghan v. Malaney*, 378.

10. **SPECIFIC PERFORMANCE, Failure to Assess Damages Where Such Performance is Refused.**—Where the court refusing to decree specific performance of a valid contract might retain the bill for the purpose of giving relief in damages, it is not bound to do so, but may dismiss the suit, leaving the plaintiff wholly to his remedy at law. (Mass.) *Banaghan v. Malaney*, 378.

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## STARE DECISIS.

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## STATUTE OF LIMITATIONS.

See Limitation of Actions.

## STATUTES.

1. **STATUTES**, Construction of.—The sole object of the courts in construing statutes is to ascertain the intent with which they are enacted, and to arrive at this the several sections of an act are to be considered as parts of a connected whole and harmonized, if

possible, so as to give aid in giving effect to the intention of the law-makers. (Iowa) *Coggeshall v. Des Moines*, 221.

2. **STATUTES, PENAL, Construction of.**—Statutes in their nature penal should not be extended by construction beyond their natural meaning. (Idaho) *Independent School Dist. v. Collins*, 76.

3. **PENAL LAWS OF Another State—Enforcement.**—The courts of one state will not enforce the penal laws of another, in an action brought in the former state, especially when the courts of the state where the statute was enacted have declared such statute to be penal in its nature. (Pa.) *Commercial Nat. Bank v. Kirk*, 823.

## STOCK AND STOCKHOLDERS.

See Corporations.

## STREET RAILWAYS.

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## STREETS.

See Municipal Corporations.

## STRIKES AND STRIKERS.

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See Waters and Watercourses, 10-23.

### SUNDAY.

#### *Contracts Made on Sunday.*

1. **SUNDAY CONTRACTS**—Whether may be Ratified.—Contracts made in violation of the statute forbidding business on Sunday are void and insusceptible of ratification. (Wis.) *King v. Graef*, 1101.

2. **SUNDAY CONTRACTS**—Transaction Completed on Monday.—When an oral agreement to sell potatoes is made on Sunday, but they are not weighed, delivered, nor paid for until Monday, this is tantamount to a complete contract of sale on the latter day. (Wis.) *King v. Graef*, 1101.

#### *Violation of Sunday Law.*

3. **SUNDAY LAW**—Several Acts as One Offense.—A butcher and ice dealer making several sales and deliveries on the same Sunday commits but one offense. (S. C.) *State v. James*, 902.

4. **SUNDAY LAW**—Works of Necessity Defined.—“Necessity,” as used in Sunday laws, is an elastic term; it does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. There is a tendency, which ought not to be sanctioned, to claim accustomed luxuries as necessities. (S. C.) *State v. James*, 902.

5. **SUNDAY LAW**.—Ordinary Sales or Deliveries of Ice or Fresh Meat are not works of necessity within the exception of Sunday laws. (S. C.) *State v. James*, 902.

See Time.

## TAXATION.

*In General.*

1. **TAXATION.**—Equity has Jurisdiction to Enjoin the enforcement of an unauthorized tax, although there is an adequate remedy at law. (Va.) *Town of Wytheville v. Johnson*, 981.

2. **TAXATION.**—A Perpetual Leaseholder, Rather than a Lessor, is responsible for the taxes on the property. (Va.) *Norfolk v. Perry*, 940.

3. **TAXATION.**—When a Municipal Corporation Makes a Perpetual Lease of land, and the lessee covenants to pay the public taxes which shall become due on the property, the term "public taxes" includes not only those levied by the state, but also those levied by the municipality, although at the time of the execution of the lease municipal taxes on land were unknown. (Va.) *Norfolk v. Perry*, 940.

4. **TAXATION.**—The Mere Nonuser by a Government of Its Power to Tax, however long continued, cannot be construed into a forfeiture of the power. (Va.) *Norfolk v. Perry*, 940.

5. **TAXATION.**—The Failure of a City in Times Past to Tax Certain Land, in disregard of the constitutional mandate to tax all property not exempt, is no reason for a continuation of the disobedience. (Va.) *Norfolk v. Perry*, 940.

6. **TAXATION.**—Perpetual Lease.—A City has Power, though it is the holder of the legal title to land of which it has made a perpetual lease, to levy taxes on the property to be paid by the lessee, since he and not the city is virtually the owner. (Va.) *Norfolk v. Perry*, 940.

7. **TAXATION.**—Perpetual Lease—Land and Buildings.—The failure to assess the buildings as well as the land to the lessor (the tax being charged to the lessee), where there has been a perpetual lease of the land, is at most harmless error; but if a joint assessment will be of advantage to the lessee, and he has a right to it, his remedy at law by motion is adequate to have the assessment corrected in that particular. (Va.) *Norfolk v. Perry*, 940.

*Inheritance Taxes.*

8. **INHERITANCE TAXATION.**—Power of City to Impose.—The power of a city to impose an inheritance tax can be conferred only by express grant clear and unmistakable in its terms. (Va.) *Town of Wytheville v. Johnson*, 981.

9. **COLLATERAL INHERITANCE TAXES.**—Illegitimate Children. Under an act regulating and defining the legal relations of an illegitimate child or children, its or their heirs with each other, and the mother and her heirs, and making such child or children as legitimate as to her as if born in lawful wedlock, the expressed intention of the act to be to legitimate an illegitimate child and its heirs as to its mother and her heirs, an illegitimate child inheriting property from her mother is under no liability to pay a collateral inheritance tax thereon. (Pa.) *Commonwealth v. Mackey*, 825.

10. **COLLATERAL INHERITANCE TAXES.**—Illegitimate Children.—A statute regulating and defining the legal relations of an illegitimate child or children, its or their heirs, with each other and the mother and her heirs, and making such child or children as legitimate as to her as if born in lawful wedlock, the expressed intention of the legislature being to legitimate an illegitimate child and its heirs as to its mother and her heirs, gives sufficient notice of exemption from a collateral inheritance tax of estates passing from mothers to their illegitimate children. (Pa.) *Commonwealth v. Mackey*, 825.

11. **COLLATERAL INHERITANCE TAXES.**—Situs.—The liability of the property of a decedent to collateral inheritance taxes is



to be determined by its situs at the time of his death. (Pa.) Shoenberger's Estate, 737.

**12. COLLATERAL INHERITANCE TAXES—Real Estate, When Becomes Converted into Personality.**—At the instant of a testator's death, his real estate, which he has directed to be converted into money, becomes, by operation of law, so converted, and may, therefore, for the purpose of the collateral inheritance taxes, be treated as if situated in the state of his domicile. Therefore, if a testator, dying and domiciled in New York, directs the conversion into money of his real estate in Pennsylvania, the proceeds of such conversion are not subject to the collateral inheritance taxes of the latter state. (Pa.) Shoenberger's Estate, 737.

**13. COLLATERAL INHERITANCE TAXES, What State may Impose.**—A state can tax only what is within it at the time of the death of the owner of it. (Pa.) Shoenberger's Estate, 737.

**14. LEGACY, Moneys Improperly Paid as Collateral Inheritance Taxes, Deduction of from.**—Where, during the progress of the administration of the estate of a decedent, collateral inheritance taxes are paid upon property not as a matter of law subject thereto, no deduction can be made because of such payment from a legacy remaining unpaid, if the legatee had not appeared at earlier stages of the administration and presented the question of the necessity of paying such tax, and no adjudication had therefore been made against him on that question. (Pa.) Shoenberger's Estate, 737.

#### TELEGRAPHS AND TELEPHONES.

**1. TELEGRAPH CORPORATIONS—Duty of to Deliver Message After Office Hours.**—If a telegraph corporation receives a message from the sender and undertakes to deliver it to the addressee at a time not within its office hours, this is a waiver of the benefit of such hours. (N. C.) Suttle v. Western Union Tel. Co., 631.

**2. TELEGRAPH CORPORATION—Notice of Nature of Message and of Necessity of Prompt Delivery.**—If a husband, having been in a railroad wreck, delivered to a telegraph corporation a message to his wife stating that he had not been hurt, and was assured by the operator that the message would be delivered that evening, the husband stating that if it would not be so delivered he would drive home, because otherwise he knew she would hear of the wreck and spend a miserable night, this is a sufficient notice to the company that mental anguish will naturally result from the failure to deliver the message, and it is liable to her if it is not delivered, through negligence, though the message was not received until after office hours at the station to which it was addressed. The delay in delivering the message until the following morning was clearly the proximate cause of her injury. (N. C.) Suttle v. Western Union Tel. Co., 631.

**3. TELEGRAPH CORPORATIONS—Death Message—Damages from Seeing the Body Only in a State of Decomposition.**—A plaintiff suing for negligence of a telegraph corporation in not delivering a message informing him of the death of his father cannot recover damages because he saw the body of such father only after decomposition had advanced so far that his features could hardly be recognized. (N. C.) Woods v. Western Union Tel. Co., 581.

**4. TELEGRAPH CORPORATIONS—Negligence, Presumption of from the Failure to Deliver a Message.**—Where a telegraph corporation fails to promptly deliver a message, and offers no evidence to explain such failure or to show any effort at delivery, its negligence will be presumed. (N. C.) Woods v. Western Union Tel. Co., 581.

**5. TELEGRAPH CORPORATIONS—Failure to Deliver a Misdirected Message.**—Though the address of a message gives a street

number different from the number at which the addressee resides, the corporation may be held guilty of negligence if it makes no effort to find him, his name being in the city directory and his correct address being there given. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

6. **TELEGRAPH CORPORATIONS, Duty of in Seeking to Deliver a Message.**—A telegraph corporation, though the message is not addressed to the correct street number, must make reasonable inquiry and exercise that degree of care which a prudent person would use under the circumstances in an effort to deliver a message. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

7. **TELEGRAPH CORPORATIONS—Message, Variation Between the Addressee's Name and the City Directory.**—Where the addressee's name was Jay Woods, and his name as appearing in the city directory was Jay Wood, this, while a variation, does not render such directory inadmissible for the purpose of tending to show that the corporation could have found the addressee by exercising ordinary care, and was therefore guilty of negligence in not attempting to deliver the message to him, though directed to the wrong number of the street on which he resided. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

8. **TELEGRAPH CORPORATIONS, Duty of to Inquire for a Better Address.**—If due search is made for the addressee at the place named in the telegram, and he cannot be found there, the corporation should wire back for a better address, and its failure to do so is evidence of negligence. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

9. **TELEGRAPH CORPORATIONS—Delay in Delivering Message Announcing Death.**—If a telegraph corporation is negligent in delivering a message informing the addressee of the death of his father, the fact that he, notwithstanding, saw the body before its burial, does not defeat the action. (N. C.) *Woods v. Western Union Tel. Co.*, 581.

10. **TELEGRAPH COMPANIES—Damages.—Mental Anguish** for distress suffered by a father by reason of his failure to reach his sick daughter in law, caused by the delay in the delivery of a telegraphic message cannot be recovered for anguish, unless the company had notice of the affectionate relations existing between such father and his daughter in law, and such relations must be alleged in the complaint. (S. C.) *Amos v. Western Union Tel. Co.*, 845.

11. **TELEGRAPH COMPANY—Mental Suffering.**—There is no presumption of mental anguish arising from delay in a telegram depriving one of an opportunity to attend his cousin's funeral. (S. C.) *Johnson v. Western Union Tel. Co.*, 905.

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#### TENANCY IN COMMON.

1. **COTENANCY—Recovery for Betterments.**—A cotenant cannot recover the value of betterments put upon the land without having credited thereon against him the value of the use of the land. (S. C.) *Vaughan v. Langford*, 912.

2. **COTENANCY—Accounting and Betterments.**—In an accounting between cotenants, betterments are to be regarded as paid pro tanto by the rents as they accrue, and the statute of limitations is subject to this rule. (S. C.) *Vaughan v. Langford*, 912.

See Partition.

#### TENEMENT HOUSES.

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#### TIMBER.

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#### TIME.

**NOTICE—Time—Sunday.**—If an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded from the computation, but if the number of days is less than seven, Sunday is not counted. (S. C.) *Craig v. United States H. & A. Ins. Co.*, 877.

#### TORTS.

See Municipal Corporations.

#### TRADEMARKS.

1. **TRADEMARKS—Protection.**—The owners of trademarks and trade names have the right to protect them against piracy, whether such owners are residents or aliens. (Iowa) *Atlas Assur. Co. v. Atlas Ins. Co.*, 189.

2. **TRADEMARKS—Protection.**—An insurance company is entitled to protection in the use of the figure of "Atlas" as a trademark. (Iowa) *Atlas Assur. Co. v. Atlas Ins. Co.*, 189.

3. **TRADEMARKS—Protection—Similarity.**—If the resemblance in a trademark or name is such as to mislead purchasers or those doing business with the person or corporation using the name who are acting with ordinary caution, this is sufficient to entitle the one first adopting such trademark or name to protection. (Iowa) *Atlas Assur. Co. v. Atlas Ins. Co.*, 189.

4. **TRADEMARKS—Protection—Injunction.**—The wrongful use of a trademark, trade name, or device may be enjoined without proof that anyone has been actually deceived. (Iowa) *Atlas Assur. Co. v. Atlas Ins. Co.*, 189.

5. **TRADEMARKS—Equity Jurisdiction—Protection.**—A trade name as well as a trademark, symbol, or device is entitled to protection by courts of equity, and it makes no difference in the application of the rule whether the person using the name or trademark



acts in good faith or otherwise. (Iowa) Atlas Assur. Co. v. Atlas Ins. Co., 189.

6. **TRADEMARKS—Injunction.**—The fact that a corporation adopting a certain trade name or device has permitted another corporation conducting a like business, but not in privity with it, to use a similar name or device in its business does not preclude the former from enjoining the latter from using such name. (Iowa) Atlas Assur. Co. v. Atlas Ins. Co., 189.

7. **TRADEMARKS, Legitimate Use of.**—The use of a trademark by another in such manner as to clearly and unmistakably show that one company is entirely separate and distinct from the other, and which can in no way mislead the public, is not objectionable and will not be enjoined. (Iowa) Atlas Assur. Co. v. Atlas Ins. Co., 189.

### TRADE UNIONS.

1. **LABOR ORGANIZATIONS, Right to Form.**—Individuals have a perfect legal right to form labor organizations for the protection and promotion of the interests of the laboring classes. (Mo.) Lohse Patent Door Co. v. Fuelle, 492.

2. **AN INJUNCTION will not Issue to Enjoin Members of a Labor Organization** from peacefully withdrawing from the services of an employer. (Mo.) Lohse Patent Door Co. v. Fuelle, 492.

3. **COMBINATIONS in Restraint of Trade, What are not.**—The United Brotherhood of Carpenters and Joiners and their allied associations are not unlawful combinations in restraint of trade, but are legal and highly laudable when confined within proper bounds. (Mo.) Lohse Patent Door Co. v. Fuelle, 492.

4. **CONSPIRACY—Boycott.**—A combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and it may be enjoined. (Mo.) Lohse Patent Door Co. v. Fuelle, 492.

5. **LABOR UNIONS—Boycotts by Which are Prohibited.**—The prohibition of the members of a labor organization from working for dealers, contractors and other persons who purchase and use building materials manufactured by the plaintiff in the conduct of his planing-mill is illegal, and a boycott to enforce such prohibition will be enjoined. (Mo.) Lohse Patent Door Co. v. Fuelle, 492.

### TRESPASS.

See Abatement and Revivor, 3.

### TRIAL.

1. **TRIAL—Instructions.**—The only office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact case-made by either party to the controversy. (Iowa) Kelly v. Chicago R. I. & P. Ry. Co., 195.

2. **INSTRUCTIONS—Hypothetical Statement of Facts.**—It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, if the statement fairly presents the case shown in evidence. (Va.) Life Ins. Co. of Virginia v. Hairston, 989.

3. **INSTRUCTIONS—Hypothetical Statement of Facts.**—When the court chooses to present a hypothetical case to the jury, it should

be careful to put before the jurors all facts bearing upon the issues which the evidence proves or tends to prove. (Va.) Life Ins. Co. of Virginia v. Hairston, 989.

**TRUSTS.**

**1. TRUSTEE AND COTRUSTEE, Duties and Liabilities of.**—A trustee is not an insurer of trust funds against the possibility of loss, nor a surety for his cotrustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements are met, he is not liable for losses due to the bad faith or embezzlement of his cotrustee. (Pa.) Adams' Estate, 727.

**2. TRUSTEES, What Required of.**—The law requires of a trustee fidelity to the trust and the exercise of the same degree of diligence that a man of ordinary prudence may be expected to exercise in the care of his property under the same circumstances. (Pa.) Adams' Estate, 727.

**3. COTRUSTEES, Liability of for One Another.**—Though, as a general rule, a trustee is not liable for trust funds received by his cotrustee, yet he is required to exercise general superintendence and care over the trust. If he hears of any fact tending to call attention to the mismanagement or misapplication of trust funds by a cotrustee, it is his duty to intervene and prevent a devastavit. His failure to do so is a breach of his trust, imposing liability upon him for the loss. (Pa.) Adams' Estate, 727.

**4. COTRUSTEES.—The Joint Receipt by Cotrustees of trust funds imposes a joint liability.** The obligation rests upon each to exercise good faith and use reasonable diligence in executing the trust. If, through the negligence or default of either trustee, the other is permitted to dissipate the funds or convert them to his own use, he is responsible for the loss. (Pa.) Adams' Estate, 727.

**5. COTRUSTEES, Duty of One to Take Action Against the Other.** If two trustees have and are entitled to the possession of negotiable trust funds or securities, each must exercise a general superintendence over them and observe reasonable and proper precautions in protecting them against loss from embezzlement by the other. Neither can shut his eyes and fold his hands and permit his cotrustee to use the funds at his own pleasure and for his own purposes, and if either has any reason to believe that the other is not acting in good faith or will convert the trust funds to his own use, he must take all necessary steps to prevent such misapplication of the funds. (Pa.) Adams' Estate, 727.

**6. COTRUSTEE, Facts Showing His Liability for an Embezzlement by the Other Trustee.**—If a trustee discovers that all the trust securities have been removed, without the consent or knowledge of the innocent trustee, by his cotrustee from a box in a bank in which they had been kept, and after an agreement that the box should not be opened except in the presence of both trustees, and the guilty trustee, on the demand of the other, returns the securities to the box, these circumstances are sufficient to excite grave suspicion, especially when the financial circumstances of the removing trustee are known to be bad, and if the funds are left in the same box where the other trustee has an opportunity to, and in fact does, remove and dispose of them, embezzling the proceeds, his cotrustee is answerable for the loss, because it was possible for him to have had the funds placed where they could not have been removed or disposed of without his knowledge. (Pa.) Adams' Estate, 727.

**7. A TRUSTEE is not Exonerated from Liability for the Embezzlement of His Cotrustee** because he was a helpless invalid long before the embezzlement occurred, if, before becoming such invalid, he knew of an act on the part of the other trustee indicating a pur-

pose to commit a breach of the trust, and took no measures to guard against the embezzlement which the previous conduct and the financial condition of such trustee rendered probable. (Pa.) Adams' Estate, 727.

8. **A TRUSTEE is not Relieved from Liability** because he bestows the same degree of care on the trust estate as on his own property of like character, nor because the cotrustee, who is guilty of embezzlement, is a brother. The standard of care required is to be gauged by the conduct of a reasonably prudent man in the management of his property. (Pa.) Adams' Estate, 727.

9. **A TRUSTEE by Informing the Cestuis Que Trustent of the misconduct of the cotrustee in removing securities from the place of their deposit, does not relieve himself from liability for the future misconduct of such cotrustees, where he does not exercise reasonable diligence to prevent such misconduct.** (Pa.) Adams' Estate, 727.

See Charities.

### UNDERTAKERS.

See Constitutional Law, 21-25.

### USURY.

1. **USURY—Agent Exacting Bonus from Borrower.**—The fact that a son, in loaning money for his mother, asks her no compensation, does not raise a conclusive presumption of knowledge on her part that he exacts a commission from the borrower in addition to lawful interest. (Wis.) Franzen v. Hammond, 1079.

2. **USURY—Agent Exacting Bonus from Borrower.**—Where an agent, intrusted with money to loan, without the direction or knowledge of his principal, exacts from the borrower a sum in addition to legal interest as compensation for his services, this does not taint the contract with usury. (Wis.) Franzen v. Hammond, 1079.

3. **USURY—Agent Exacting Bonus from Borrower.**—The fact that a principal accepts securities from his agent covering the exact amount of money loaned by the latter and showing on their face that the loan is legitimate, and insists upon enforcing the same after obtaining knowledge that the agent has exacted solely for his compensation a sum from the borrower in excess of lawful interest, does not make the loan usurious. (Wis.) Franzen v. Hammond, 1079.

### VENDOR AND VENDEE.

*Dower—Abatement in Price.*

1. **DEEDS—Dower—Fraud—Abatement of Price.**—If a vendee knows when he accepts a deed from a husband without his wife's dower right renounced, and gives a bond and mortgage for the balance of the purchase price, that the dower right is outstanding, it is immaterial that he has previously been led to believe that such wife was the owner, nor is it such a fraud or estoppel as to entitle him, in an action to foreclose, to an abatement of the price for the outstanding dower right. (S. C.) Coleman v. Whittle, 841.

2. **DEEDS—Dower—Fraud—Abatement of Price.**—If the vendee accepts the deed of a husband with covenants of warranty, without his wife's dower renounced, and gives a bond and mortgage with full knowledge of the facts, he must be presumed to have waived his rights to have the dower renounced and to have chosen to rest upon the warranty, and he cannot recover damages or have abatement of the purchase price because of such outstanding encumbrance until he has extinguished it or been thereby evicted, unless for fraud. (S. C.) Coleman v. Whittle, 841.



*Option to Sell.*

3. **OPTION TO SELL—Nature and Validity.**—An option to sell land is a standing offer to convey to the person and upon the terms named in the option, and an agreement to keep the proposition open for acceptance for the time stated, if its terms are fair, and have been understandingly entered into, it will be enforced if accepted and offered to be complied with by the payment of the consideration within the time stipulated. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

4. **OPTION TO SELL—Nature and Consideration.**—An option to sell contains two contracts, one to sell the land and the other to give the optionee a certain time within which to accept and become bound upon the first contract; each must have a consideration to support it. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

5. **OPTION TO SELL.—A Consideration of One Dollar will not** support an option to sell valuable property; it is so grossly disproportionate to the value of the privilege as to be merely nominal. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

6. **OPTION TO SELL—Necessity of Consideration.**—An option to sell land, to be binding upon the owner so as to be irrevocable during the period for which it is given, must be upon a valuable and sufficient consideration. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

7. **OPTION TO SELL—When Becomes Binding.**—If an option to sell is not withdrawn prior to acceptance, it then becomes binding, notwithstanding it may have been based on an insufficient consideration. (Ky.) *Murphy, Thompson & Co. v. Reed*, 259.

*Contracts to Sell—Forfeiture.*

8. **VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Relief in Equity.**—If the parties to a contract for the sale of land have so stipulated as to make the time of payment of the essence of the contract, a court of equity cannot relieve a vendee who has made default. (Ark.) *Souter v. Witt*, 40.

9. **VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Jurisdiction of Equity.**—If persons to a contract for the sale of lands have made the time of payment of the essence of the contract, the discretion which a court of equity has to grant or refuse specific performance must of necessity be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. (Ark.) *Souter v. Witt*, 40.

10. **VENDOR AND PURCHASER—Contract for Sale of Land—Forfeiture—Waiver.**—If a contract for the sale of land provides that, on default in payment of the purchase money, the vendee shall forfeit his rights to purchase and become liable as a tenant for rent, the vendor's failure to demand rent after the default of the vendee and the retention by the former of the purchase money notes, does not constitute a waiver of the forfeiture. (Ark.) *Souter v. Witt*, 40.

See Deeds; Specific Performance.

**VOTING.**

See Elections.

**WAGES.**

See Constitutional Law, 35-38.



**WAIVER.**

1. **WAIVER**—Definition.—A Waiver is the Intentional relinquishment of a known right. (Wis.) Swedish-American Nat. Bank v. Koebernick, 1090.

2. **WAIVER**.—A Waiver may be Shown by a Course of Conduct Signifying a purpose not to stand on a right, and leading by reasonable inference to the conclusion that the right in question will not be insisted upon. (Wis.) Swedish-American Nat. Bank v. Koebernick, 1090.

3. **WAIVER**—When Established by Conduct.—A Person Who does Some Positive Act, which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that the right has been dispensed with, will be deemed to have waived it. (Wis.) Swedish-American Nat. Bank v. Koebernick, 1090.

4. **WAIVER**—When a Question of Law.—Where the Facts and Circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law. (Wis.) Swedish-American Nat. Bank v. Koebernick, 1090.

**WATERS AND WATERCOURSES.***Water Companies—Supply to Customers.*

1. **WATER COMPANIES**.—Mandamus is a Proper Remedy to compel a public service water company to supply its customers with water, upon compliance with its reasonable rules and regulations. (S. C.) Poole v. Paris Mountain Water Co., 923.

2. **WATER COMPANIES**—Shutting Off Supply to Delinquent.—It is reasonable to allow a water company to protect itself by cutting off the supply from a customer until he has paid delinquent water rents due by him, but it is unreasonable to cut off the supply to a tenant because he refuses to pay delinquent water rents due by the landlord or by a former occupant. (S. C.) Poole v. Paris Mountain Water Co., 923.

3. **WATER COMPANIES**—Shutting Off Supply to Delinquent.—While a water company has the right to cut off a customer's supply for nonpayment of reasonable and just bills for water rents, and to refuse to engage to furnish further supply until those bills are paid, the right cannot be exercised so as to coerce the customer into paying a bill which is unjust, or which he in good faith and with show of reason disputes, when he offers to comply with the reasonable rules of the company as to the supply for the current term. (S. C.) Poole v. Paris Mountain Water Co., 923.

*Obstructions and Overflows.*

4. **WATERS**—Obstruction Causing Overflow—Successive Actions.—Where one erects culverts and a fence upon his land so that the act is not unlawful in itself and can occasion no cause of action until damage results to an upper proprietor, new actions can be brought for recurring injuries resulting in overflows from a continuance of the nuisance. (Va.) American Locomotive Co. v. Hoffman, 953.

5. **WATERS**—Obstruction Causing Overflow—Damages.—Where a riparian proprietor is liable to a succession of actions for subsequent injuries caused by a continuance of an obstruction to the stream which backs water upon the premises of an upper proprietor, the diminution of the market or fee-simple value of the premises is not a proper subject for consideration in ascertaining the damages in an action for several overflows that have already occurred. (Va.) American Locomotive Co. v. Hoffman, 953.

**6. WATERS.**—The Fact that One Riparian Proprietor has Himself Partially Obstructed the stream does not preclude him from recovering damages for injuries due to further obstructions by a lower proprietor. (Va.) *American Locomotive Co. v. Hoffman*, 953.

**7. WATERS—Care to Avoid Obstruction.**—The Degree of Care Exacted of a riparian proprietor in so constructing culverts and water-gates as not to injure an upper proprietor by causing the water to back upon his premises is that which an ordinarily prudent man would exercise under all the circumstances of the case. (Va.) *American Locomotive Co. v. Hoffman*, 953.

*Surface Waters.*

**8. WATERS, SURFACE—Right to Shut Out.**—The owner of a city lot in grading and improving it may shut out the surface flow of water upon his lot with no obligation to prevent it from flowing over adjacent lots, provided he does not proceed negligently so as to do unnecessary damage to others, nor obstruct a natural channel for the flow of the water, nor a channel that has acquired the character of an easement, nor can he gather surface water into a body and discharge it on the adjoining land. (Pa.) *Rielly v. Stephenson*, 804.

**9. WATERS, SURFACE—Right to Shut Out.**—The right of a city lot owner to shut out the surface flow of water from his lot is not accompanied by an obligation to prevent it from flowing over the adjacent land and to lead it by artificial or other means to a sewer or other avenue of escape. (Pa.) *Rielly v. Stephenson*, 804.

*Subterranean Water.*

**10. SUBTERRANEAN WATERS—Right to Use and Divert.**—According to the earlier American decisions a land owner may not be enjoined from doing an act on his own premises which results in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's land. But the cases where this rule has been applied have invariably been those in which the person complained of had interfered with the enjoyment by another of percolating waters by some act directly and naturally connected with the improvement or enjoyment of his own land. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

**11. SUBTERRANEAN WATERS—Right to Use and Divert.**—In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

**12. SUBTERRANEAN WATERS—Whether Regarded as Minerals.** Subterranean waters are treated as a mineral in the decisions relating to their use and enjoyment. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

**13. SUBTERRANEAN WATERS—Mineral Properties.**—The right of a land owner to divert subterranean waters to the detriment of his neighbors is not modified by the peculiar character and quantity of the salts and gases which happen to be in solution. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

**14. SUBTERRANEAN WATERS—Right to Use and Divert.**—A land owner has no right by the use of pumps and other apparatus greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed

throughout the country, and with the result of wasting great quantities of mineral waters and of destroying or impairing the natural flow of such waters and gas in and through the springs of other land owners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

15. **SUBTERRANEAN WATERS—Right to Use at Will.**—A land owner has no absolute right to divert or waste subterranean waters at will, regardless of resulting injuries to neighboring proprietors. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

16. **SUBTERRANEAN WATERS—Extent of Right to Use and Divert.**—A person may by pumps or otherwise draw on the waters percolating under the surface of his lands for a purpose naturally and legitimately connected with the improvement and enjoyment of his lands, even though it interferes with others, but an unreasonable attempt to force and increase the flow of such waters for the purpose of diverting them to some use entirely disconnected with such improvement and enjoyment, and whereby the flow of such waters under the lands of others is destroyed or diminished, may be restrained as unlawful. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

17. **SUBTERRANEAN WATERS—Validity of Statutory Regulation.**—A statute which forbids accelerating or increasing the flow of percolating waters or natural carbonic acid gas, such as are found at Saratoga Springs, from wells bored into the rock, by pumping or any artificial contrivances whatsoever: first, absolutely and without qualifications; second, when the result of so doing will be to impair the natural flow or the quality of such waters or gas in the spring or well of another person; third, when the object of so doing is to extract and collect the carbonic acid gas for the purpose of marketing the same—is constitutional as to the last prohibition but unconstitutional as to the first two; but each of the provisions is so complete and independent of the others that the last one may be upheld while the others are condemned. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

18. **CONSTITUTIONAL LAW.**—In Determining the Constitutionality of a Statute courts are bound to consider what may be, as well as what is presently being effected under the statute. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

19. **SUBTERRANEAN WATERS—Right to Divert for Market.**—A land owner has no vested right unnaturally and unreasonably to force the flow of percolating waters for the purpose of marketing them, or for any purpose not connected with the use or enjoyment of his land. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

20. **SUBTERRANEAN WATERS—Statutory Regulation of Use.**—It is proper for the legislature to adopt a statute defining and regulating the rights of persons desiring to use mineral waters like those at Saratoga Springs, and calculated to prevent such use thereof as will either result in waste of the natural resources of the land to the injury of general and public interests, or in the unreasonable impairment of the rights of others to draw from a common source. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

21. **SUBTERRANEAN WATERS.—The Legislature in Restricting the Right** to divert subterranean waters may classify wells so that the statute shall apply only to wells bored into rock and not to those sunk in the dirt. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

22. **SUBTERRANEAN WATERS—Who may Protect.**—The legislature may authorize the people, or a person in their stead, to main-



tain an action looking toward the conservation of subterranean mineral waters, although the action is deemed to relate to private interests. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

**23. SUBTERRANEAN WATERS—Right of People to Protect.**—The people have the right to maintain an action to prevent the waste and secure the just distribution to collective owners of subterranean mineral waters. (N. Y.) *Hathorn v. Natural Carbonic Gas Co.*, 555.

See Railroads, 11-15.

## WAYS.

See Easements; Private Ways.

## WILLS.

### *In General.*

**1. WILLS—Possibility of Reverter.**—Words in a will signifying an intention to exclude certain devisees from participation in any other property than that devised to them cannot have the effect of excluding them, as heirs, from participating in other property, such as a possibility of reverter, not disposed of. (S. C.) *Vaughan v. Langford*, 912.

**2. WILLS—Presumption as to Testamentary Intent.**—If an instrument speaks for itself and is by its terms a testamentary disposition of property, the law will presume that the maker signed it understandingly and intended it as his will, if legal proof is furnished of its execution. (Pa.) *Lillibridge's Estate*, 723.

**3. WILLS—Nature of Proceeding to Probate.**—The proceeding to probate a will is a proceeding in rem, which binds all the world and in which public welfare and policy are involved. (Wis.) *Will of Dardis*, 1033.

**4. WILLS.—The Public Interest in Probate Proceedings** requires that a valid will shall be established, independently of the wish of those specifically named therein. (Wis.) *Will of Dardis*, 1033.

**5. WILLS—Stipulation by Beneficiaries to Defeat.**—A stipulation by the heirs and beneficiaries in the will of a decedent that he was of unsound mind and under undue influence, and that the probate of the will shall be denied, does not relieve the court in which the probate of the will is pending from the duty of establishing the status of the instrument. (Wis.) *Will of Dardis*, 1033.

### *Construction.*

**6. WILLS, INTERPRETATION OF—Estate Remaining at the Death of a Devisee.**—A will devising property to the testator's son, with a provision that the property remaining at the latter's death shall go to other persons, refers to the property not disposed of by the son in his lifetime. (Mass.) *Galligan v. McDonald*, 421.

**7. WILLS, INTERPRETATION OF—Limitation Which does not Cut Down an Estate for Life.**—A devise of all property by the testator to his son, with a provision that what remains at the latter's death shall go to other specified persons, does not cut down the son's interest to an estate for life pure and simple, nor a life estate with a power of disposal. (Mass.) *Galligan v. McDonald*, 421.

**8. WILLS, Devises with Repugnant Limitations.**—If a will devises property to the testator's son and provides that what remains at his death shall be taken by the testator's brother and sister, the son takes an absolute estate in fee. The limitation over is void, and the son can give a good title, and hence may maintain a suit for specific performance of a contract to purchase of him property thus acquired from his father. (Mass.) *Galligan v. McDonald*, 421.



**9. DEVISES—Construction.**—If there is a devise in fee simple absolute, in the first instance, and the gift is intermediate, words of survivorship will be referred to the death of the testator and not to death generally, whenever it may occur. The first taker is entitled to the benefit of every implication, and his estate will not be cut down unless the intention to do so plainly appears. (Pa.) *Robinson v. Jones*, 793.

**10. WILLS—Devises—Construction.**—Under a devise to three children, naming them, to take share and share alike, with direction that if "any one or more of my last named children wishes his or their money out of my estate, it is my will that they choose three disinterested persons to appraise such estate at cash value. It is my will and desire that if either shall die without a lawful heir, his or her or their share of the estate to fall to the last named heir or heirs," the children take an estate in fee simple. (Pa.) *Robinson v. Jones*, 793.

#### *Witnesses.*

**11. WILLS—Subscribing Witnesses, Want of Knowledge on Their Part.**—Where an instrument is in terms a will, it is not necessary that the subscribing witness knew of its character or of its having been read to the testator. (Pa.) *Lillibridge's Estate*, 723.

**12. WILLS—Subscribing Witness, No Request to Necessary.**—It is not necessary that a subscribing witness to a will be specifically requested by the testator to sign as such witness. If the attestation was in his presence, it will be presumed to have been with his knowledge and approval. (Pa.) *Lillibridge's Estate*, 723.

**13. WILLS—Subscribing Witnesses—Hearing Will Read or Knowing Its Contents.**—It is not necessary that a subscribing witness to a will should hear it read or know its contents. (Pa.) *Kessler's Estate*, 741.

**14. WILLS—A Subscribing Witness Need not See the Testator Sign His Will.**—He may, after the will has been prepared, affix his name and subsequently acknowledge his signature in the presence of a subscribing witness. (Pa.) *Kessler's Estate*, 741.

**15. WILLS—Executor as Subscribing Witness.**—The nomination by the testator of a person to act as executor does not in itself constitute such an interest as to disqualify him from acting as a subscribing witness. (Pa.) *Kessler's Estate*, 741.

**16. WILLS—Subscribing Witness, Interest Which will Disqualify.**—The interest which will, as such, disqualify a subscribing witness must be present, certain and vested, not uncertain, remote or contingent. It must be substantially a legal interest. (Pa.) *Kessler's Estate*, 741.

**17. WILLS—Subscribing Witnesses, Necessity of Their Being Disinterested.**—The purpose of requiring an attesting witness to a will was to place the testator at the time of its execution in the presence of two disinterested witnesses, so that he would be entirely free from importunity and solicitation of interested persons. (Pa.) *Kessler's Estate*, 741.

**18. WILLS—Subscribing Witnesses, When not Disinterested.**—If an attesting witness is interested as a devisee or legatee under the will or is to derive a pecuniary benefit or advantage from any part of it, or if he is interested at the time of attesting in a religious or charitable institution to be benefited thereby, he is not disinterested within the meaning of the statute. (Pa.) *Kessler's Estate*, 741.

**19. WILLS—Subscribing Witness, When has a Disqualifying Interest.**—Where one who is made executor in a will was an officer and

trustee of a church which is to be benefited, had an option to purchase certain shares which were part of the trust for religious or charitable uses at a price to be agreed upon by disinterested persons, was one of two trustees to whom certain stock was given to vote at corporate elections, and whose duties required that dividends received be paid by them to the trustees named, had certain benefits accruing as stockholder in a corporation by reason of the power to vote stock held in trust by him, and was entitled to commissions as trustee as well as executor, is so interested under the will that he is disqualified to be a subscribing witness thereto. (Pa.) Kessler's Estate, 741.

See Conversion; Estates; Equity, 2.

#### WITNESSES.

**PHYSICIANS**—Privileged Communications.—A physician, never consulted by the patient or her husband nor by her attending physician, but who is informed by him of the nature of an operation to be performed on her, and who is present thereat at the request of a third party, is competent to testify to his observations of the operation as performed, but in which he did not participate. (Iowa) Woods v. Town of Lisbon, 208.

#### WOMEN AS VOTERS.

See Elections.

#### WRONGFUL DEATH.

See Death.

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